1-22

New Jersey Commissioner of Education

Final Decision

Stephen Spotts,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Petitioner appealed the New Jersey State Board of Examiner's (Board) denial of his application for a Teacher of Marketing Certificate of Eligibility (CE). The Board filed a motion to dismiss, asking that it be converted to a motion for summary decision at the Office of Administrative Law (OAL); the motion for summary decision was subsequently denied, and a hearing in the matter was held at OAL in December of 2020.

The AU found, *inter alia*, that: petitioner attended Lebanon Valley College in Pennsylvania from August 2006 through May 2010, and completed all program requirements for a bachelor of science degree with a major in Digital Communications and concentration in Design; petitioner also attended County College of Morris in New Jersey from February 2019 through April 2019, and completed New Pathways to Teaching in New Jersey-Stage 1; although petitioner took and passed the Marketing PRAXIS exam, a credential review conducted by the Board reflected that petitioner is short 24 semester hour credits in required Business courses, 9 of which must be at the advanced level and 12 of which must be in Marketing coursework; and the Board may not waive established requirements for certification. The AU concluded that petitioner failed to demonstrate that he fulfilled the endorsement requirements necessary for a Teacher of Marketing CE pursuant to *N.J.A.C.* 6A:9B-9.1. Accordingly, summary decision was granted in favor of the Board, and the petition was dismissed.

The Commissioner concurred with the findings and determination of the AU in this matter. Accordingly, summary decision was granted in favor of the Board and the petition was dismissed.

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

1-22
OAL Dkt. No. EDU 04807-20
Agency 0kt. No. 73-3/20

New Jersey Commissioner of Education

Fina.l Decision

Stephen Spotts,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions. Upon such review, the Commissioner agrees with the Administrative Law Judge (AU) - for the reasons thoroughly expressed in the Initial Decision - that petitioner has not met the requirements necessary for a Teacher of Marketing Certificate of Eligibility pursuant to *N.J.A.C.* 6A:9B-9.1.[1] Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 5, 2022
Date of Mailing: January 5, 2022

[1]While the AU utilized an arbitrary, capricious, and unreasonable standard of review, the Commissioner notes that when there is a challenge to a finding by the Board of Examiners denying a request for the issuance of a certificate, the Commissioner is not legally mandated to give deference to her staff, but instead determines if the finding was legally appropriate. Therefore, the appropriate standard of review in this matter is whether the decision is consistent with the applicable statutory and regulatory provisions.

[2]This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.5.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-l(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04807-20
AGENCY DKT. NO. 73-3/20

STEPHEN SPOTTS,
Petitioner,
v.
STATE BOARD OF EXAMINERS,
Respondent.

Stephen Spotts, pro se, petitioner

Sydney Finkelstein, Deputy Attorney General, for respondent (Andrew J. Bruck, Acting Attorney General of New Jersey, attorney)

Record Closed: October 12, 2021 Decided: November 26, 2021

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

STATEMENT OF THE CASE

Petitioner Stephen Spotts challenges the State Board of Examiners' decision denying his application for a Teacher of Marketing Certificate of Eligibility.

PROCEDURAL HISTORY

By letter dated December 16, 2019, the State Board of Examiners (Board) advised petitioner that at its meeting on December 13, 2019, the Board voted to deny his request for issuance of a Teacher of Marketing Certificate of Eligibility (CE) pursuant to N.J.A.C. 6A:9B-9.1.[1] Petitioner filed a Pro Se Petition of Appeal on March 11, 2020. Respondent filed a motion to dismiss, consisting of a letter brief, on April 3, 2020. The Department of Education, Office of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL), where it was filed on April 7, 2020, for determination as a contested case.

Respondent's April 3, 2020, letter brief requested that if the matter were transmitted to the OAL, the motion to dismiss be converted to a motion for summary decision. Respondent's June 30, 2020, letter requested that the April 3, 2020, motion to dismiss be converted to a motion for summary decision. Petitioner's opposition to the motion for summary decision was filed on July 27, 2020, and respondent's letter reply was filed on August 6, 2020. By order dated August 27, 2020, the motion for summary decision was denied. The hearing was held on December 11, 2020, and the record closed on October 13, 2021, upon receipt of the parties' post-hearing submissions.

FACTUAL DISCUSSION AND FINDINGS

Spotts attended Lebanon Valley College in Pennsylvania from August 2006 through May 2010. He completed all the program requirements of a bachelor of science degree with a major in Digital Communications and concentration in Design. (J-2.)

Spotts also attended County College of Morris in New Jersey from February 2019 through April 2019. He completed New Pathways to Teaching in New Jersey-Stage 1 (fifty hours). (J-5.)

[1] The Board Decision reflects the correct citation, but the Board's letter reflects "69B-9.1."

On March 23, 2019, Spotts took and passed the "5561-Marketing Education" exam. (P-L)

Spotts' Official Academic Transcript from Lebanon Valley College reflects courses with the following prefixes: AMS, ART, BIO, CSC, DCOM (Digital Communications), ENG, HIS, MAS, MED, MSC, PHL, PSY, REL, SOC, and SPA. (J-1.) Lebanon Valley College does not offer an undergraduate degree in marketing. (J-2.)

The Digital Communications Program is described by Lebanon Valley College as follows:

> The Digital Communications Program explores the fundamental elements of communication, business, design and technology. The program fosters critical reasoning and learning so graduates have the ability to evolve as quickly as current technology.
>
> The program is interdisciplinary and combines classes from the art, business, English, and computer science departments into one degree. After graduating with a B.S. in digital communications, the student is prepared to enter a wide range of technology-related positions in marketing, public relations, information technology, journalism, graphic design, internet development, multimedia, and programming.
>
> The creation of content, both written and visual, remains at the heart of this subject. Students will study art, writing and marketing in the context of content creation for the New Media. Students will learn the theory behind the design of effective presentations and will employ existing multimedia technologies to create them. The techniques with which content is created, processed and delivered are found in the study of programming and computer science. Students in the program will choose a discipline related to the program and complete advanced coursework to form a cognate in that area. Students will also investigate and carefully consider the social, ethical, and legal ramifications of the information technology revolution.
>
> The program, designed to be interdisciplinary and integrative, emphasizes critical thinking, creativity and analysis, rather than specific applications and technologies. The General Education Program at the College, together

> with the courses in the students' cognate areas, will expose the students to the fundamental questions of how information is created, processed, understood, and communicated to these disciplines.
>
> [J-2.]

In 2019, Spotts applied for certification through the Teacher Certification Information System (TCIS) for a Teacher of Marketing (2560) CE.

A May 15, 2019, "Evaluation of Credentials-Marketing (#2560)" letter from the Board reflects that an evaluation was completed for the Marketing CE, but that with respect to subject-matter preparation, Spotts needed to "complete an additional 24 semester-hour credits in Business studies with 9 of those credits at the advanced level," which "credits must include 12 semester hour credits in Marketing coursework," and with respect to the physiology-and-hygiene requirement, Spotts needs to present evidence of basic military training or complete "a course such as biology, health or nutrition that appears on a regionally accredited 2 or 4 year college or university transcript," or complete "a 35 question True/False test administered in the county office of education." (J-7.)

A June 11, 2019, letter from the State Board of Examiners to Spotts provided information on the process and procedures in appealing to the Board. (J-3.) A June 17, 2019, letter from the Board to Spotts enclosed the procedures for Board review of alternative education and/or experience to complete requirements for certification, and stated, in part:

> Please be advised that the State Board of Examiners does not waive requirements. It determines if the experience and/or study presented is equivalent to the required coursework. Your information packet should focus on each area of deficiency.
>
> Official documentation of experience should include not only <u>original</u> letters by appropriate employers and/or those responsible for providing alternative study indicating dates of employment and job responsibilities, but should also include information relevant to the specific areas of deficiency. The

> material you submit for review must include the completed summary sheet and a notarized statement that all documentation is true and accurate. It is recommended that in addition to documentation of employment and academic study, you include in your packet a narrative statement in which you clearly outline the one-to-one equivalence of your experience/coursework to the licensure deficiency.
>
> [J-4.]

Included with the June 17, 2019, letter was a "SAMPLE" credentials-review summary and a two-page information document addressing substitution of alternative education and/or experience, requesting an individual credentials review for certification, preparation of documentation, and procedure after materials have been submitted. (P-M.) The two-page information document states, inter alia, that the Board "cannot waive any requirement and that it is your responsibility to submit documentation of experience which you believe is equivalent to licensure requirement(s) which you have not completed," and with respect to "Preparation of Documentation" states:

> A. If you are presenting job experience as an alternative to required college study or other licensure requirements, your documentation should include, but is not limited to, items such as the following:
>
> 1. Verification by your administrator/supervisor on official letterhead substantiating the dates of employment, description of job functions and other information relevant to establishing equivalency. Documentation must be official, original and signed. Testimonials and recommendation may be included, but the aforementioned information is most relevant.
>
> 2. Official job description(s) from employing agency.
>
> 3. Any evidence of work produced which demonstrates your knowledge of the content covered in required courses or shows that your experience is equivalent to other licensure requirements.
>
> 4. Job performance rating and/or evaluations demonstrating satisfactory performance.

> 5. Transcripts only if not previously submitted and on file with the Office of Licensure and Credentials.
>
> 6. Do not include original certificates or licenses.
>
> 7. Do not include copies of certificates related to participation in professional development workshops and activities. You may list them as part of your narrative . . . .

Additionally, the instructions state, "Include a narrative statement in your packet which gives more detail about the alternative education/experiences being submitted and the one-to-one correspondence you believe the alternative education/experience has to the deficiencies." (P-M.)

The June 17, 2019, Credentials Review Summary reflects the "Certificate Deficiencies" as follows:

> Complete the following:
>
> - Additional 24 semester-hour credits in Business Studies with at least 9 semester-hour credits at advanced level. At least 12 of the required 24 credits must be in Marketing.
>
> - Physiology and Hygiene Test.
>
> [J-4.]

Spotts submitted a Credentials Review Pack to the Board on or about August 4, 2019. Spotts completed the "Alternate Education/Experience" section of the Credentials Review Summary as follows:

> **Education Experience**
>
> - 2016-Present Assistant Marching Band Director, Morris Hills High School
>
> - 2013-2016 DrumlineNisual Instructor, Morris Hills High School

- 2006-2012 Indoor & Outdoor Snare Tech/Indoor Visual Coordinator, Central Dauphin High School

- 2008-2011 Head Drumline Instructor, Bishop McDevitt High School

Spotts completed the "Experience" section of the Credentials Review Summary as follows:

Corporate Marketing Experience

- 2019[2]- Present Service Coordinator/Project Manager, Firefighter One

- 2015-2019[3] Marketing Coordinator, Firefighter One

- 2012-2015[4] Graphic Designer/Social Media Marketer, Custom Sign Source

- 2012-2012[5] Graphic Designer, Sign-A-Rama

- 2010-2012[6] Marketing and Sales Consultant/Graphic Designer, Colortech Inc./The Blue Cardinal Group Inc.

Additional Experience

- 2014-Present Volunteer Firefighter Roxbury Fire Company #3 (Roxbury Twp., NJ)

  - Assistant Engineer 2016

  - Engineer 2017

  - Lieutenant 2018, 2019

- 2006-2012 Volunteer Firefighter, Friendship Fire Company (S. Lebanon Twp., PA)

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[2] His resume reflects May 2019.
[3] His resume reflects July 2015-May 2019.
[4] His resume reflects December 2012-July 2015 and "Graphic Designer" but not "Social Media Marketer."
[5] His resume reflects February 2012-December 2012.
[6] His resume reflects November 2010-February 2012.

Spotts completed the "Sources" section of the Credentials Review Summary, noting the source of the documents in the Evidence List, as follows:

- Petitioner
- Petitioner
- Supervisor, Firefighter One (Do Not Contact)
- Mr. Richard Hartsuiker, Director of Bands Morris Hills High School
- Mr. Matthew Ceresini, Teacher Hempfield High School (Formally Central Dauphin High School)
- Mr. Stephen Gugoff, Assistant Director, Central Dauphin High School Marching Band; Director, Central Dauphin School District Indoor Percussion Ensembles

[J-5.]

Spotts' narrative statement included course descriptions,[7] as well as his own italicized indication next to each of whether the course satisfied business or market credits ("business," "marketing," "business [plus] advanced level of study," or "marketing [plus] advanced level of study") as follows:

> **DCOM 130**[8]: **Introduction to Digital Communications** ***(Business)***
>
> A broad survey of the curriculum making up the Digital Communications major. This includes the authoring of content (text. visual, aural); designing presentations for that content; understanding the processes, components, and distribution of information technology; introducing the legal and ethical environments; and comprehending the integrative nature of design, business, communication and technology in society's culture. 3 credits.

[7] A letter from Lebanon Valley College, dated October 26, 2020 (J-2), lists the courses completed by Spotts as part of the Digital Communications major, and includes excerpts from the college catalog indicating the 2006-2007 college-catalog description for each course. Some descriptions were identical to Spotts' narrative, but others, as hereinafter noted, differed.

[8] This description differs entirely from the description in J-2. However, it is noted that while J-2 reflects the course as "DCOM 130: Introduction to Digital Communications," its description reflects "130. Principles of Information Design."

CSC 122: Programming for Applications *(Business)*

Topics include algorithms, data types, graphical user interfaces, objects, event handlers, and database programming. This course does not prepare students for more advanced computer science courses, but it does satisfy the core requirement in computer programming for Digital Communications majors. We will use Visual Basic. 3 credits.

ART 213[9]: Fundamentals of Design *(Marketing)*

An introduction to the fundamental elements of design. Students work with graphic symbols, theories of visual perception, principles of composition, and color interaction in a variety of studio projects. The emphasis of the course will be placed on the design process as students develop their ability to communicate their ideas through the use of traditional and electronic media. This course will introduce students to Adobe Photoshop 3 credits.

DCOM 230[10]: Information Law and Ethics *(Business)*

Students will begin with a foundation in media law and ethical reasoning and examine both legal and ethical questions surrounding the use of digital media. They will then move on to examine the ways that the Web and digital media platforms have transformed traditional understandings of concepts like intellectual property rights, privacy, and free speech. Students will work with case studies, national and international legal documents, academic research, and company guidelines in order to understand whether legal strictures or ethical reasoning should guide personal, governmental, and corporate behavior. Fulfills requirement: Writing Process, Disciplinary Perspectives, Critical Thinking through Writing. Prerequisite: ENG 112 or FYE 112, and junior or senior standing. 3 credits.

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[9] The description in J-2 is: "An introduction to the fundamental elements of art and design. Students work with graphic symbols, theories of visual perception, principles of composition, and color interaction in a variety of studio projects. [Cross-listed as Digital Communications 255.] 3 credits."

[10] The description in J-2 is: "This course will examine the legal and ethical issues arising from the information age. Topics such as copyright, patent, privacy, security, libel, liability, and government regulation will be explained. 3 credits."

CSC 245: Concepts of Network and Database *(Business)*

This course has three distinct segments: 1) principles of computer networks and the Internet, 2) database design concepts, and 3) network database applications. Hands-on. Prerequisite: CSC 122 or 144 or permission of the instructor. 3 credits.

DCOM 265: Business of Information I (Renamed: E-Commerce) *(Business)*

An exploration of the important technologies related to doing business on the Internet. Topics will include e-commerce, advertising, customer support, and business-to-business applications. Emphasis on how businesses implement these technologies, resource requirements, cost-to-benefit analysis. 3 credits.

DCOM 285: Writing for Digital Media *(Marketing)*

This course will provide students with the skills, theories of design, and experience to design viable digital media projects that meet specific goals and target specific audiences. Prerequisite: DCOM 130, or permission. Offered fall semester. Writing process. 3 credits.

DCOM 345: Digital Video *(Marketing)*

This course introduces students to the basic principles and practices of digital video creation and production. This course allows the students to build their digital video making skills by having them conceive, storyboard, film, edit, and author projects in DVD format. To complement their practical knowledge, the course gives the students theoretical understanding of how moving and time-based imagery function both conceptually and expressively. Corequisite: DCOM 344. 3 credits.

DCOM 355: Design I *(Marketing)*

The course will focus on blending the creative and technical aspects of developing electronic images. Students will apply traditional art methods and techniques to the electronic canvas. Additionally, the course will serve to provide a historical perspective of electronic imaging and examine the limitations and possibilities of working in the electronic medium. 3 credits.

DCOM 365: Business of Information II *(Business)*

An exploration of the way businesses utilize technology to operate effectively. The course will focus on how businesses generate, manage, store, and distribute information that is key to performance of business objectives. Topics will include Enterprise Resource Planning (ERP), Customer Relationship Management (CRM), Supply Chain Management (SCM), e-Marketing, and Business Intelligence. Prerequisite: DCOM 265, or permission. 3 credits.

DCOM 385: Multimedia *(Marketing + advanced level of study)*

This course will reinforce and build upon the design skills, theories, and experience from Writing for Digital Media I, and focus on the production and post-production development process. Prerequisite: DCOM 285, or permission. Corequisite: DCOM 300.[11] 3 credits.

DCOM 390[12]: Web TV *(Marketing + advanced level of study)*

Special Topic Course offered in 2009/2010

DCOM 390[13, 14]: Advanced Graphic Design *(Marketing + advanced level of study)*

The course will focus on blending the creative and technical aspects of developing electronic images and layouts. Students will apply traditional design methods and techniques to the electronic canvas. Additionally, the course will serve to familiarize students with industry standard software and procedures for producing creative work for a variety of media. Work will be produced in the latest version of Adobe InDesign [ang] Illustrator. Prerequisite: DCOM 150, or permission of the instructor. 3 credits.

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[11] DCOM 300 does not appear on the Official Academic Transcript.

[12] The description in J-2 is: "The class will create a student-run 'TV show' broadcast on the web. The subject matter and theme of the show will depend on the students enrolled (possibly sketch-comedy). Students will actively develop and pitch ideas, learn basic script writing, videography, and post-production skills, and promote the program using social medial. No prerequisites. Open to all majors. Any English Theater concentrator may count this course as a major (elective) requirement. Fulfills DCOM Design, Communications and Business concentrations. Cross-listed with ENG 390.)"

[13] The description in J-2 is: "This advanced studio attempts to complete the standard form graphic design portfolio. Projects include visual identity and branding, packaging design, applied typography, and multiform layout. The course also covers industry standards, printing processes, and portfolio standards. Students will employ Adobe in Design and Illustrator.)"

[14] DCOM 390 is listed as "Web TV DCOM" and "Advanced Graphic Design" by the College. (J-2.)

DCOM 430: Capstone Project Management *(Business + advanced level of study)*

This capstone course teaches the theory and application of planning projects in the field of digital communications. The course covers principles of project management, research, and project strategy. Additionally, topics of professionalism, client interface, modes of communication, and collaborative group theory and practice are explored. 3 credits. [This course is cross-listed with IEXD 410.]

DCOM 440[15]: Capstone Research and Development *(Business + advanced level of study)*

This course is a practicum class where students work on a project for external clients. This course simulates the collaborative and interdisciplinary environment of the field of digital communications and emphasizes usability testing in the identification of a problem, in formative testing and prototyping of potential design ideas, and summative testing of the final project. The course takes the integrative theory and skills from the areas of concentration and builds upon the theory and application explored in the first Capstone course to develop a multi-disciplinary team of students to deliver an appropriate project. 3 credits. [This course is cross-listed with IEXD 411 .]

Spotts' Credential Review Summary reflects his present positions as Service Coordinator/Project Manager for employer Firefighter One, and Assistant Marching Band Director for Morris Hills High School. (J-5.) Spotts included with the completed Credentials Review Summary the following: a resume; a performance review from Firefighter One; a letter of recommendation from Richard Hartsuiker, Director of Bands at Morris Hills High School; a letter of recommendation from Matthew Ceresini, Director of Bands/General Music Teacher at Hempfield High School; and a letter of recommendation from Stephen Gugoff, Assistant Marching Band Director and Indoor Percussion Ensembles Director at Central Dauphin High School. (J-5.) His narrative statement reflects, "Because my employer is unaware of my pursuit for a Certificate of Eligibility in Marketing Education, I am unable to provide documentation from my

[15] The description in J-2 differs in the final sentence and appears incomplete as follows: "The course takes the integrative theory and skills from the four areas of concentration (visual, content, commercial, and technological) and builds upon the theory and application ex-."

present career in the form of recommendation letters, as it would put my job status at risk; however, I have included my most current performance evaluation." (J-5.) His narrative statement also reflects: "I also believe that BIO 103, found on my transcripts, should meet the requirement necessary for the Physiology and Hygiene requirement." (J-5.)

Spotts' resume reflects his education experience with Morris Hills High School as: Plan and teach marching and visual technique for the entire ensemble during preseason summer rehearsals; responsible for teaching proper technique for all marching percussion instruments in a competitive band atmosphere; assist in the design and development of the overall visual components of the competitive field show; and assist with planning and leading rehearsals throughout the seasons from June-November. (J-5.) Spotts' resume reflects his education experience with Central Dauphin School District as: Interpreted proper playing technique for the snare drums in both the outdoor and indoor programs; responsible for writing the drill and overall visual design of the indoor program in 2011 and 2012; and assisted with the planning of weekly rehearsals. (J-5.) Spotts' resume reflects his education experience with Bishop McDevitt High School as: Taught proper technique for all marching percussion instruments in a competitive band atmosphere; arranged the battery percussion music for the competitive field show; and assisted with the planning of weekly rehearsals. (J-5.)

Spotts' resume also reflects his "relative work experience" as: Work with internal marketing team to execute service related customer facing social mediate, print and digital advertising; create graphics and marketing materials for both print and digital media; create content and manage marketing campaigns for various company social media accounts; assist with the planning and execution of all company marketing initiatives, including web site content management, print media, video, social media marketing and email marketing; assist clients to create consistent branding; prepare files for large format printing and sign construction; presenting quotes for customer projects from design to construction completion; lead implementation [and] onboarding of new software; and responsible for the maintenance and implementation of all company technology assets. (J-5.)

Spotts' Employee Assessment from Firefighter One, dated May 22, 2017, reflects his department as "Marketing" and job title as "Marketing Coordinator." (J-5.)

By letter dated August 21 , 2019, Spotts was notified that the Board had received the experience he documented for review and that he would need to submit copies of his packet and his review would be scheduled. (J-6.)

A memo from Singh to the Board members, dated October 17, 2019, regarding the credentials review for a Teacher of Marketing CE, N.J.A.C. 6A:9B-9.1, reflects that Spotts "appeals the decision of the examiner and, in the alternative, seeks the review of education and/or experience he/she believes is equivalent in the area(s) of deficiency," and that he satisfies the requirements toward certification except for the following:

> Needs 24 semester-hour credits in Business Studies with at least 9 semester-hour credits at the advanced level. At least 12 of the required 24 credits must be in Marketing. The physiology-and-hygiene requirement must be met as well.
>
> [J-7.]

Spotts attended the December 13, 2019, Board meeting. The Board did not ask Spotts any questions.

A letter dated December 16, 2019, reflects that the State Board of Examiners advised petitioner that at its meeting on December 13, 2019, the Board voted to deny his request for issuance of a Teacher of Marketing CE pursuant to N.J.A.C. 6A:9B-9.1,[16] and enclosed the Board's Decision.

Spotts was issued a "Teacher of Graphic Design" Certificate of Eligibility in July 2020.

[16] The Board Decision reflects the correct citation, but the Board's letter reflects "698-9.1."

Testimony

Rani Singh

Rani Singh is employed at the New Jersey Department of Education as the director of the Office of Certification and Induction and as secretary to the State Board of Examiners. Prior thereto she was the chief examiner and supervisor of all examiners in the office who review certification applications. She became director in February 2019. The Examiner Unit reviews all the applications.

The Board found that Spotts was not qualified to teach marketing and voted to deny his request for a Teacher of Marketing CE. The Board reviews alternate education and experience as part of its decision. There was alternate experience listed in his Credentials Review Summary, but no documentation was provided to verify his experience. His resume with work employment history and assessment review were not sufficient documentation of the experience listed on his Credentials Review Summary. Official documentation from an employer to document the experience is required. J-2 was not provided with his appeal. The course descriptions in his narrative statement were not official course descriptions from Lebanon Valley College. The Board does not accept unofficial course descriptions. One-to-one correspondence has to do with whether an individual's experience has a significant relation to the type of experience that the certificate requires, and not to do with a comparison of classes offered at different institutions. Spotts' representation that other universities provided courses similar to Lebanon Valley College has no bearing on whether he qualifies for the Teacher of Marketing CE.

The candidate's packet is reviewed for completeness, in that it must contain the notarized oath and all the information required, but it is up to the candidate to submit all the documentation verifying what is on the Credentials Review Summary. The Board only reviews information submitted by the candidate. If the Board has any questions relevant to the documentation submitted, the Board will ask questions at the meeting. The Board does not request documentation from the candidate if the Board feels there is documentation missing to support information.

BIO 103, environmental science, is not an appropriate course to fulfill the physiology-and-hygiene requirement, as environmental science is not accepted. However, physiology and hygiene did not have a significant bearing on why the CE was denied for marketing.

Stephen Spotts

Spotts followed the template he received with the June 17, 2019, letter, and he was provided a sample Credentials Review Summary. He received the document about alternate education and experience, but the Credentials Review Summary was the only sample document provided as a guide. The document did not really explain anything, it just had an area to list experience. The only experience referenced in the Board's letter was the music teaching experience and supplemental experience working with students, but the Board did not reference the corporate marketing and business experience that he listed in his Credentials Review Summary. The corporate marketing experience on his resume and evaluation confirm his real-world marketing experience. He passed the marketing PRAXIS exam.

After the initial submission for a marketing CE, he also submitted an application for a graphic-design CE. The graphic-design CE was approved, and his BIO 103 course was accepted for the graphic-design CE. He does not know why it would be accepted for graphic design, but not for marketing. He has never completed the physiology-and-hygiene test.

His coursework in DCOM does show a one-to-one correlation between marketing and business coursework that is available at other state universities. He provided course descriptions taken from the official college course descriptions in his packet to the Board. The descriptions match the ones in the Lebanon Valley College official letter he received. He did not make up any course description with his own words to try to make it appear that they meet the requirements.

Perhaps there was some clerical paperwork missing from his application as far as official documentation from employers, but the office or Board should have advised him that additional documentation was necessary. If there was a clerical issue that caused the denial, he wishes the Board would have asked questions about that and provided him an opportunity to submit additional documentation to support the marketing and corporate experience listed on his Credentials Review Summary.

LEGAL ANALYSIS AND CONCLUSION

The Board may issue and revoke three categories of educational certificates: Instructional, Administrative, and Educational Services. N.J.S.A. 1BA:6-38; N.J.A.C. 6A:9B-5.3(a). In determining appeals from decisions of the Board, the Commissioner must ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated that the Board acted in a manner that was arbitrary, capricious, or contrary to law. N.J.A.C. 6A:4-4.1 (a).

Pursuant to N.J.A.C. 6A:9B-9.1:

> (a.) To fulfill the endorsement requirements necessary for instructional certification pursuant to N.J.A.C. 6A:9B-8, the candidate shall:
>
> > 1. Complete one or more of the following coursework requirements for the subject area in which the candidate is seeking the endorsement:
> >
> > > i. Complete an undergraduate major in the subject area as documented by an official transcript from a regionally accredited four-year college or university;
> > >
> > > ii. Hold a graduate degree in the subject area; or
> > >
> > > iii. Complete at least 30 credits in a coherent sequence of courses appropriate to the subject area as documented by an official transcript from a regionally accredited college

> or university, of which 12 semester-hour credits must be at the advanced level of study, including junior-, senior-, or graduate-level study as documented by the official transcript of a four-year, regionally accredited college or university;
>
> 2. Pass the appropriate State test(s) of subject matter knowledge. However, if a candidate's score on the appropriate State test(s) of subject matter knowledge falls below the passing score by five percent or less, but the candidate has a GPA of 3.50 or higher when a GPA of 4.00 equals an A grade, he or she shall meet this paragraph's requirements. This alternative requirement shall not be construed as a waiver under N.J.A.C. 6A:9B-4.12(c) . . . . ; and
>
> 3. When applicable, complete additional requirements or exceptions pursuant to N.J.A.C. 6A:9B-11.
>
> (b) Except if certified in an experience-based career and technical education endorsement pursuant to N.J.A.C. 6A:9-11.3 or military science pursuant to N.J.A.C. 6A:9-11.8, holders of a CE, CEAS, or standard instructional certificate in one endorsement may obtain the corresponding CE, CEAS, or standard instructional certificate in a different endorsement upon completion of the academic and test requirements listed in (a) above and any additional requirement(s) or exception(s) in N.J.A.C. 6A:9B-10 or 11.

A candidate for certification may appeal to the Board of Examiners an adverse decision regarding his or her certification eligibility. N.J.A.C. 6A:9B-4.12(a). If a candidate receives an evaluation pursuant to N.J.A.C. 6A:9B-5.3(c) that identifies areas of deficiency in the certification requirements, the candidate may provide the Board with evidence of alternative education and/or experience that he or she believes is equivalent to the area(s) of deficiency. N.J.A.C. 6A:9B-4.12(b). However, the Board may not: (1) waive any test, GPA, degree completion, or approved educator preparation program completion requirements; (2) permit a candidate to substitute education and/or experience for any test, GPA, degree, or approved educator preparation program completion requirements; or (3) issue a certificate that is expired and/or is not a type of certificate endorsement pursuant to N.J.A.C. 6A:9B-9 through 11. N.J.A.C. 6A:9B-

4.12(c). The candidate is responsible for demonstrating by clear and convincing evidence that he or she is eligible for the requested certificate. N.J.A.C. 6A:9B-4.12(d).

"Business education/business-related technologies" endorsements authorize the holder to teach business education and business-related technologies in all public schools, in kindergarten through grade 12, including approved career and technical education programs in grades nine through 12 in all public schools. N.J.A.C. 6A:9B-9.4(a)(1). A "marketing education" endorsement authorizes the holder to teach marketing occupations including sales, advertising and retailing, global marketing, entrepreneurship, and exploration of related business occupations. N.J.A.C. 6A:9B-9.4(a)(1)(vii); see also https://nj.gov/education/license/endorsements/2560S.pdf. Specific career and technical education endorsements are based on the candidate's Department-approved employment or self-employment experience, bachelor's degree, and/or associate degree. N.J.A.C. 6A:9B-9.4(c). Endorsements are organized under sixteen different career clusters, including "marketing," and are listed on the Department's website. Ibid. Endorsements are authorized under the "marketing" career cluster for career and technical education programs that prepare students for careers related to the planning, management, and performance of marketing activities to reach organizational objectives. N.J.A.C. 6A:9B-9.4(c)(14).

Spotts submitted six documents with the completed Credentials Review Summary: a narrative statement regarding his education/experience; his resume; a Firefighter One performance evaluation from 2017; and three letters of recommendation from band directors. His narrative statement included course descriptions noted therein to be from the Lebanon Valley College course catalog. However, the instructions from the Board reflect that official documentation is required. That said, it is observed that Spotts later obtained the October 26, 2020, letter from Lebanon Valley College, which for the most part corroborates his earlier descriptions. However, the alternative education/experience must have a one-to-one correspondence with the deficiencies. (P-M.) Petitioner argues that he should be issued a Marketing CE because the coursework to obtain his degree in digital communications shows a one-to-one correlation between the marketing and business coursework at other New Jersey State universities and the coursework satisfies the requirement of thirty credits in business

with twelve specifically in marketing, and because of his years of corporate marketing experience as evidenced in his Credentials Review Summary, resume, and employee assessment. However, the instructions from the Board were clear that documentation should include "verification by your administrator/supervisor on official letterhead substantiating the dates of employment, the description of job functions, and other information relevant to establishing equivalency," "official job description(s) from the employing agency," "evidence of work produced which demonstrates . . . knowledge of the content covered in required courses or shows . . . experience equivalent to other licensure requirements," and "job performance rating and/or evaluations demonstrating satisfactory performance." Although Spotts argues that his resume reflects "corporate marketing experience," he provided no "official" documentation from Colorless, Inc./The Blue Cardinal Group, Inc., Sign-A-Rama, or Custom Sign Source and the only documentation provided from Firefighter One was a 2017 Employee Assessment that was not signed by Spotts or his manager. Additionally, it is noted that in response to "in what areas can the employee stand to improve," it states, "[u]nderstand job responsibilities and priorities in marketing."

Spotts also provided course descriptions in his narrative statement. Spotts cited the "Lebanon Valley College 2009-2010 Course Catalog," available online and accessed June 4, 2019, as the source of the descriptions. However, he did not provide to the Board "official" descriptions from Lebanon Valley College. While it is observed that the course descriptions for most courses matched the official October 26, 2020, Lebanon Valley College letter Spotts later obtained, the course descriptions for some courses did not match. Nevertheless, even if the course descriptions and comparisons between Lebanon Valley College courses and various New Jersey college/university courses (P-F) were acceptable evidence, I disagree that all the courses are business and marketing courses, as some are clearly focused on art and graphic design or show no specific relation to marketing or business as is required for the credentials review.

In view of the foregoing, I **CONCLUDE** that Spotts did not demonstrate by clear and convincing evidence that he fulfilled the endorsement requirements necessary for a Teacher of Marketing CE pursuant to N.J.A.C. 6A:9B-8. Thus, I further **CONCLUDE**

that the Board's decision was supported by sufficient credible evidence in the record and was not arbitrary, capricious, or contrary to law.

ORDER

It is hereby **ORDERED** that Spotts' request for issuance of a Teacher of Marketing CE is **DENIED** and his 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. 52:148-10.

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.

Kelly J Kirk

November 26, 2021

DATE

KELLY J. KIRK, ALJ

Date Received at Agency:

Date Mailed to Parties:

WITNESS LIST

For Petitioner:

Stephen Spotts

For Respondent:

Rani Singh

EXHIBIT LIST

Joint:

J-1 Official Academic Transcript
J-2 October 26, 2020, letter from Lebanon Valley College
J-3 June 11, 2019, letter from the Board
J-4 June 17, 2019, letter form the Board
J-5 Credentials Review Summary
J-6 August 21, 2019, letter from the Board
J-7 October 17, 2019, letter from the Board and Attachments
J-8 December 16, 2019, letter from the Board
J-9 Board Decision, dated December 17, 2019

For Petitioner:

P-A (Not in evidence)
P-B (Not in evidence)
P-C (Not in evidence)
P-D (Not in evidence)
P-E Statement of Spotts
P-F Comparison Chart
P-G (Not in evidence)
P-H (Not in evidence)
P-I (Not in evidence)

P-J (Not in evidence)

P-K (Not in evidence)

P-L Praxis Scores

P-M Form Samples

For Respondent:

None

New Jersey Commissioner of Education

Final Decision

Stephen Margiotta,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

Synopsis

Petitioner appealed the decision of the respondent New Jersey Department of Education, Office of Student Protection (OSP), disqualifying him from employment with any educational institution under the supervision of the Department of Education. Petitioner had been involved in a motor vehicle accident in 2017, in which his car hit a guardrail, struck two trees, and struck another vehicle. Petitioner contended that he had been unable to breathe, blacked out, and has no memory of the accident. A person in the other vehicle died as a result of the crash. Petitioner subsequently pied guilty to reckless vehicular homicide, a crime of the third degree in violation of *N.J.S.A.* 2C:11-S(b)(S), for failure to maintain a lane.

The AU found, *inter alia,* that: the statute governing disqualification, *N.J.S.A.* 18A:6-7.l(c)(l), disqualifies individuals who are convicted of "a crime involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder."; petitioner's conduct in failing to maintain a lane did not involve force or the threat of force, nor was it a gross deviation from the standard of conduct that a reasonable person would observe in a similar situation. The AU concluded that the petitioner should not be disqualified from employment in public education.

Upon review, the Commissioner concurred with the AU that petitioner's conviction for reckless vehicular homicide for failure to maintain a lane does not warrant disqualification from employment in public education. The Commissioner found that while petitioner's conduct might be considered reckless under *N.J.S.A.* 2C:11-S(b)(S) with regard to his failure to maintain a lane, it does not demonstrate force or threat of force by petitioner and is not on the same level as the crimes enumerated in *N.J.S.A.* 18A:6-7.l(c)(l), *i.e.* robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder. Accordingly, the OSP's decision to disqualify petitioner from public education employment was reversed.

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

2-22
OAL Dkt. No. EDU 11575-19
Agency Dkt. No. 157-7/19

New Jersey Commissioner of Education

Final Decision

Stephen Margiotta,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

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 by the New Jersey Department of Education, Office of Student Protection (OSP), pursuant to *N.J.A.C.* 1:1-18.4. The petitioner did not file a reply.

In this matter, petitioner challenges his permanent disqualification from employment with an educational institution under the supervision of the Department of Education. Petitioner was involved in a motor vehicle accident on September 23, 2017, in which his car hit a guardrail, struck two trees, and struck a vehicle. Petitioner contends that he felt like he could not breathe, took a deep breath, and then does not remember the accident. A person in the other vehicle died as a result of the crash. In June 2019, petitioner pied guilty to reckless vehicular homicide, a crime of the third degree, in violation of *N.J.S.A.* 2C:11-5(b)(5), for failure

to maintain a lane.[1] Petitioner also pied guilty to assault by auto, a crime of the fourth degree, in violation of *N.J.S.A.* 2C:12-1(c)(1), which is not a disqualifying offense. On June 18, 2019, the OSP sent a permanent disqualification notice to petitioner, which petitioner appealed.

Following a hearing, the Administrative Law Judge (AU) found that petitioner should not be disqualified from employment in public education. The statute governing disqualification, *N.J.S.A.* 18A:6-7.1(c)(1), disqualifies individuals who are convicted of "a crime involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder." The AU found petitioner's conduct in failing to maintain a lane did not involve force or the threat of force, nor was it a gross deviation from the standard of conduct that a reasonable person would observe in a similar situation.

In its exceptions, the OSP argues that by pleading guilty to reckless vehicular homicide in the third degree, petitioner conceded that he was reckless in failing to maintain a lane. The OSP notes that the Commissioner has previously determined that a third-degree crime involving the use of force, even when caused by recklessness, falls within the purview of the disqualification statute. As such, the OSP argues that petitioner recklessly operated a motor vehicle by failure to maintain his lane, and the force associated with the impact caused a death, such that his conduct warrants permanent disqualification from teaching.

As a threshold matter, when there is a challenge to a disqualification determination by the Office of Student Protection, the Commissioner is not legally mandated to give deference to

[1] *N.J.S.A.* 2C:11-5(b)(S) provides that: "Reckless Vehicular homicide is a crime of the third degree if the defendant proves by a preponderance of the evidence that the defendant did not commit any conduct constituting driving a vehicle or vessel recklessly other than failing to maintain a lane in violation of R.S.39:4-88."

her staff, but instead determines if the finding was legally appropriate. It is important to recognize that a decision by the OSP, or any office within the Department, is not akin to the appellate review of a final agency decision, which is entitled to an arbitrary, capricious or unreasonable standard of review. Moreover, where the Department of Education has limited the scope of review of a subordinate office or division, it has done so by regulation, *i.e.* appeals filed under *N.J.A.C.* 6A:4 challenging a decision of the State Board of Examiners revoking/suspending a certificate, or a decision of the School Ethics Commission. *See, Board of Trustees of the Passaic County Elks Cerebral Palsy Center v. New Jersey Dept. of Educ., Office of Fiscal Accountability and Compliance,* Commissioner's Decision No. 334-14, dated August 14, 2014 (finding that a decision of the Office of Fiscal Accountability and Compliance is not given deference by the Commissioner); *Jessica Walder v. New Jersey Department of Education, State Board of Examiners,* Commissioner's Decision No. 503-14, decided December 29, 2014 (finding that the Commissioner does not give deference to a decision of the State Board of Examiners denying a request for issuance of a certificate). Therefore, the appropriate standard of review of the OSP's June 18, 2019 decision to disqualify petitioner from teaching is whether the decision is consistent with the applicable statutory and regulatory provisions.

Upon review, the Commissioner agrees with the AU that petitioner's conviction for reckless vehicular homicide for failure to maintain a lane does not warrant disqualification from employment in public education. Pursuant to *N.J.S.A.* 18A:6-7.1(c)(1), an individual shall be permanently disqualified from public education employment if he or she is convicted of "[a] crime involving the use of force or the threat of force to or upon a person or property including,

but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter, and murder." Petitioner's conviction for reckless vehicular homicide in the third degree means that petitioner "did not commit any conduct constituting driving a vehicle or vessel recklessly other than failing to maintain a lane." *N.J.S.A.* 2C:11-5(b)(5). While such a determination is very fact specific, the Commissioner finds that petitioner's conduct in failing to maintain a lane fails to rise to the level of "force or threat of force" as required by *N.J.S.A.* 18A:6-7.1(c)(1).

The OSP relies on two cases that are distinguishable from the present matter. First, in *Erin Markakis v. New Jersey Department of Education, Office of Criminal History Review,* Commissioner's Decision No. 369-11, decided September 1, 2011, the petitioner pied guilty to third degree assault by auto in violation of *N.J.S.A.* 2C:12-1(c)(2) after she drove with a blood alcohol level of .197% (more than twice the legal limit), crossed over the center line of the road into oncoming traffic, crashed into a vehicle containing a woman and three young children, which vehicle then collided with a third vehicle containing only the driver. All five individuals were injured in the crash. The Commissioner in that case agreed with the AU that:

> Petitioner was convicted of a crime, the elements of which are driving recklessly while intoxicated, and in the course of so doing, causing serious bodily injury. A third degree crime of assault by auto involving drunk driving and a resulting serious injury can be deemed to be on the same level as the crimes enumerated as representative of those that are automatic disqualifiers. These crimes also clearly involve the use of force or threat of force. There is no indication in this case that the petitioner intended to use force or threat of force, but she did act recklessly in using force upon another person or property.
>
> *[Id.* at 3.]

The Commissioner finds that this matter is readily distinguishable from the present matter because the reckless behavior in driving with a blood alcohol content of more than twice the legal limit and causing injury is significantly different than petitioner's reckless conduct in failing to maintain a lane after blacking out, causing a fatal accident.

Second, in *Olivia Howard v. New Jersey Department of Education, Office of Criminal History Review, et al.,* Commissioner's Decision No. 355-01, decided October 1, 2001, the petitioner was applying for certification and was disqualified based on a former conviction from 1991 for death by auto, then a crime of the third degree, which is substantially equivalent to second-degree death by vehicular homicide. In the *Howard* case, after meeting at a construction site to discuss their financial difficulties, petitioner and her husband argued in Howard's car; when her husband left the vehicle and walked away, Howard drove after him, catching the passenger door in a construction fence and breaking one of the door hinges. *In re Howard,* 143 *N.J.* 526, 528 (1996). She continued to drive after her husband, going the wrong way down two one way streets, before pulling into a parking lot where she left the car to seek help from her husband in dealing with the broken door. *Ibid.* Receiving no help, petitioner got back in the car, hit the gas and reached to close the door at the same time. *Ibid.* In so doing, petitioner ran over her husband, who died from his injuries later that day. *Ibid.* The Commissioner adopted the Initial Decision, which found that the petitioner's conduct clearly involved force and she disregarded a substantial and unjustifiable risk that her conduct could injure or kill her husband. In the instant matter, the Commissioner finds that petitioner blacked out while driving and failed to maintain his lane, whereas Howard hit the gas and reached to

close the door at the same time, knowing that her husband was near the car, thereby causing a homicide while driving in a clearly reckless manner.

The Commissioner does not find the OSP's exceptions to be persuasive. While petitioner's conduct may be *per se* reckless under *N.J.S.A.* 2C:11-S(b)(S) with regard to his failure to maintain a lane, such conduct does not demonstrate force or threat of force by petitioner and is not on the same level as the crimes enumerated in *N.J.S.A.* 18A:6-7.l(c)(l), which are robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder. Petitioner explained that he could not breathe and then did not remember failing to maintain his lane and making impact with the other vehicle. Given the unique circumstances in this matter, petitioner's conduct in failing to maintain his lane does not warrant disqualification under *N.J.S.A.* 18A:6-7.l(c)(l).

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The OSP's June 18, 2019 decision to disqualify petitioner from employment is hereby reversed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2022
Date of Mailing: January 12, 2022

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.l. Under *N.J.Ct.R.* 2:4-l(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 11575-19
AGENCY DKT. NO. 157-7/19

STEPHEN MARGIOTTA,

Petitioner,

v.

DEPARTMENT OF EDUCATION, OFFICE OF STUDENT PROTECTION,

Respondent.

John Paul Velez, Esq. for petitioner (Arbore, Velez, LLC)

Jaclyn M. Frey, Deputy Attorney General., for respondent (Andrew J. Bruck, Acting Attorney General of New Jersey)

Record Closed: October 4, 2021 Decided: October 14, 2021

BEFORE **KIMBERLY A. MOSS,** ALJ:

Petitioner, Stephen Margiotta (Margiotta or petitioner), appeals Department of Education Office of Special Education (DOESP or respondent) decision disqualifying him from employment for his conviction for vehicular homicide for failure to maintain lane.

On June 19, 2019, defendant sent a permanent disqualification letter to petitioner. Petitioner filed an appeal of the disqualification. The Commissioner of Education forwarded the appeal to the Office of Administrative Law (OAL) as a contested matter. A petition was filed with OAL on August 19, 2019. On August 13, 2019, respondent filed a motion to dismiss the petition. Petitioner filed opposition to the motion on September 26, 2019. The Motion was denied on October 3, 2019. The hearing was held on May 5, 2021. The parties closing briefs were filed on October 4, 2021, at which time I closed the record.

FACTUAL DISCUSSION

I **FIND** the following stipulated **FACTS.**

1. Petitioner received a New Jersey Elementary K-6 teaching certification in or about 2008.
2. Petitioner was involved in a motor vehicle accident on September 23, 2017.
3. During the motor vehicle accident, petitioner's vehicle collided with another vehicle, resulting in the death of the driver and bodily injury to the passenger in the other vehicle.
4. On or about January 22, 2019, petitioner was charged with reckless vehicular N.J.S.A. 2C:11-5a, and assault by auto, a crime of the fourth degree, in violation of N.J.S.A. 2C: homicide, a crime of the second degree, in violation of 12-1 c (1).2
5. On or about February 19, 2019, petitioner pied guilty to reckless vehicular homicide, a crime of the third degree, in violation of N.J.S.A. 2c:11-5b (5), and assault by auto, a crime of the fourth degree, in violation of N.J.S.A. 2C:12-1c (1).
6. Under N.J.S.A. 2C: 11-5b (5) reckless vehicular homicide is a crime of the third degree if the defendant proves by a preponderance of the evidence that the defendant did not commit any conduct constituting driving a vehicle or vessel recklessly other than failing to maintain a lane in violation of R.S. 39:4-88.
7. Under N.J.S.A. 2C:12-1c (1) a person is guilty of assault by auto or vessel when the person drives a vehicle or vessel recklessly and causes either serious bodily injury or bodily injury to another. Assault by auto or vessel is a crime of the fourth degree if serious bodily injury results.

8. By letter dated June 18, 2019, respondent notified petitioner that he was permanently disqualified from serving in any position with any educational institution under the supervision of the Department of Education or with a contracted service provider under contract with said school or educational facility, as a result of his conviction for a disqualifying crime.
9. On or about June 28, 2019, a judgment of conviction was entered by the Superior Court of New Jersey, Morris County reflecting the final charges from the guilty plea and sentencing.

TESTIMONY

James Scaringelli

James Scarigelli (Scaringelli) is an investigator for the DOESP. He has worked there since October 2008. He previously was a police officer. As an investigator, he checks the criminal history of employees and prospective employees. This includes checking fingerprints and determining if there are pending charges or convictions that would disqualify the person. Anyone who has been fingerprinted since February 2003, their records are keep by the state police.

The Office of Student Protection receives a notification from the state police if an employee of the Department of Education or candidate for employment has been arrested. N.J.S.A. 18A:6-7.1 lists crimes that if convicted, a person is disqualified from employment with the Department of Education. The list is not exhaustive. The determination is next made based on the charge and conviction whether the crime is a disqualifying charge according to the statute.

The state police notify the DOE of an arrest of an employee. Scaringelli received the state police notification of arrest for Margiotta, who was charged with vehicular homicide. The notification lists Margiotta as a substitute teacher. Scaringelli checked with the Department of Labor for the last eight quarters. He received notification of Margiotta's employment status from his employer. He spoke with petitioner and petitioner's attorney.

On June 18, 2019, petitioner informed Scaringelli that he was pleading to vehicular homicide. Scaringelli confirmed that through Promise Gavel. He reviewed N.J.S.A. 18A:6-7.1, to determine if the crime was a disqualifying crime. Portion C of the statute states any crime involving force or the use of force against a person or property is a disqualifying offense. Scaringelli spoke to his superior Chris Carabela regarding this matter.

A letter of disqualification was sent to Margiotta on June 18, 2019. The disqualifying charge was vehicular homicide-result of failure to maintain lane. Petitioner also plead guilty to assault by auto, but it is not a disqualifying offense. Scaringelli received the conviction notice from the state police on November 13, 2019.

Scaringelli agrees that reckless can be defined as injuring or creating a risk of injury to an innocent person when he/she consciously disregards a substantial and unjustifiable risk that the injury or risk of injury will result from his/her conduct. He agrees that risk is a gross deviation from a standard of conduct.

N.J.S.A. 18A: 6-7.1 (c) disqualifying crimes lists crimes involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter, and murder; the list is not exhaustive.

Scaringelli knew that there was a change to the vehicular homicide statute N.J.S.A. 2C: 11-5(5) in January 2018.He looked at this statute and saw the same reckless element as the statute had prior to the change. He spoke to his superior Carabelli about the statute change. They both agreed that a charge petitioner plead guilty to be a disqualifying crime. Scaringelli believes that petitioner used force when he made impact with the other vehicle which was the cause of the accident. He did not review the police report and does not look at the particulars of a charge.

Stephen Margiotta

Stephen Margiotta was last employed as an educator at the College Academy Charter School from August 2018 to January 2019. He has been employed in education

since 2008. On September 22, 2017, he was employed at the Aberdeen School in Virginia. He had taken prescription Ambien on September 21, 2017. On September 22, 2017, he drove from Virginia to Scotch Plains, New Jersey to see his parents. He had worked that day prior to driving to New Jersey. His parents have dementia. He arrived at approximately eleven P.M. He slept for six to seven hours, then drove to his home in Midland Park, which took one hour. He was in Midland Park for approximately thirty minutes. He rested for twenty of those minutes.

As he was driving back to his parents' home, he was in the left lane of Route 287, going forty-five miles per hour. He took a deep breath because he felt that he could not breath and he does not recall the accident. He does recall hitting the guardrail. He was informed that his car struck two trees and a car. Petitioner was injured because of the accident. When he was at the hospital, he was informed that there was a fatality. Petitioner broke three bones in his foot, had a concussion, broke bones in his back and had a sixteen-inch cut. He was charged with vehicular homicide on January 22, 2019.

Margiotta has had difficulty with sleeping for most of his life. He had a sleep study done one year after the accident. It was determined that he had sleep apnea. He also retained an accident reconstruction expert.

Margiotta plead guilty to vehicular homicide as a result of failure to maintain lane. He was sentenced to three years' probation and ninety days in the sheriff labor assistance program.

New Jersey Motor Vehicle Department (Motor Vehicle) sent him a notice of suspension of 660 days for the vehicular homicide conviction. Due to his injuries petitioner could not drive after the accident for two years. He had a hearing at Motor Vehicle where his suspension was reduced to time served. He had to take driver education class and take the written and rode test before he could get his license back.

Having reviewed the testimony and evidence I **FIND** the following additional **FACTS:**

Margiotta had been employed in education since 2008. In September 2017, he was employed by the Aberdeen School in Virginia. On September 21, 2017, he took a prescribed Ambien. On September 22, 2017, he taught at the Aberdeen School in Virginia. After school, he drove from Virginia to Scotch Plane, New Jersey to his parents' house. He arrived in New Jersey at approximately 11:30 pm on September 22, 2017. He slept for six hours. On September 23, 2017, Margiotta drove from his parents' home in Scotch Planes to his home in Midland Park, New Jersey. The drive took one hour. He stayed at his Midland Park home for thirty minutes, he rested for twenty minutes of that time. He then began to drive back to Scotch Planes. He was traveling in he left lane of Route 287, going forty-five miles per hour. He began to feel like he could not breath and took a deep breath. He does not remember the accident, although he does remember hitting the guardrail. Margiotta's was told that after striking the guardrail, car went across the road, struck two trees, and struck a vehicle. A person in the other vehicle died as a result of injuries sustained in the accident. Margiotta broke three bones in his foot, broke bones in his back, and sustained a concussion among other injuries because of the accident.

On February 19, 2019, Margiotta plead guilty before the Honorable David Ironson, J.S.C. in Morris County Criminal Court to Third degree vehicular homicide-result of failure to maintain lane and fourth degree assault by auto-vessel-reckless serious bodily injury. On or about June 18, 2019, Margiotta informed Scaringelli that he pied guilty to vehicular homicide. On June 21, 2019, Margiotta was sentenced by Judge Ironson to three years' probation and ninety days to be served in the sheriff's labor assistance program. On June 18, 2019, a permanent disqualification letter was sent to Margiotta by Carl Carabella, Manager of DOESP.

On or about January 19, 2019, the Motor Vehicle sent Margiotta an Order of suspension because of his involvement in a fatal accident on September 23, 2017. He was required to surrender his driver's license. immediately. The proposed suspension was 660 days. A hearing was held on the motor vehicle suspension on October 3, 2019. The result of the OMV hearing was that Margiotta's driving privileges were suspended for 318 days effective November 7, 2019. In addition, he had to pass the motor vehicle road and written test.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 2C:11-5 (b)(5) provides:

> Reckless Vehicular homicide is a crime of the third degree if the defendant proves by a preponderance of the evidence that the defendant did not commit any conduct constituting driving a vehicle or vessel recklessly other than failing to maintain a lane in violation of R.S.39:4-88.

N.J.S.A. 18A :6-7.1(c) provides:

> A facility, center, school, or school system under the supervision of the Department of Education and board of education which cares for, or is involved in the education of children under the age of 18 shall not employ for pay or contract for the paid services of any teaching staff member or substitute teacher, teacher aide, child study team member, school physician, school nurse, custodian, school maintenance worker, cafeteria worker, school law enforcement officer, school secretary or clerical worker or any other person serving in a position which involves regular contact with pupils unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists on file 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 capacity or position. An individual employed by a board of education or a school bus contractor holding a contract with a board of education, in the capacity of a school bus driver, shall be required to meet the criminal history record requirements pursuant to section 6 of P.L.1989, c.104 (C.18A:39-19.1). 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 may require criminal history record checks for individuals who, on an unpaid voluntary basis, provide services that involve regular contact with pupils. In the case of school districts involved in a sending-receiving relationship, the decision to require criminal history record checks for volunteers shall be made jointly by the boards of education of the sending and receiving districts.

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

> c. (1) A crime involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter, and murder; or
> (2) A crime as set forth in chapter 39 of Title 2C of the New Jersey Statutes, a third degree crime as set forth in chapter 20 of Title 2C of the New Jersey Statutes, or a crime as listed below:

Recklessly endangering another person N.J.S.2C:12-2
Terroristic threats N.J.S.2C:12-3
Criminal restraint N.J.S.2C:13-2
Luring, enticing child into motor vehicle, structure, or isolated area P.L.1993, c.291 (C.2C:13-6)
Causing or risking widespread injury or damage N.J.S.2C:17-2
Criminal mischief N.J.S.2C:17-3
Burglary N.J.S.2C:18-2
Usury N.J.S.2C:21-19
Threats and other improper influence N.J.S.2C:27-3
Perjury and false swearing N.J.S.2C:28-3
Resisting arrest N.J.S.2C:29-2
Escape N.J.S.2C:29-5

Bias intimidation N.J.S.2C:16-1; or

(3) Any crime of the fourth degree involving a victim who is a minor; or
(4) Conspiracy to commit or an attempt to commit any of the crimes described in this act.

Recklessly endangering another person N.J.S.2C:12-2 was repealed in January 2016, prior to the accident in this case.

The New Jersey Model Criminal Jury Charge for vehicular homicide define reckless as:

> A person acts recklessly when he/she consciously disregards a substantial and unjustifiable risk that death will result from his/her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the defendant's conduct and the circumstances known to him/her, disregard of the risk involves a gross deviation from the standard of conduct that a reasonable person would observe in the defendant's situation.

In other words, in order for you to find that the defendant drove a vehicle [or vessel] recklessly, the State must prove beyond a reasonable doubt that the defendant was aware he/she was operating a vehicle [or vessel] in such a manner or under such circumstances as to create a substantial and unjustifiable risk of death to another. The State must also prove beyond a reasonable doubt that the defendant consciously disregarded this risk and that the disregard of the risk was a gross deviation from the way a reasonable person would have conducted himself/herself in the situation.

Recklessness is a condition of the mind that cannot be seen and that can often be determined only from inferences from conduct, words, or acts. It is not necessary for the State to produce a witness to testify that the defendant stated that he/she acted with a particular state of mind. It is within your power to find that proof of recklessness has been furnished beyond a reasonable doubt by inferences that may arise from the nature of the facts and circumstances surrounding the conduct in question.

In Markakis v. N.J. State Dept of Educ., Office of Crim Hist Rev. OAL DKT. No. EDU 13275-10 Initial Decision (June 11, 2011) adopted Comm'r Final Decision (September 1, 2011) Markakis was driving with a blood alcohol of 197 which is twice the legal limit. While driving, she crossed over the center lane into oncoming traffic and collided with a sport utility van.

Markakis was convicted of a crime, the elements of which are driving recklessly while intoxicated, and in the course of so doing, causing serious bodily injury. A third-degree crime of assault by auto involving drunk driving and a resulting serious injury can be deemed to be on the same level as the crimes enumerated as representative of those that are automatic disqualifiers. These crimes also clearly involve the use of force or threat of force. There is no indication in this case that the petitioner intended to use force or threat of force, but she did act recklessly in using force upon another person or property.

This can be distinguished from the present case because Markakis was driving while intoxicated and Margiotta was not driving while intoxicated.

In Olivia C. Howard v. Carl H. Carabelli OAL Dkt EDU 10197-00 Initial Decision (August 13, 2001) adopted Comm'r Final Decision (October 1, 2021) the petitioner applied for a teaching certificate. A criminal record check revealed that on February 15, 1991, petitioner was convicted by a jury of death by auto, N.J.S.A. 2C:11-5, then a crime of the third degree. In 1995, this statute, entitled death by vehicular homicide, was changed to raise the crime to a second-degree offense. It defines criminal homicide as vehicular homicide when it is caused by driving a vehicle or vessel recklessly. The facts in that matter were:

On July 3, 1989, the Howards met to discuss some of their financial difficulties. Using Mrs. Howard's car, they drove to a construction site so they could talk. An argument ensued. Mr. Howard, who was in the front passenger seat, exited the car. When Mrs. Howard backed up the car to follow her husband, the passenger door "flew open" and became caught in some fencing at the construction site. The door hinge broke, and the door dragged on the ground as Mrs. Howard drove.

Mrs. Howard followed her husband as he walked away. After going the wrong way down two one-way streets, Mrs. Howard pulled into the driveway of a health clinic. When Mr. Howard approached the car, she got out to seek his assistance with the door. Having had no success, Mrs. Howard got back into the car, hit the gas, and reached for the door at the same time. She ran over her husband, who died later that day as a result of his injuries. In re Howard 143 NJ 526 (1986).

In that matter, the Court stated that although respondent characterizes this tragedy as an accident, she was convicted of criminal homicide caused by driving a vehicle recklessly. N.J.S.A. 2C: 11-5. Under this statute, a person acts recklessly when she consciously disregards a substantial and unjustifiable risk that her driving will result in someone's death. The disputed conduct must involve a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. N.J.S.A. 2C:2-2b (3). Thus, despite her contention to the contrary, the jury found that respondent disregarded a substantial and unjustifiable risk that her conduct would kill her husband. Ibid. It was determined that Howard's crime involved the use of force and threat of force upon a person.

In the Howard matter Howard hit the gas and reached to close the door at the same time knowing that her husband was near the car causing the homicide. Driving in this manner is clearly reckless.

In the case at bar, an issue is whether failure to maintain lane is a use of force or threat of force. The crimes listed in N.J.S.A.18A:6-7.1. (c) robbery, aggravated assault, stalking, kidnapping, arson, manslaughter, and murder are crimes where physical force or intimidation or threats of the use of force are listed. Margiotta while he was driving had difficulty breathing. He remembers hitting a guardrail and being informed that his vehicle struck two tree and a car and that there was a fatality.

Reckless vehicular homicide because of failure to maintain lane does not involve a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

I **CONCLUDE** that Margiotta did not use force or threat of force and his conduct of failure to maintain lane is not a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

Accordingly, it is **ORDERED** that respondent's decision to disqualify Margiotta from employment for his conviction for vehicular homicide for failure to maintain lane is hereby **REVERSED.**

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

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

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

October 14, 2021

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: October 14, 2021

Date Mailed to Parties: October 14, 2021

ljb

WITNESESES

For Petitioner

None

For Respondent

James Scaringelli

EXHIBITS

For Petitioner

P-1 Not in Evidence
P-2 Pro Se Petition of Appeal Dated June 28, 2019
P-3 New Jersey Police Crash Investigation Report
P-4 Not in Evidence
P-5 Not in Evidence
P-6 Waiver and Accusation
P-7 New Jersey Judiciary Plea Form
P-8 Not in Evidence
P-9 Judgement of Conviction
P-10 NJDMV Order of Suspension Dated January 9, 2019
P-11 NJDMV Hearing and Petition Dated October 3, 2019
P-12 NJDMV Order of Suspension dated November 7, 2019
P-13 Not in Evidence
P-14 Not in Evidence
P-15 Not in Evidence
P-16 Not in Evidence
P-17 Not in Evidence
P-18 Not in Evidence
P-19 Not in Evidence
P-20 Not in Evidence
P-21 Not in Evidence
P-22 Not in Evidence
P-23 Not in Evidence

P-24 Not in Evidence

P-25 Not in Evidence

P-26 Not in Evidence

For Respondent

R-1 New Jersey State Police Arrest Notification

R-2 New Jersey Promise Gavel Charge/Disposition

R-3 June 18, 2019, Permanent disqualification letter from Carl H. Carabelli to Petitioner

R-4 New Jersey State Police State Conviction Notification

R-5 Same as Exhibit P-9

New Jersey Commissioner of Education

Final Decision

Willingboro Education Association, on behalf of member, Michelle N. Reddick,

Petitioner,

v.

Board of Education of the Township of Willingboro, Burlington County,

Respondent.

Synopsis

This matter involves a challenge by petitioner to the outcome of an Affirmative Action complaint which she filed with the respondent Board in 2018. Petitioner, who is African American, alleged that she was subjected to a hostile work environment based on her race. Petitioner's allegations stem, *inter alia,* from a series of interactions between herself and another employee, who petitioner claimed repeatedly called her a "monkey". The Board assigned an attorney to investigate petitioner's complaint, which was ultimately found to be unsubstantiated. The Board filed a motion to dismiss in lieu of an answer to petitioner's appeal, and the contested matter was transmitted to the Office of Administrative Law (OAL).

The AU found, *inter alia,* that: petitioner's appeal presents sufficient facts to support a viable claim, relief from which could lie in the petitioner's favor; further, the Board's decision on the Affirmative Action complaint failed to provide factual findings or legal conclusions, aside from the ultimate conclusion that petitioner's allegations were not substantiated. Accordingly, the AU denied the Board's motion to dismiss and remanded the matter to the Board for issuance of a new decision on petitioner's Affirmative Action complaint, with instruction that the Board address the reasoning behind its conclusion that petitioner's hostile workplace claims could not be substantiated.

Upon a comprehensive review of this matter, the Commissioner noted that, pursuant to *N.J.S.A.* 18A:6-9, her jurisdiction is limited to controversies and disputes that arise under New Jersey school laws. Further, petitioner's allegations about a hostile work environment arise out of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.,* which does not involve New Jersey school law. As petitioner's challenge of her Affirmative Action complaint stems from the substance of the investigation and findings, a determination of such issues is outside of the Commissioner's expertise and beyond her jurisdiction. Accordingly, the Initial Decision of the OAL was rejected and the petition was dismissed for lack of jurisdiction. In dismissing the appeal, the Commissioner noted that while she lacks jurisdiction in this matter, the petitioner may pursue her hostile work environment claim at the New Jersey Division on Civil Rights.

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

3-22

OAL Dkt. No. EDU 14369-19
Agency Dkt. No. 234-9/19

New Jersey Commissioner of Education

Final Decision

Willingboro Education Association, on behalf of member, Michelle N. Reddick,

Petitioner,

v.

Board of Education of the Township of Willingboro, Burlington County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board did not file a reply.

In this matter, petitioner challenges the outcome of an Affirmative Action complaint she filed with the Board in 2018. Petitioner, who is African American, alleged that she was subjected to a hostile work environment based on her race when another employee called her a "monkey." Petitioner also alleges that the employee indicated that she would call her a "monkey" from now on, sent an email saying nothing else but "MONKEY!!!!," and that on two other occasions the employee verbally harassed her by speaking aggressively. The investigating attorney found that petitioner's complaint was unsubstantiated, and both the Superintendent

and the Board affirmed the findings. Petitioner appealed the Board's decision to the Commissioner, and the Board filed a motion to dismiss in lieu of an answer.

The Administrative Law Judge (AU) denied the Board's motion to dismiss because the petition presents sufficient facts to support a viable claim and such relief could lie in petitioner's favor. The AU also found that the Board's decision on the Affirmative Action complaint failed to provide factual findings or legal conclusions, aside from the ultimate conclusion that petitioner's allegations were not substantiated. Accordingly, the AU remanded the matter to the Board for issuance of a new decision on petitioner's complaint, with instruction that the Board address the reasoning behind its conclusion that petitioner's hostile workplace claims could not be substantiated.

In her exceptions, petitioner disagrees with the portion of the Initial Decision that remands the matter to the Board. Petitioner argues that since the Board's decision did not include any factual findings or legal conclusions, it is arbitrary, capricious and unreasonable. Accordingly, petitioner contends that a remand is not the appropriate remedy, and the decision should be overturned.

Upon review, the Commissioner notes that her jurisdiction is limited to controversies and disputes that arise under the school laws of this State. *N.J.S.A.* 18A:6-9. Petitioner's allegations about a hostile work environment arise out of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.,* which does not involve New Jersey school law. As petitioner's challenge of her Affirmative Action complaint stems from the substance of the investigation and findings, a determination of such issues is outside of the Commissioner's expertise and, therefore, beyond her jurisdiction. *See Sterling Education Association,*

individually and on behalf of its member Simone Colancecco v. Board of Education of the Sterling Regional School District, Camden County, Commissioner's Decision No. 108-19, decided April 23, 2019 (finding that the Commissioner lacked jurisdiction over an Affirmative Action complaint involving sexual harassment because it did not arise out of New Jersey school law). The Commissioner notes that the petitioner is not without recourse to pursue her hostile work environment claim at the New Jersey Division on Civil Rights. [1]

Accordingly, the Initial Decision of the OAL is rejected for the reasons stated herein. The petition of appeal is hereby dismissed due to lack of jurisdiction.

IT IS SO ORDERED.2

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2022
Date of Mailing: January 12, 2022

[1] To the extent that the Board's Affirmative Action policy indicated that petitioner could appeal to the Commissioner in addition to the New Jersey Division on Civil Rights, the Commissioner notes that a Board policy cannot confer jurisdiction on the Commissioner, as the Commissioner only has jurisdiction over controversies and disputes that arise out of the school laws of the State. *N.J.S.A.* 18A:6-9.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-l(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14369-19
AGENCY DKT. NO. 234-9/19

WILLINGBORO EDUCATION ASSOCIATION ON BEHALF OF ITS MEMBER, MICHELLE N. REDDICK,

Petitioner,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY,

Respondent.

Matthew B. Wieliczko, Esq., for petitioner (Zeller & Wieliczko, LLP, attorneys)

Lester E. Taylor 111,Esq., for respondent (Florio, Perrucci, Steinhardt & Cappelli, LLC, attorneys)

Record Closed: August 26, 2021 Decided: October 15, 2021

BEFORE **JEFFS. MASIN,** ALJ (Ret, on recall):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Willingboro Education Association, acting on behalf of its member, Michelle N. Reddick, filed a Verified Petition with the Commissioner of Education on September 6,

2019, alleging that the Board of Education of the Township of Willingboro acted in an arbitrary and capricious manner when it denied Ms. Reddick's Affirmative Action Complaint. On October 4, 2019, the Board filed an answer to the Petition and a motion to dismiss the Petition. Petitioner responded on December 10, 2019, in opposition to the motion to dismiss. On January 3, 2020, the Board filed a response to the petitioner's reply. The contested case was transferred to the Office of Administrative Law on October 10, 2019, without the Commissioner having decided the motion to dismiss. The case was assigned to Honorable John S. Kennedy, ALJ. Judge Kennedy was appointed to the Superior Court before deciding the motion, and the case was transferred on July 28, 2021, to this judge, retired and serving on recall.

FACTUAL DISCUSSION

In her Petition of Appeal, Ms. Reddick states that she is an African-American woman employed by the Board of Education as a payroll administrator. Stacey Robinson is employed by the Board as its human resource director. Reddick and Robinson's departments work together regarding the District's payroll operations. Reddick states that on September 14, 2017, she spoke to Robinson and pointed out a salary correction for employee D.R. She asserts that during that meeting, Ms. Robinson spoke "in an aggressive tone" and insisted that Reddick was mistaken. When Reddick demonstrated to Robinson that it was Robinson who was mistaken, Robinson stated to Reddick, "You're such a monkey," a comment that Reddick says took her aback. Robinson then said, "I am going to call you monkey from now on." Reddick felt embarrassed and insulted by these comments and left Robinson's office. Then, that same day, Robinson "revived an older email thread," and in the text merely repeated the word "MONKEY!!!!" More specifically, an email dated July 13, 2017, from Robinson to Reddick and others was originally forwarded by Reddick to at least one other person. On September 14, 2017, Robinson wrote to Reddick as a part of that same email chain and the text of that message is nothing other than "MONKEY!!!!" It is not clear if this message, addressed to Reddick, also went to others addressed in the original email of July 13.

Ms. Reddick then points to two separate occasions when Robinson continued to subject her to a "retaliatory hostile work environment." The first occurred on or about

February, 28, 2018, when Robinson "verbatly harassed" her when Reddick indicated that Robinson had failed to comply with standard procedures regarding payroll notices. "When confronted," Robinson "aggressively dismissed" Reddick, stating that Robinson was "not discussing this with her any further" and that Reddick "should speak to her peers." Robinson also stated that she would withhold any prior payroll notices for school year 2017-2018 from the payroll department, which Reddick claims would violate standard procedures for keeping accurate and current payroll notices.

The second incident occurred on August 23, 2018, when Robinson called Reddick "ignorant, just ignorant" when Reddick delivered reports to Robinson. Later that day, Robinson refused to speak to Reddick and slammed a door in her face.

The Verified Petition relates that after Ms. Reddick filed an Affirmative Action Complaint with the District's superintendent on September 4, 2018, the Board assigned an attorney "representing the District" to conduct an affirmative action investigation. This assignment was necessitated by the fact that Ms. Robinson was the District's affirmative action officer After what are alleged to have been inappropriate delays in that investigative process that violated the time frames established for such an investigation in the District's own Resolution 1505, the District released a response on March 28, 2019, 211 days after the complaint was filed. The investigating attorney reported that following a "thorough investigation" involving interviews with "numerous witnesses" and the review and analysis of "all documentation provided by the Board and Reddick and her union representative," "we did not find that the complaint was substantiated." Subsequent appeals to the superintendent and then to the Board were denied. The superintendent wrote that he "concurred with the report and [did] not find that your complaint was substantiated.'" The Board met on June 26, 2019, and went into executive session for thirty-two minutes. No discussion concerning Reddick or her complaint occurred during the public session. On July 16, 2019, the Board's business administrator advised Reddick that "on JunE: 26, 2019, the Board decided to sustain Dr. Ronald Taylor's findings concerning Michelle Reddick's hostile work environment complaint." The present appeal to the Commissioner followed the issuance of the Board's notification to Reddick of its denial of her appeal.

The Board filed an Answer to the Petition of Appeal. In that Answer, it denied many of Reddick's factual and legal claims. However, in addition, it filed its motion to dismiss, contending that the complaint failed to state a claim upon which relief could be granted, as petitioner "has not sufficiently plead allegations to support [its] claim." In explaining exactly how the complaint lacks such support, the Board states that the petitioner has "not only failed to adequately plead, or prove, any of the required elements of a hostile work environment claim," but has additionally "failed to establish that the Board's determination was arbitrary, capricious or unreasonable." According to the Board, the "legal basis relied upon by [petitioner} for filing this Petition is predicated on whether Robinson engaged in conduct unbecoming of a public employee, which is **not** at issue in Reddick's Affirmative Action Complaint, nor can it be an issue within the scope of this Petition." The Board notes that Reddick relies upon "three separate, unrelated events, each occurring approximately five months apart, to attempt to establish her hostile work environment claim." It argues that Reddick has failed to allege that the alleged events would .iot have occurred but for her status in a protected class and failed to allege any facts to e5tablish that the "three, unrelated events were severe or pervasive enough to make a reasonable person in Reddick's position believe the conditions of her employment were altered and the work environment is hostile or abusive."

In its response to the Board's motion, the petitioner notes that while the Board has characterized its application as a motion to dismiss, it actually reads like a motion for summary decision, as provided for in N.J.A.C. 1:1-12.5.

Motion to Dismiss

A motion seeking the dismissal of a petition filed with the Commissioner of Education is permitted by the regulations governing pleadings in matters before the Department's .3ureau of Controversies and Disputes. N.J.A.C. 6A:3-1.10 allows a motion to dismiss based upon the contention that even if the petitioner's factual allegations are accepted as trne no cause of action will lie. In determining such motion, the standard is drawn from that applied in similar motions brought in the judicial branch under R. 4:6-2€, where the "inquiry is confined to a consideration of the legal sufficiency of the alleged

facts apparent on the face of the challenged claim." Rieder v. State, Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). The court must "assume the facts as asserted by {petitioner] are true," and giving the petitioner the benefit of "all inferences that may be drawn in {pet1f.ioner'sJ favor," the court must decide whether the facts would support a basis for relief. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005) (citation omitted). If the factual allegations are "palpably insufficient to support a claim upon which relief can be granted," dismissal is warranted. Reider, 221 N.J. Super. at 552. However, if discovery might supply a basis for relief, dismissal at this stage is unwarranted.

In the petition, Ms. Reddick asserts that in September 2014, Ms. Robinson, in the course of aggressively responding to Ms. Reddick's correcting her about a payroll issue, referred to Reddick as a "monkey" and then within the same encounter repeated that term, stating that she would continue to refer to Reddick by the term, then almost immediately doing so in an email. Reddick then presents two instances of events occurring in February and August 2018 in which she claims Robinson exhibited harassing conduct towar1 her. According to Reddick, this conduct constituted discrimination against her and subjected her to a hostile work environment. It is immediately obvious that while the two events identified as occurring in 2018 may have involved what a person might well see as hostility, and either or both together might well cause an employee to be uncomfortable and disturbed by Robinson's attitude and conduct, on their face neither involves any statement, characterization, or other indicia of discriminatory conduct relating to Ms. Reddick's status as a member of a protected class. Thus, the claim that unlawful discrimination occurred and that a hostile work environment existed must of necessity be grounded upon the first alleged incident, the instance where Ms. Robinson is alleged, and for purposes of this motion must be found, to have referred to Ms. Reddick, an African-American woman, as a "monkey." In her briefs, Ms. Reddick has detailed some history of the use of this and related terminology as a derogatory and highly offensive reference to persons of Black African descent. It is not necessary to repeat this material here, and for the purposes of this motion at least, it can be readily accepted that a person of such heritage would likely find the use of the term as employed by Robinson offensive.

If the rredicate for the claim of discrimination and the genesis of the hostility characterizing the workplace is this September 14, 2017, incident, then the two events in 2018 identified in the complaint can arguably be understood as not merely examples of commonplace workplace disagreements and obnoxious behavior, but instead as continued manifestations of Ms. Robinson's discriminatory hostility towards this member of a protected class, an invidious discrimination first disclosed by the "monkey" references.

In moving for dismissal, the respondent notes that alleged harassment can only be a violation of the Law Against Discrimination if the harassment in the workplace is based upon a protected characteristic and is sufficiently severe or pervasive. As the Board notes correctly, the LAD is not a "general civility" code and mere discourtesy or rudeness is not to be confused with harassment that is aimed at and motivated by a protected characteristic. Citing the test set forth by the New Jersey Supreme Court in Taylor v. Metzger, 152 N.J. 490, 498 (1998) (citing Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993)), respondent contends that the complaint fails to plead the required elements of a hostile-workplace claim, and also fails to demonstrate that the Board's ultimate decision to deny the complaint was arbitrary and capricious. Thus, the appeal must fail at its :nception, as the petitioner has neither set forth a claim that the Board could have legally granted nor, given the legal constraints on the Commissioner's authority to interfere with the Board's decision, demonstrated any legal basis for the Commissioner to overturn the Board's action. The limits on the Commissioner's authority will be discussed later in this decision.

Since the claim of discriminatory conduct that created the ongoing hostile-workplace environment must be founded on the "monkey" references, the Board argues that there is "no support or corroboration that Robinson's complained of comments and interactions with Reddick, e.g., calling Reddick a 'monkey,' [were] based upon Reddick's protected status." In the course of presenting this argument as a basis for demonstrating that the claim put forth by Reddick is so weak that even with the generous treatment of complaints used in determining motions to dismiss, the Board adds a fact that is not mentioned in the appeal filed with the Commissioner by Reddick or in her briefs, a fact that the Board contends must, given case law, be seen as significant in assessing the

viability of Reddick's claim. That fact is that Ms. Robinson, like Ms. Reddick, is an African-American wor.11an.

LAD and Board Regulation 1550

The Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, prohibits discrimination "because of race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality." N.J.S.A. 10:5-3. A person claiming to have suffered conduct that violated the LAD bears the initial burd n of establishing a prima facie case of a hostile work environment. Aguas v. State, 220 N.J. 494, 524 (2015).

The Willingboro Board of Education adopted Resolution 1550, which set forth a process for t?ie investigation and resolution of complaints arising from claims of discriminatory conduct related to "employment and contract practices." Section A4 states that "[e]very r\:?asonable effort will be made to expedite the process in the interest of a prompt resolution. Time limits may, however, be extended with the consent of all parties." If an informal attempt to resolve the complaint is unsuccessful after ten working days following the filing of the complaint, the District's affirmative action officer is directed to investigate and respond to the complaint "in writing no later than ten working days after receipt of the written complaint." Resolution 1550, Section C3. 1n the present matter, as Ms. Robinson was both the subject of the complaint and also the District's affirmative action officer, the investigation was assigned to an attorney employed by the Florio, Perucci law firm.

After the investigator responds to the complaint, the complainant may seek review of the investigator's determination from the District's superintendent. An informal hearing may be reque3ted, and here such a meeting was held on May 2, 2019. The following day, May 3, 2019, Superintendent Taylor denied the complaint. The complainant may then appeal the superintendent's determination to the Board of Education, which is directed to render a decision no later than forty-five days after either the date when the appeal to the Board is filed or a hearing requested by the complainant is held, whichever

is later. Here petitioner claims that despite Reddick having requested a hearing before the Board, none occurred. The Board apparently discussed the complaint during an executive session held at its meeting on June 26, 2019, and Ms. Reddick was informed of the Board's decision on July 16, 2019.

In Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993), the New Jersey Supreme Court established the test for determining whether acts of harassment in the workplace rose to the le·1el of invidious discrimination in violation of the LAD. In Taylor, 152 N.J. 490, the Court stated this test in regard to a claim of invidious discrimination based upon the race of the complainant.

> 'Nhen a black plaintiff alleges racial harassment under the LAD, she must demonstrate that the defendant's "conduct (1) would not have occurred but for the employee's [race]; and [the conduct] was (2) severe or pervasive enough to make a (3) reasonable [African American] believe that (4) the conditions of employment are altered and the working environment is hostile or abusive."
>
> The Court in Lehmann specifically adopted the "severe or pervasive" test as part of its comprehensive standard. That test conforms to the standard for establishing workplace racial or gender harassment under federal Title VII law. In choosing its test, the Court clearly rejected an alternative regular-and-pervasive test that requires repetitive or recurrent acts to establish workplace harassment; that test would bar harassment-discrimination actions that were "based on a ,ingle, extremely severe incident." Consequently, under the chosen standard-severe or pervasive conduct-one incident of harassing conduct can create a hostile work environment.
>
> [Citations omitted.]

Given the test established in Taylor, the "monkey" remark directed by Robinson towards Reddick, if found to have been addressed to Reddick because of her status as a member of her race and if found to be severe or pervasive in nature, could reasonably be deemed conduct of a discriminatory nature. Its use towards her on September 14, whether viewed as one incident, or as more than one since it was first spoken that day and then repeated in a written communication, can by itself be sufficient to create a hostile work environment,

again if it is also found that a reasonable member of the protected class would believe it to have altere•J her conditions of work. Of course, Reddick additionally proposes that the other, later incidents described also establish that hostility and demonstrate that they are continued manifestations of Robinson's racially motivated discrimination.

The Board argues that since both Reddick and Robinson are African-American females, the claim of race discrimination is "severely weaken(d), if not eliminate(d)," citing, among other cases, Johnson v. State Department of Corrections, No. A-5021-09 (App. Div. October 28, 2011), https://njlaw.rutgers.edu/collections/courts/, where the plaintiff's LAD claim was that she was terminated from her position at least part due to her race. Johnson was an African-American, as was the Commissioner of the Department of Corrections wtio dismissed her, as was the person immediately hired to replace her. The Appellate Div:sion noted that while New Jersey's courts had not yet addressed the significance of the circumstance of the fact that the person terminating the employment was of the same race as the terminated employee, some federal courts had recognized that the inference of unlawful racial discrimination "may be significantly diminished by the fact that the employer's decision-maker was a member of the same race as the plaintiff. . . . The undisputed circumstances that plaintiff's employment was terminated by an African-American man, and that she was replaced by an African-American woman, severely weaken if not entirely eviscerate her attempt to present a prima facie case of racial discrimination through the anecdotal circumstances alleged," circumstances which, according to c?footnote, were disputed by the defendants.

The Board distinguishes several education tenure cases cited by the petitioner in support of the contention that the "monkey" remark was meant to be discriminatory and harassing towards Reddick, cases in which Caucasians used terms deemed derogatory toward African-Americans and were found to have engaged in misconduct. In re Tenure Hearing of W8tson, Sch. Dist. of Franklin, Somerset Cty., 2014 N.J. Super. Unpub. LEXIS 1283 (teache! told class of predominantly African-American students that they were "stupid" and "acting like monkeys"); In re Tenure Hearing of EmrL Sch. Dist. of Evesham, Burlington Cty., 2002 N.J. AGEN LEXIS 565 (Caucasian teacher used "N word" and stated that some African-American girls reminded her of monkeys touching each other's hair). The Board, besides pointing out that Robinson was not a teacher and thus not held

to the high stendards required of teachers, and that these teachers were alleged to have engaged in multiple actions of misconduct, claims that Reddick, in citing only one instance where the term "monkey" was used in reference to her, failed to establish "that the term was used toward Reddick because of her race."

While the Board relies on cases such as Johnson, the law clearly recognizes that in matters of discriminatory conduct that violate such federal laws as 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, the fact that the alleged discriminator is of the same race, color, ethnic group or sex as the alleged victim of the discriminatory conduct does not necessarily erase the invidious nature of such conduct. In Castaneda v. Partida, 430 U.S. 482. 499 (1977), the Supreme Court recognized that "[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." In Oncale v. Sundowner Offshore Services. Inc., 523 U.S. 75 (1998), the Court held that same-sex sex•1al harassment was actionable under Title VII. New Jersey's LAD is a more expansive law than the federal provisions and there is no doubt that merely because the person alleger:l to have acted in a discriminatory manner against another person of the same color, r1-1ce, or other protected class due to the recipient's memberships in such group does n,Jt automatically foreclose a determination that actionable discrimination occurred.

It is also possible that the identification of Robinson as Black might be meant to suggest that while discriminatory conduct by a Black person against another Black person can be actionable under the LAD, nevertheless, the fact that Robinson was also Black might suggest it to be less likely that the reference to Reddick was in fact meant to be discriminatory Perhaps Robinson did not mean it to be, and possibly she did not understand thdt it might be perceived by another Black person as a demeaning reference made due to Reddick's being of Black African descent. However, the case law recognizes that the question is not what the alleged perpetrator intended but what the reasonable person, here the reasonable Black person, referred to as, here, a "monkey," might perceive the reference to mean, that is, to understand it as demeaning her because she is Black and of African descent. In Ross v. Douglas County, 234 F.3d 391 (8th Cir. 2000),

the complainant in the Title VII action was a Black man employed in a correctional facility. His supervisor, Johnson, was also Black. The Court noted,

> The only reason that Johnson used such racial epithets was because of Ross' race. We are well aware that Title VII should not turn into "a general civility code," see Oncale, 523 U.S. at 80, but Johnson's epithets go beyond mere incivility: the only .-eason Ross was called a "nigger" was because he was black-that Johnson was also black does not alter this.

In Taylo.r. 152 N.J. 490, a public official referred to an African-American employee as a "jungle bunny." The Court recognized that this term had an "unambiguously demeaning racial message that a rational factfinder could conclude was sufficiently severe to contribute materially to the creation of a hostile work environment. The term defendant used, 'jungle bunny,' is patently a racist slur, and is ugly, stark and raw in its opprobrious c,mnotation." Taylor, 152 N.J. at 502-03. It is clear enough that reference to an African-American as a "monkey" is likewise a patently racist remark. Indeed, as counsel for th€ complainant has documented in its brief, there have been several articles published thai have examined the use of this term and its historical use as a slur against Africans and tl,ose of Black African descent. The fact that a Black supervisor would direct it against a suoordinate during a confrontation over work-related issues does not lessen the derogatory connotations of the term.

Thus, while the fact that both Reddick and Robinson are Black may well be a highly relevant factor in ultimately analyzing the merits of Reddick's claim that she was the victim of discriminatory conduct that altered the conditions of her employment, this factor is not a sufficient basis for concluding that in her complaint, Reddick did not present a sufficient claim for which relief might lie. A fact finder could legally conclude that Robinson, despite being an Africdn-American, did specifically address Reddick as a "monkey," indeed more than once, due specifically to Reddick's membership in that protected class. The test on a motion to dismiss is not one that involves weighing the sufficiency of the proofs, but is instead whether, given the stated facts, assumed to be true and with all inferences in the petitioner's favor, relief could lie under the law. Here, relief could lie for Reddick, despite Robinson's similar racial category.

The remaining three tests are whether the conduct was (2) severe or pervasive enough so that (3) a reasonable person of the same protected class would believe that (4) the conditions of employment were altered and the working environment became hostile or abusive." Taylor, 152 N.J. at 498. As Taylor concluded, one use of a patently racist term could be sufficiently severe to persuade a reasonable member of a protected class that such a hostile work environment existed. Here, on one day, according to Reddick, Robinson first verbally used the "monkey" term directly in reference to Reddick, telling her to her face that Reddick was "such a monkey" and that "from now on" she would refer to Reddick as a "monkey." The statement of intention to continue to use the term in direct reference to Reddick certainly could persuade a reasonable member of a protected clas3 that the demeaning and discriminatory conduct was likely to continue and that a hostile vJOrk environment had been created for her. Then, Robinson used the term in an email. /\s such, she seemed to be carrying out her threat to continue to refer to Reddick with this slur. Given these facts, even without the two later incidents cited by Reddick, a fac.t finder could find that the incident on September 14, 2017, was severe or pervasive enc.Jgh that a reasonable member of a protected class could conclude that she faced a hostil, work environment. If the fact finder also deemed the later incidents as continuing eviience of such hostility, that would simply confirm the impact of the events of September 14. Thus, given the allegations presented by Reddick and applying the Taylor test, the facts presented are sufficient to present a claim for which relief could lie.

I **CONCLUDE** that the complaint and the petition present sufficient facts such that, under the app1icable law, relief could lie in favor of Ms. Reddick. Thus, as to the motion to dismiss, it ir; without merit and is **DENIED.**

The Commissioner's Ability to Decide This Appeal

The conclusion reached by the Board's investigator, the superintendent and, ultimately, the Board, whose decision is of course the decision that is here under review, was that the complaint was not substantiated. As noted previously, the Commissioner's review of a Board's decision concerning matters that are within the scope of a Board's plenary authority is a limited one, confined to whether that decision was arbitrary,

capricious or unreasonable. The Board's decision in regard to its quasi-judicial activity in determining a complaint alleging discriminatory conduct, which is entitled to a ""presumption of correctness," Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294-96 (App. Div. 1960). Indeed, if the facts of the case leave "room for two opinions" and the decision is "exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached," the Commissioner will not interfere. Worthington v. Fauver, 88 N.J. 183, 204-05 (1982). Thus, the burden on the petitioner to o.Jerturn the Board's conclusion is significant.

The problem that is presented by this request for the Commissioner to exercise that limited authority of review is that it is difficult to properly assess a determination of the Board th.at is presented in such a baldly conclusory manner. When an appellate court considers an appeal of an agency final decision, it too has limits placed on its authority to overturn the agency's decision. While the appellate body is not bound by the agency's interpretation ,Jf the applicable law, when it considers the agency's factual findings and the factual cc 1clusions reached from them and how the agency has applied a proper understanding of the law to those factual findings, the appellate court is not free to substitute its judgment and it defers to the agency's decision so long as the record demonstrates that the agency acted in a reasonable manner based on the facts established before it. In this case, this judge, and then the Commissioner, hopefully aided by this initial decision, must make that same determination. Yet, how the conclusion of the Willingboro Board was arrived at is, frankly, a mystery, for nowhere in the investigating attorney's lett9r of March 28, 2019 (Exhibit J to the Petition), the superintendent's letter of May 3, 2019 (Exhibit M), or the Board's letter of July 16, 2019 (Exhibit P) is there one word regarding any of the factual findings or the legal conclusions reached at any level of the investigation or during the review of that investigation by the Board, except for the ultimate conclusion, presented without any reference to what supported that conclusion. Attorney Rose's letter merely states that she, or her firm, "undertook a thorough investigation, interviewing numerous witnesses and reviewing and analyzing all documentation provided by the Board and by your client and her union representative," and they "did not find that the complaint was substantiated." The letter offers no clue as

to who was inteNiewed, what they said, exactly what documents were reviewed, or what the analysis of the information gathered was and what findings and conclusions that "analysis" led to. [1] Superintendent Taylor simply states that he "concur{s] with the report and [does] not find that your complaint was substantiated." If he is referring to Rose's letter as the "report," what exactly did Taylor concur in, what factual findings, what analysis? Finally, the Board's letter reveals only that the "Board decided to sustain Dr. Taylor's findings." What those findings were, beyond the conclusion that the complaint was not substantiated, is left to the imagination of those receiving, or those reviewing, that decision. Did the Board conclude that Reddick made up the facts? Did the Board fir,d that being called a "monkey" was not a derogatory, discriminatory reference? Did the Board believe that the events occurred, but were not severe or peNasive enc ugh to warrant a finding that they created a hostile work environment? Did the Board thirl< that a Black person could not be found to have discriminated against a Black person? The point of these questions is simply to point out that there is no way to know whethei the Board's decision was the result of a reasoned analysis of the events and law and rit reasonable conclusion from the facts, even if that decision might be disag reed witl by others, or was instead an unreasonable, arbitrary or capricious decision based upon rr.istakes about the law or unreasonable factual conclusions unsupported by a reasoned analysis of the facts as revealed by the investigation, whatever that inquiry may have consisted of. And while it is possible that the Board received additional information about the investigation during its closed executive session on June 26, 2019, there is no v,ay to determine what that information was and whether the Board's conclusion that the allegation was unsubstantiated was supported by that "secret" information. An appellate court faced with such a completely conclusory and unexplained agency final decision would not engage in speculation as to what findings and/or legal conclusions the agency head made in reaching the decision. Instead, in almost every case, the appellate court would remand the matter to the agency with instructions to detail its findings and conclusions so that a proper review might occur if the matter were again appealed to the court. In this case, while it recognized that the Board's determination is

[1] When she met with the superintendent for the informal hearing, Reddick was asked who else should be spoken to and she only identified a "Ms. Brown at the front desk." It is not clear if Reddick had any idea who had been interviewed by the investigator, the minutes of the hearing provide no hint of any such information being offered, and as noted, the letter from the investigating attorney does not mention any names of any of i-ne "numerous witnesses."

entitled to a "presumption of correctness," given the absolutely unsatisfactory manner in which the Bor:ird chose to tell its employee that her complaint was "unsubstantiated," I see no way in which it is appropriate to ask this judge or the Commissioner to exercise review authonty on this decision. There is simply no way to tell if it was, or was not, arbitrary or unreasonable. Therefore, I **CONCLUDE** that the matter should be returned to the Board for it to issue a new decision, including therein findings of fact and conclusions of law such that the Commissioner and any reviewing court will be able to do more than merely rubber stamp the wholly conclusory decision of July 16, 2019.

It is understood that a case can be made that the Board's conclusion is correct, or at least reasonably so, albeit without at present it having stated any supporting explanation. It is possible that it could find that while certain events did occur, given the tests applicable, the facts do not support that the actions of Ms. Robinson were either directed at a characteristic of a protected group, were not severe or pervasive in nature and/or would not provide a member of the protected class with a reasonable apprehension that her work environment had become hostile or abusive. As, depending upon the expltination offered, such a determination may be supportable, a reversal of the decision in favor of Ms. Reddick's complaint is not presently appropriate. But if I or the Commissionei were to presume that any of these determinations were made, singly or in tandem, by the Board upon review of whatever information it actually had following the as of now undetailed investigation, we would be stepping into the shoes of the Board and essentially dc-ing their job for them, creating a rationale for finding the complaint unsubstantiated that the Board itself has failed to provide. Therefore, I decline to provide them their rationale, and return the matter to them to set forth the factual and legal basis for whatever c•:mclusion they reach. Of course, following the issuance of such a decision, the petitioner may, should it choose, request that the Commissioner review the amended determination.

ORDER

It is **ORDERED** that this matter be returned to the Willingboro Board of Education for the issuance of a determination of Ms. Reddick's Affirmative Action Complaint with findings of fact and conclusions of law. It is not intended that the Board must provide a

"judicial-like" opinion, but it must at the very least provide basic findings and conclusions that permit an understanding of the rationale for its conclusion, whatever that may be.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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, 2021
DATE

JE S. MASIN, ALJ (Rel., on recall)

Date Received at Agency: 10/15/2021

Date Mailed to Parties: 10/15/2021

mph

LIST OF EXHIBITS:

For petitioner:

Exhibit A	Regulation 1550/Policy Affirmative Action
Exhibit B	Email chain July 13, 2017-September 14, 2017
Exhibit C	Letter from Michelle Reddick to Dr. Taylor
Exhibit D	Emails October 28 and 29, 2018
Exhibit E	Emails November 12, 2018-January 4, 2019
Exhibit F	Emails November 26, 2018-January 4, 2019
Exhibit G	Memorandum, Reddick to Taylor, dated January 14, 2019
Exhibit H	Emails, January 13, 2019-February 13, 2019
Exhibit I	Letter dated March 22, 2019
Exhibit J	Letter dated March 28, 2019
Exhibit K	Letter dated April 10, 2019
Exhibit L	Memo regarding informal hearing, May 2, 2019
Exhibit M	Letter dated May 3, 2019
Exhibit N	Letter dated June 3, 2019
Exhibit 0	Minutes of Willingboro Board of Education Meeting, June 26, 2019
Exhibit P	Letter dated July 16, 2019

4-22
Agency Dkt. No. 2-2/21A
SEC Dkt. No. T-04-20

New Jersey Commissioner of Education

Final Decision

In the Matter of Carmen Torres-Izquierdo,
University Academy Charter High School,
Hudson County.

This matter involves an appeal of the School Ethics Commission's (SEC) January 26, 2021 determination that the appellant, Carmen Torres-Izquierdo - a charter school trustee for the University Academy Charter High School - violated the School Ethics Act (Act) for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.l(a). The appellant ultimately completed the training after the issuance of the SEC's December 22, 2020 Order to Show Cause (OTSC), but prior to its January 26, 2021 decision. The SEC recommended a penalty of reprimand for the violation. Appellant appealed the SEC's determination, challenging both the finding of a violation and the recommended penalty. Having carefully reviewed the SEC's decision and the record in its entirety, the Commissioner finds that the SEC's decision is supported by sufficient, credible evidence, and that the appellant failed to establish that the decision is arbitrary, capricious or contrary to law. *N.J.A.C.* 6A:4-4.l(a). Additionally, the Commissioner finds that a penalty of reprimand is appropriate.

Pursuant to *N.J.A.C.* 6A:28-4.1, charter school trustees must annually complete a training program offered online by the New Jersey School Boards Association (NJSBA). Appellant was required to complete her Governance 4 training by June 30, 2020. Appellant alleges that she completed the training on December 2, 2020, but thereafter continued to receive notifications that she had not completed it. On December 15, 2020, appellant contacted the NJSBA regarding her technical issues

with the training, and the matter was forwarded to NJSBA's Information Technology department. Appellant argues that she subsequently attempted to re-do the training but was unable to do so because the online portal did not show any modules available for her to complete. Following the SEC's December 22, 2020 OTSC, appellant successfully completed the training on January 12, 2021.

In her appeal to the Commissioner, appellant argues that any violation of the Act was no fault of her own because there were technological problems with the web portal and it failed to register when she initially completed the course, purportedly on December 2, 2020. Additionally, appellant argues that a penalty of reprimand is unwarranted given the extenuating circumstances regarding her inability to complete the training. Citing *In the Matter of Obdulia Gonzalez, Board of Education of the City of Perth Amboy, Middlesex County,* Commissioner Decision No. 271-18A, decided September 7, 2018, appellant urges the Commissioner to weigh the effects of the aggravating and mitigating circumstances when evaluating the appropriate penalty. Appellant contends that the NJSBA was unable to determine how appellant could access the modules to re-take the required training after the system failed to record that she had completed it and argues that had the NJSBA been able to remedy the situation and enable appellant to re-do the training more quickly, it would have been completed prior to the issuance of the OTSC on December 22, 2020. Accordingly, appellant argues that any violation of the Act was beyond her control because she was unable to access the training, rendering a penalty unwarranted and unjust in this circumstance.

In opposition, the SEC argues that appellant violated the Act by failing to complete the required training by June 30, 2020 - not by failing to complete it by the issuance of the OTSC on December 22, 2020. As such, the SEC contends that appellant's arguments regarding the technological issues that she faced in December 2020 are without merit because she first attempted to complete the training six months after the completion deadline. Accordingly, the SEC argues that

appellant should be reprimanded for violating the Act by failing to complete charter school trustee training in a timely manner.

In reply, appellant argues that a letter from the Interim Executive County Superintendent indicated that if the training was not completed by December 9, 2020, the SEC would initiate independent efforts to ensure compliance. Thereafter, the December 10, 2020 "final notice" from the SEC indicated that if she did not complete the training by December 18, 2020, an OTSC would be issued and a penalty would be imposed. As such, appellant argues that when board members complete the training before the issuance of the OTSC, a penalty is not imposed, which is supported by prior case law. Appellant contends that given her multiple attempts to complete the training before the issuance of the OTSC on December 22, 2020, and the fact that she was only unable to re-do the training prior to that date was because of the NJSBA's inability to fix technical issues with the portal, a penalty should not be issued in this matter.

Upon a comprehensive review of the record, the Commissioner finds that the SEC's determination that the appellant is in violation of the Act is supported by sufficient credible evidence, and the appellant has not established that the SEC's decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-4.l(a). Pursuant to *N.J.A.C.* 6A:28-4.1, appellant was required to complete the Governance 4 training program by June 30, 2020. There is no dispute that appellant's first attempt to complete the training did not occur until December 2, 2020. As such, appellant failed to timely complete her charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.l(a).

With respect to the appropriate penalty, the Commissioner is sympathetic to appellant's argument that she dealt with multiple technological issues in trying to complete the required training. After her first attempt, appellant's training would not register as completed, and this resulted in much

back-and-forth correspondence with the NJSBA to fix the glitch in the portal that prevented her from accessing the modules needed to re-do the training. However, the Commissioner notes that appellant's first attempt to complete the training did not occur until December 2, 2020, six months after the training deadline had passed. While the Commissioner acknowledges that there were mitigating factors in this case and understands how frustrating the situation must have been, appellant's communications with the NJSBA to fix the computer issues began only days before the issuance of the OTSC. Given the lengthy time that appellant remained out of compliance with *N.J.S.A.* 18A:12-33, *N.1.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.l(a), the Commissioner finds that a penalty of reprimand - the lowest possible penalty - is warranted in this matter. Therefore, the SEC's recommended penalty will not be disturbed.

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

IT **IS SO** ORDERED.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2022
Date of Mailing: January 12, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-l(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

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January 12, 2022

VIA EMAIL ONLY

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Re: *In the Matter of Minzhi Liu, Princeton Charter School, Mercer County, Agency 0kt. No. 160-8/21, Commissioner Decision No. 241-21SEC.*

Dear Parties:

I have reviewed the materials filed in connection with respondent's motion for reconsideration of the Commissioner's October 14, 2021 decision, removing respondent as a member of the Princeton Charter School Board of Trustees for failure to timely complete board member training required by the School Ethics Act.

Pursuant to *N.J.A.C.* 6A:3-l.15(b)(2), a motion for reconsideration shall be determined 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.

Upon review and consideration of the submissions, I have determined to grant respondent's request for reconsideration of the Commissioner's decision. In her papers, respondent indicates that she did not receive emails from the School Ethics Commission. In the absence of any explanation for or opposition to respondent's statement in the response to the motion filed by counsel for the SEC, the Commissioner accepts respondent's representation that she did not receive the emails. As respondent did not receive notice of the Order to Show Cause or the SEC's decision, and accordingly did not have the opportunity to respond, the Commissioner finds that the standard for reconsideration has been met. Accordingly, the motion for reconsideration is hereby granted.

Sincerely,

Acting Commissioner

c: State Law Library
Board Secretary, Princeton Charter School Board of Trustees
School Ethics Commission

5-22SEC

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ANc.hLICA ALLEN- McMILLA'.'l. Ed.D.
Acting Commissionl!r

January 19, 2022

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Re: *In the Matter of the Certificates of Nicholas Cilento,* State Board of Examiners Dkt. No. 2021-123, Commissioner Appeal Dkt. No. 9-12/21A

Dear Counsel:

I have reviewed the materials filed in connection with appellant Nicholas Cilento's Motion to Stay the decision of the State Board of Examiners (Board) suspending appellant's teaching certificates for two years.

Pursuant to *N.J.A.C.* 6A:4-3.3(a), a motion for a stay of a decision by the Board must first be made to the Board. Appellant did so here, but the Board declined to consider the motion because it was untimely under *N.J.A.C.* 6A:9B-4.16, which requires a motion for a stay to be filed within 30 days of the mailing date of the Board's decision. While appellant argues that no such time limitation applies to a motion for a stay made to the Commissioner, the Commissioner concludes that the 30-day time limitation would be rendered meaningless if an appellant were permitted to circumvent it by moving for a stay before the Commissioner after failing to meet the deadline before the Board. The Board's decision was dated October 28, 2021 and mailed on November 3, 2021. Appellant did not file his motion for a stay before the Board until December 6, 2021, three days beyond the 30-day time limit. Appellant offers no explanation for the delay in filing the motion before the Board beyond that he could not seek a stay until he filed a notice of appeal with the Commissioner. The Commissioner notes, however, that pursuant to *N.J.A.C.* 6A:4-

3.3(a)(l), motions to stay may be made to the State Board of Examiners concurrent with the filing of a notice of appeal. Appellant has been represented by counsel throughout the proceedings below and was able to file a notice of appeal of the Board's decision within 30 days, on the same date that a motion for stay before the Board was due. Accordingly, the motion for stay is denied as untimely.

Furthermore, even if the Commissioner relaxed the time limitations, appellant's motion must be denied. Pursuant to *N.J.A.C.* GA:4-4.l(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that appellant has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that appellant has failed to meet this standard. Specifically, appellant has failed to demonstrate that the legal right underlying his claim is settled. Appellant argues that it is settled law that the Board does not have the authority to take action against a teacher's certificates after the arbitrator in a tenure proceeding chose not to order the teacher's termination. Based on such a novel argument, the Commissioner can in no way find that the right underlying appellant's claim is settled in his favor.

In light of the fact that all of the Crowe prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, appellant's request for a stay of the State Board of Examiner's October 28, 2021 Order of Suspension is hereby DENIED.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: State Law Library

8-22L

New Jersey Commissioner of Education

Final Decision

Heather Garcia,

Petitioner,

v.

Board of Education of the Borough of Norwood, Bergen County

Respondent.

Synopsis

The petitioner, a member of the Board of Education of the Borough of Norwood (BOE), also sits on the Board of Trustees of the Valley Kids Matter Foundation, Inc. (VKMF), an organization that advocates for children with special needs. In a separate action, fellow members of the BOE filed a School Ethics complaint alleging that petitioner's board membership with VKMF is in conflict with her responsibilities to the BOE, and therefore petitioner's removal as a member of the BOE is appropriate and necessary to protect the interests of the BOE. In the instant matter, petitioner sought indemnification for the fees and costs of defending herself in the School Ethics case, as well as for the costs associated with the within petition. The parties filed cross motions for summary decision.

The AU found, *inter alia,* that: there is no genuine issue as to any material fact here, and the matter is ripe for summary decision; the issue of indemnification of members of boards of education against the cost of legal proceedings is governed by N.1.5.A. 18A:12-20, which provides for indemnification when a legal action against a board member arises out of and in the course of the performance of their duties as a member of the board; the issue in this case is whether N.1.5.A. 18A:12-20 requires that petitioner be indemnified for legal fees and expenses incurred in connection with her defense against a School Ethics complaint filed by fellow members of the BOE. The AU concluded that those allegations arose out of petitioner's private activities involving VKMF, not her service as a member of the BOE. Accordingly, the AU granted the Board's motion for summary decision, denied petitioner's cross motion, and dismissed the petition.

Upon review, the Commissioner concurred with the AU that the allegations against petitioner in this matter are based on private actions and therefore petitioner is not entitled to indemnification under N.1.5.A. 18A:12-20. Accordingly, the Commissioner denied petitioner's motion for summary decision, and granted the Board's cross-motion for summary decision. 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.

OAL 0kt. No. EDU 04851-21
Agency 0kt. No. 78-5/21

New Jersey Commissioner of Education

Final Decision

Heather Garcia,

Petitioner,

v.

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

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to N.J.A.C. 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

Petitioner, who is a member of the Norwood Board of Education, is the subject of a complaint alleging that she is in violation of the School Ethics Act (Act) because she also serves on the Board of Trustees of the Valley Kids Matter Foundation, Inc. (VKMF), an organization that advocates for children with special needs and is alleged to be in conflict with petitioner's responsibilities to the Board.[1] In the instant matter, petitioner seeks indemnification for the fees and costs of defending herself in the School Ethics matter, as well as for those associated with the instant petition. Following cross-motions for summary decision, the Administrative Law Judge (AU) concluded that the allegations against petitioner in the School Ethics complaint are based on private action, outside the performance of her duties as a member of the Board. Accordingly, the AU concluded that petitioner is not entitled to indemnification and granted the Board's cross-motion for summary decision.

[1] The School Ethics complaint is pending separate adjudication and this decision does not address the merits of that complaint.

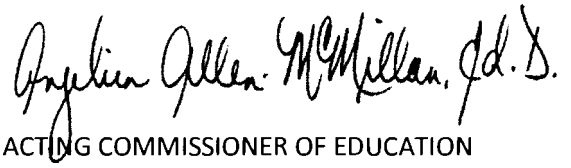
In her exceptions, petitioner argues that the School Ethics complaint does not accuse petitioner of doing anything unethical by forming VKMF, but rather only alleges that petitioner improperly received confidential information, participated in discussions, and voted to further VKMF's objectives. Petitioner contends that these actions clearly arise out of her duties as a Board member and thus she is entitled to indemnification.

In reply, the Board argues that all of the violations alleged in the School Ethics complaint arose with the incorporation of VKMF, and none pertain to any act or omission petitioner performed as a member of the Board. Therefore, the Board contends, petitioner is not entitled to indemnification.

Upon review, the Commissioner concurs with the AU that the allegations against petitioner are based on private actions and therefore petitioner is not entitled to indemnification. The Commissioner does not find petitioner's exceptions, which reiterate arguments made below that were considered and rejected by the AU, to be persuasive. *N.J.S.A.* 18A:12-20 provides for indemnification when a legal proceeding against a board member arises out of and in the course of the performance of her duties. Here, the allegations arise out of petitioner's activities involving VKMF, not her activities involving the Board.

Accordingly, the petitioner's motion for summary decision is denied, and the Board's cross-motion for summary decision is granted. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 19, 2022
Date of Mailing: January 19, 2022

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.l. Under *N.J.Ct.R.* 2:4-l(b), a notice of appeal must be filed with the Appellate Division within 4S days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION

OAL DKT. NO. EDU 04851-21
AGENCY REF. NO. 78-5/21

HEATHER **GARCIA,**
Petitioner,
vs.
BOARD OF EDUCATION OF THE BOROUGH OF NORWOOD, BERGEN COUNTY,
Respondent

David 8. Rubin, Esq., for Petitioner {Law Office of David B. Rubin, LLC, attorneys)

Stephen R **Fogarty, Esq.,** for Respondent {Law Office of Fogarty & Hara, attorneys)

Record Closed: November 29, 2021 Decided: December 9, 2021

BEFORE: **JOHN P. SCOLLO,** ALJ:

STATEMENT OF THE CASE

The matter at hand in Heather Garcia v. Norwood Board of Education, OAL Docket Number EDU 04851-21 (referred to as the "Indemnification Matter") deals with

the question of whether Heather Garcia (hereinafter referred to as "Garcia") is entitled under N.J.S.A. 18A:12-20 to be indemnified for attorney's fees, expenses and costs associated with her defense of another OAL matter, I/M/O Heather Garcia, Norwood Board of Education, OAL Docket Number EEC-10392-20.

BACKGROUND

I/M/O Heather Garcia, Norwood Board of Education (soon to be re-titled School Ethics Commission v. Heather Garcia) concerns a Complaint filed under the School Ethics Act, N.J.S.A. 18A:12-21 to 24 and under the Code of Ethics for School Board Members, N.J.S.A. 18A: 12-24.1 alleging that Heather Garcia (hereinafter, "Garcia"), a current member of the Norwood Board of Education (hereinafter, the "BOE") is in violation of several provisions of said laws in connection with her incorporation of, membership on the Board of Trustees of, and affiliation with a New Jersey 501 (c)(3) non-profit corporation named Valley Kids Matter Foundation, Inc. (referred to herein as "VKMF") while simultaneously serving as a member of the Norwood Board of Education.

In essence, the Complaint filed by fellow BOE members alleges that VKMF is an advocate for parents of special needs children (referred to herein as "special needs parents") who reside in the same school district (Northern Valley) wherein Norwood is located; that VKMF's avowed purpose is to advocate on behalf of said parents and children (it clients) including being involved in actions brought against said school district and/ or Norwood BOE; that as a member of both the Norwood BOE and VKMF, Garcia would repeatedly find herself in situations where her loyalties must necessarily be divided between the BOE and the clients of VKMF; that Garcia's membership on the Norwood BOE places her in a position to obtain information that is not generally available to the public and to use that information against the interests of the BOE and the District; that Garcia would thereby place herself into a conflict of interest with respect to her duties to the BOE, and also with respect to her duties to VKMF's clients; and that, inasmuch as her affiliation with VKMF conflicts with her duties to the Norwood

BOE, her removal from the BOE's Board is appropriate and is necessary to protect the interests of the BOE.

By way of further background information, Garcia asked the School Ethics Commission (the "SEC") for an Advisory Opinion seeking to determine (1) whether her or her husband's (Daniel Garcia's) role or participation with VKMF poses a potential conflict of interest with her membership on the Norwood BOE, (2) whether there is "an ethical prohibition or issue with the organization (VKMF) performing fundraising activities designed to pay for private services, directly to the provider of the services, such as physical therapy, occupational therapy, equine or canine therapy, or the like"; and (3) if there is a conflict related to Heather Garcia's or Daniel Garcia's participating in the foundation (i.e., VKMF), or in other words, "Would a non-immediate family member who is not an elected or appointed school board trustee possess such a conflict?". On April 21, 2020, the SEC, in response to Garcia's request, issued Advisory Opinion A07-20. This April 21, 2020 Advisory Opinion A07-20 is attached to Garcia's Summary Decision Motion papers as Exhibit 'B'.) The essence of the Advisory Opinion is that

> " [T]he [School Ethics] Act does not prohibit [Garcia's] involvement in [VKMF] generally, or in a leadership role specifically. Therefore, and based on your representations set forth in your request, there is *no current prohibition* on your involvement with the foundation. However, although you are permitted to be involved with the foundation in the capacity that you described, *you would violate* the Act if [Garcia], [Garcia's] spouse, or any other member of [Garcia's] foundation provided services to the families of the students who attend the District's schools." [Emphasis supplied.]

ISSUE TO BE DECIDED HEREIN

The issue in EDU 04851-21 is: Under the circumstances of this matter, does N.J.S.A. 18A: 12-20 require that Garcia be indemnified for her legal fees and expenses incurred in connection with her defense against the charges of the Amended Complaint

filed on March 30, 2020 by her fellow members of the Board of Education, which is the subject of EEC 10392-20?

PROCEDURAL HISTORY

Carlos Guzman and five other members of the Norwood BOE filed a Complaint on March 17, 2020 with the School Ethics Commission (the "SEC"), which the SEC found deficient. After curing the deficiencies, an Amended Complaint was filed on March 30, 2020 and served on Heather Garcia, on April 1, 2020. On April 1, 2020, the SEC issued a letter to Garcia and to the Norwood BOE in which Garcia (therein referred to as the "Respondent" for purposes of the Complaint) was directed to file an Answer or a Motion to Dismiss within twenty days.

On May 4, 2020, after receiving an extension, Garcia sought to dismiss the March 30, 2020 Amended Complaint by filing a Motion to Dismiss in Lieu of Answer (hereinafter, the "Motion to Dismiss"). The Complainants (Guzman, et als.) filed a response to the Motion to Dismiss. The SEC considered the filings at its meeting of June 23, 2020 and on July 21, 2020 voted to deny the Motion to Dismiss and directed Garcia to file her Answer. Moreover, the SEC found that the Complaint was not frivolous and denied Garcia's Motion for sanctions. Garcia filed her Answer to the Amended Complaint on August 10, 2020.

On September 21, 2020 the SEC notified the Norwood BOE and Garcia that the SEC would place this matter on its agenda for September 29, 2020 to make a determination regarding probable cause. Having considered the filings on September 29, 2020, the SEC, at its meeting on October 27, 2020, voted to find probable cause for all of the allegations of the March 30, 2020 Amended Complaint and also voted to transmit the matter (hereinafter referred to as the "Ethics Matter") to the Office of Administrative Law (OAL). Sometime after the October 27, 2020 finding of probable cause, Garcia hired David B. Rubin, Esq. to represent her.

The above-mentioned Ethics matter was filed with the OAL on November 4, 2020 under Docket Number EEC 10392-20 as a contested case pursuant to N.J.S.A. 52:148-1 to -15; N.J.S.A. 52: 14F-1 to -13 and assigned to a judge. (Thereafter, in June, 2021, the Ethics Matter was re-assigned to John P. Scollo, ALJ, who held an Initial Telephone Conference on June 25, 2021 and issued a Pre-hearing Order on June 28, 2021.)

On an unspecified date, a request for indemnification for legal fees, costs and expenses was sent to the SEC. On May 11, 2021, the SEC determined that it was not obligated to indemnify Garcia and notified her of its decision. On May 17, 2021, Garcia's counsel filed a Verified Petition of Appeal seeking indemnification. On June 4, 2021 Stephen R. Fogarty of Fogarty & Hara filed an Answer to the Petition of Appeal. Garcia's counsel filed a Petition (hereinafter referred to as the Indemnification Matter) with the OAL seeking indemnification for her legal fees, costs and expenses. The Indemnification Matter was filed under OAL Docket Number EDU 04851-20 on June 4, 2021. The Indemnification matter was assigned to John P. Scollo, ALJ, who held an Initial Telephone Conference on June 22, 2021 and issued a Pre-Hearing Order on June 24, 2021.

On October 19, 2021, counsel for Garcia filed a Motion for Summary Decision. Counsel for the Norwood BOE filed Opposition papers and the BOE's Cross-Motion for Summary Decision on November 12, 2021. On November 29, 2021, counsel for Garcia filed Reply papers to the BOE's Opposition, which also served as Opposition to the BOE's Cross-Motion, and the record closed that day.

FINDINGS OF FACT

A reading of the parties' submissions, shows that both sides agree that: (1) Heather Garcia has been and presently is a member of the Norwood Board of Education; (2) Heather Garcia and her husband Daniel Garcia, formed a New Jersey 501 (c)(3) non-profit corporation named Valley Kids Matter Foundation, Inc. (VKMF) on January 9, 2020; (3) Heather Garcia, Daniel Garcia and Anthony Shand, Heather

Garcia's father, compromise the entire membership of VKMF's board of trustees; (4) according to its Certificate of Incorporation, VKMF's purpose clause reads as follows: "To provide support to families of special needs children by providing support groups, educational speakers, community events and financial assistance for therapy, and advocacy services"; (5) there are no factual issues standing in the way of deciding the legal issue set forth above; and (6) The School Ethics Commission issued Advisory Opinion A0?-20 on April 21, 2020.

APPLICABLE LAW

The definition of "relevant evidence" is set forth is Rule 401 of the New Jersey Rules of Evidence:

> "Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.

Relevant Portions of the School Ethics Act

The School Ethics Act at N.J.S.A. 18A:12-21 et seq. at 18A:12-24 (Conflicts of Interest), in pertinent parts, (i.e., omitting sections (b), (e), (h), (i) U) and (k)) provides:

> (a) No school official or member of his immediately family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;
>
> (c) No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family

> has a personal involvement that is or creates some benefit to the school official or member of his immediate family;
>
> (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;
>
> (f) No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, and or any business organization with which he is associated;
>
> (g) No school official or business organization in which he has an interest shall represent any person or party other than the school board or school district in connection with any cause, proceeding, application or other matter pending before the school district in which he serves or in any proceeding involving the school district in which he serves or, for officers or employees of the New Jersey School Boards Association, any school district. This provision shall not be deemed to prohibit representation within the context of official labor union or similar representational responsibilities.

Relevant Portions of the Code of Ethics for School Board Members

The School Ethics Act at N.J.S.A. 18A:12-24.1 (Code of Ethics for School Board Members), in pertinent parts, requires a school board member, in the performance of his duties, to set aside his own interests and the interests of others and to exercise independence of judgment. Specifically, under the following sections of N.J.S.A. 18A: 12-24.1 (omitting sections (a), (b), (d), (h) and (j)) the Board member under oath pledges:

> (c) I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only

> after the board has consulted those who will be affected by them;
>
> (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;
>
> (g) 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.
>
> (i) I will support and protect school personnel in proper performance of their duties.

The Law of Indemnity of Members of Boards of Education Against Cost of Defense of Civil and Criminal Actions

N.J.S.A. 18A:12-20 governs the issue of indemnification of members of boards of education against the cost of legal proceedings brought against them. The law reads as follows:

> Whenever a civil, administrative, criminal or quasi-criminal action or other legal proceeding has been or shall be brought against any person *for any act or omission arising out of and in the course of the performance of his duties* as a *member of* a *board of education,* and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Indemnification for exemplary or punitive damages shall not be mandated and shall be governed by the standards and procedures set forth in N.J.S.A. 59:10-4. Any board of education may arrange for

> and maintain appropriate insurance to cover all such damages, losses and expenses. [Emphasis supplied.]

ANALYSIS OF THE PARTIES' ARGUMENTS AND CONCLUSIONS

The Complaint asserts that Garcia violated the School Ethics Act N.J.S.A. 18A:12-24 (a),(c) (d) and (f) and the Code of Ethics for School Board Members 18A:12-24.1 (c), (f) and (i), when she formed VKMF and took a seat on the Board of Trustees of VKMF. The Complainants allege that the goals of VKMF and the business of the BOE are in substantial conflict and are such that they will certainly be adversaries in the foreseeable future. This being so, the BOE asserts that Garcia will find herself in a position where her loyalty must be divided between these opposing entities, the one representing the clients of VKMF and the other being the BOE.

Petitioner-Norwood BOE's Position

The BOE's positions are as follows. As a member of the BOE, Garcia is obligated under N.J.S.A. 18A:12-24(a) not to have an interest in a business organization or to engage in any business, transaction, or professional activity, which is (or will be) in substantial conflict with the proper discharge of her duties to the schools. In regard to the charge brought pursuant to N.J.S.A. 18A:12-24(a), the BOE points out that Garcia and her husband are board members of VKMF, an entity whose purpose is to advocate on behalf of parents of special needs students in obtaining services from schools. In other words, VKMF exists to assist special needs parents to obtain services from the school districts and school boards. As everyone would agree, such services cost money and there are frequent disagreements between special needs parents on the one hand, and school districts on the other hand over the appropriateness and cost of such services, which can and does lead to costly litigation. The BOE argues that because of the likelihood of such disputes and litigation, there exists a substantial conflict between the duties Garcia owes to the BOE and her activities on behalf of VKMF and the clients VKMF serves. The BOE argues that Garcia's involvement with VKMF creates the type

of conflict of interest contemplated by N.J.S.A. 18A:12-24(a) and so, the conflict makes Garcia ineligible for continued membership on the Norwood BOE.

As a member of the BOE, under N.J.S.A. 18A:12-24(c), Garcia would be prohibited from acting on any matter where the business organization she has an interest in (VKMF) has a direct or indirect financial involvement that might reasonably be expected to impair her objectivity or independence of judgment. The BOE's position is that its Complaint is not based on any of Garcia's particular BOE-related actions (i.e., Garcia's participation in BOE meetings or BOE votes). Rather, the BOE takes the position that its Complaint is based on Garcia's formation of and involvement with VKMF, private actions which are outside her duties to the Board of Education. The BOE's position is that Garcia's involvement with VKMF runs counter to the provisions of N.J.S.A. 18A:12-24(c) because it can reasonably be expected that it will result in a direct or indirect financial involvement (i.e., on behalf of VKMF's clients) regarding whether or not they obtain services or increased benefits from boards of education or school districts, and thus can reasonably be expected to impair Garcia's objectivity or independence of judgment.

Under N.J.S.A. 18A:12-24(d), Garcia, as a school official, would be prohibited from undertaking any services (compensated or uncompensated) which might reasonably be expected to prejudice her independence of judgment in the exercise of her official duties.

The BOE views VKMF as an advocacy organization formed to advocate for special needs parents whose interests can be reasonably expected to result in disputes with boards of education. The BOE takes the position that Garcia's continued involvement with VKMF runs counter to the provisions of N.J.S.A. 18A:12-24(d) because it raises a reasonable expectation of prejudice to Garcia's independence of judgment.

Finally, under N.J.S.A. 18A:12-24(f), Garcia would be prohibited from using information made known to her in the course of and by reason of her position as a member of the Board of Education, for the purpose of securing a financial gain for any business organization with which she is associated. In accordance with the goals of N.J.S.A. 18A:12-24(f), the BOE's concern is that while being involved with VKMF, whose clients will be adversaries of the BOE in foreseeable disputes, Garcia would have access to information not generally available to the general public and which could be used to the advantage of VKMF's clients and to the detriment of the BOE. While not accusing Garcia of having disclosed such information to anyone who might use it against the interests of the BOE, the BOE argues that the potential for disclosure of such information requires Garcia's termination as a board member of the BOE.

In regard to the Code of Ethics for School Board Members, N.J.S.A. 1BA:12-24.1, the BOE maintains that Garcia is in violation of several sections due to her involvement with VKMF and her simultaneous membership on the BOE's board. Under N.J.S.A. 18A: 12-24.1 (c), Garcia as a member of the Norwood board (BOE) must confine her board action to policy making, planning, appraisal, and must help to frame the BOE's policies and plans. The BOE views VKMF's purpose clause and foreseeable advocacy on behalf of its clients, including activity that can lead to litigation, as adverse to the interests of the Northern Valley School District and to the Norwood BOE. Therefore, the BOE maintains that Garcia's formation of and involvement with VKMF will inevitably include the rendering of services to VKMF clients and thus interfere with her duties to the BOE regarding policy making, planning, etcetera.

Under N.J.S.A. 18A:12-24(f), Garcia is obligated not to surrender her independent judgment to special interest groups or to partisan political groups. The BOE maintains that VKMF is a special interest group. The BOE maintains that VKMF is a partisan group, which according to its purpose clause, exists to advocate on behalf of special needs parents against school districts and boards of education. Therefore, the BOE maintains that Garcia's formation of and involvement with VKMF will interfere with

her independent judgment when and where the interests of VKMF and the school authorities differ.

Under N.J.S.A. 18A: 12-24(i), Garcia is obligated to support school personnel in the proper performance of their duties. The BOE maintains that VKMF is a special interest group which exists to advocate for special needs parents and that that advocacy will inevitably bring VKMF's clients into disputes with the BOE. Therefore, the BOE maintains that Garcia's formation of and involvement with VKMF will compromise her duty to work with her fellow BOE board members for the interests of the BOE.

To sum-up, the BOE's positions demonstrate its concern, as reflected in the cautionary language of Advisory Opinion A0?-20, that in simultaneously serving two different and foreseeably opposed masters, VKMF and its clients on the one hand and the BOE on the other hand, Garcia will be unable to adequately serve either one. Insofar as the BOE's interests are concerned, it believes that it is within its rights to remove Garcia from her current position on the board due to obvious conflicts of interest arising out of her formation of and involvement with VKMF.

Having set forth its case that Garcia's membership on the BOE is fraught with conflicts of interest, the BOE maintains that it does not seek Garcia's removal as a result of actions she has taken as a BOE member. The BOE maintains that in having formed and involved herself with VKMF, an entity dedicated to advocating for special needs parents, Garcia has already placed herself between the interests of two masters whose interests conflict. Therefore, these conflicting interests presently disable Garcia from performing and fulfilling her duties to and for the BOE and her removal is therefore justified.

Respondent-Garcia's Position

The essence of Garcia's position is that the Complaint against which she is defending was brought against her for reasons arising out of the performance of her

duties as a member of the BOE. Garcia maintains that since she is defending herself against an action occasioned by her activities as a BOE member, she comes within the ambit of N.J.S.A. 18A:12-20's indemnification provisions and therefore should be afforded indemnification for her attorney's fees, expenses and costs of suit and for any financial losses resulting from the action.

Garcia argues that the Complaint was brought because she participated in BOE meetings which necessarily involve her participation in board business such as discussions, reviewing of information and materials (which are not necessarily of the type generally available to members of the public) and her participation in votes made on board resolutions. Inasmuch as the aforementioned activities are regular parts of fulfilling her duties as a BOE member, it follows that the Complaint arose out of or, put another way, had a substantial connection with her duties as a board member. This being so, it logically follows that N.J.S.A. 18A:12-20's indemnification provisions must be afforded to her. Garcia adds that the scope of the phrase "act or omission arising out of and in the course of the performance of his [or her] duties as a member of a board of education" has been viewed with liberality by the courts due to the policy of promoting free expression and protecting school board members when they speak and act for the public good.

Garcia amplifies her argument for indemnification by analogizing her demand for indemnification under N.J.S.A. 18A:12-20 with an insured's invoking an insurance carrier's duty to defend the insured (as well as to indemnify the insured in the event of an adverse judgment).

In this matter, Garcia substitutes N.J.S.A. 18A:12-20 in place of the typical liability insurance policy and asks the Tribunal to apply the same analysis that a court would use when deciding an insurance coverage case.

Analysis

The duty to defend, in the insurance context, arises out of a contract between the insurance carrier and the policyholder, the language of which can vary from contract to contract written at different times by various companies. In the insurance context, the duty to defend is based on the agreement of the parties to the contract. Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 22 (1984). In cases where the parties find themselves in a dispute about coverage, a court may be called upon to interpret the meaning of the words and phrases employed in the language set forth in the insurance contract. This can involve an analysis of and balancing of competing interpretations of the language of the contract taking into account the literal meaning of the words employed, the discerning of any alleged ambiguities in the policy language, and the reasonable expectations of the parties to the contract. This Tribunal appreciates the analogy offered by counsel for Garcia, but as with most arguments by analogy, the argument has its limitations.

In the case at bar, the duty to indemnify is not created by the parties to a contract, but by passage of a law by the Legislature. In passing N.J.S.A. 18A:12-20, the Legislature declared that whenever an action is brought against a school board member for any act or omission arising out of and in the course of the performance of her duties as a member of the board of education, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses. As noted above, the courts of New Jersey have viewed this with liberality. It is also clear that in cases dealing with a insurance carrier's duty to defend, the courts of New Jersey recognize and uphold the principle that it is the nature of the claim that triggers the obligation to defend, not the details of accident or the ultimate outcome. Danek v. Hommer, 28 N.J. Super. 68 (App. Div. 1963), affd, 15 N.J. 573 (1954).

In the matter at bar, the deciding factor in determining whether indemnification is to be afforded or not afforded turns on whether the Complaint charges Garcia with violations that arose out of and in the performance of (i.e., within) her duties as a board

member or whether the Complaint charges Garcia with violations that arose outside (i.e., private action) the performance of her duties as a board member.

Garcia argues that it would be impossible to interpret her participation in board meetings (involving acquiring information from written documents and by spoken words, discussing issues and ideas and voting on resolutions) as being anything other than actions arising out of and in the performance of her duties as a member of the school board. Garcia's claim for indemnification (as well as at least part of her anticipated defense in the Ethics matter) rests on this base. Garcia's claim is that the Complaint charges her with actions that she performed within her board-related duties. However, the BOE argues that the Complaint does not charge Garcia with having committed any act or omission that was violative of any board-related duty. The BOE maintains that Garcia's incorporation of VKMF and taking a seat on its board of trustees was a private action well outside the bounds of her board-related duties, and one which immediately created a conflict of interest. Therefore, the BOE maintains that it is within its rights to seek Garcia's removal from the BOE.

At this point in time (in the matter encaptioned EDU 04851-21), this Tribunal must concern itself only with deciding the Indemnification issue. The decision regarding the Ethics Issue (ECC 10392-20) will await determination at a later date.

I **CONCLUDE** that the School Ethics Commission accurately assessed the situation when it issued Advisory Opinion A0?-20.

I **CONCLUDE** that the School Ethics Commission found that the formation of VKMF by Garcia and her husband was an activity that was outside the control, oversight or management of the BOE.

I **CONCLUDE** that the language of the School Ethics Commission's Advisory Decision A0?-20 means that Garcia's incorporation of VKMF was a private action and

her involvement with VKMF is a private action unrelated to the duties of a member of a board of education.

I **CONCLUDE** that the School Ethics Commission's Advisory Opinion A07-20 means that Garcia is permitted to be involved with VKMF based on the representations made in her application for the advisory opinion.

I **CONCLUDE** that the School Ethics Commission found that the School Ethics Act did not prohibit Garcia's involvement with VKMF generally, or in a leadership role specifically.

I **CONCLUDE** that the School Ethics Commission did not state that Garcia has violated any duties she owes to the BOE by either act or omission.

However, I **CONCLUDE** that in Advisory Opinion A0?-20, the School Ethics Commission issued a warning to Garcia; that warning is that if she, her husband or any member of VKMF provides services to the families of the students who attend the Northern Valley School District, then she would be in violation of the School Ethics Act.

I **CONCLUDE** that the language used in the School Ethics Commission's warning means that if VKMF provides any service to any special needs parent regarding any issue that can or does result in aiding a special needs parent in advocacy or in a dispute with the school district, then Garcia would, by virtue of being associated with or involved with VKMF, be deemed to be in violation of the School Ethics Act.

I **CONCLUDE** that the School Ethics Commission was referring specifically to N.J.S.A. 18A:12-24(a), which prohibits a school official from having an interest in an organization or taking part in any professional activity which is in substantial conflict with her duties as a school board member, and likely to other sections of the School Ethics Act or the Code of Conduct for School Board Members.

Where a Complainant refers in his Complaint to facts in setting-out his cause of action, the court analyzes the facts alleged as part of the process it uses to reach its conclusion(s) of law. Reviewing the contents of a Complaint and discerning what causes of action it contains, as well as what causes of action it does not contain, is a matter of law for the court to decide.

Having closely analyzed the language and substance of the Complaint, I **CONCLUDE** that the allegations of Garcia's violations of the Act are not based on actions which arose out of and in the performance of her duties as a member of the board of education, but rather are based on private action outside her performance of her duties to the board of education.

Having concluded that the Complaint charges Garcia with violating the School Ethics Act by taking actions that are outside her school board-related duties, it follows that I must **CONCLUDE** that Garcia is not entitled to indemnification under N.J.S.A. 1BA:12-20.

ORDER

Based upon the foregoing, it is **ORDERED** that the Respondent-Norwood Board of Education' Cross-Motion for Summary Decision on the issue of Indemnification under N.J.S.A. 18A:12-20 is **GRANTED;** and it is further

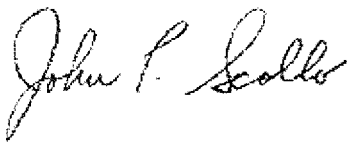
ORDERED that Petitioner-Garcia's Motion for Summary Decision seeking Indemnification under the provisions of N.J.S.A. 1BA:12-20 is **DENIED.**

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

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

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

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



December 9, 2021
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:

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Acting Commissioner

January 19, 2022

Maryann Moretti
12 Meadow Ridge Lane
Lafayette, NJ 07932

Eric L. Harrison, Esq.
Methfessel & Werbel
2025 Lincoln Highway, Suite 200
Edison, NJ 08818

Re: *M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County, Agency Dkt. No. 216-11/21.*

Dear Parties:

I have reviewed the materials filed in connection with the Lafayette Board of Education's (Board) motion for reconsideration of the December 20, 2021 decision in the above-captioned matter. In its submission, the Board seeks reconsideration of the order to supply the petitioner with a copy of the video that she has been seeking. The Board contends that Commissioner Decision No. 253-20, in related docket number 94-5/20, properly concluded that petitioner is not entitled to copies of the video at issue in this matter. While the Board is correct regarding the Commissioner's conclusions pursuant to the Family Educational Rights and Privacy Act (FERPA) and New Jersey's Pupil Records Act, the Board fails to note that the Commissioner specifically indicated that petitioner would not be precluded from seeking the video as discovery in future proceedings before the OAL.

Given that the Board has now issued a written decision memorializing the Board's vote to affirm the harassment, intimidation, and bullying (HIB) report, petitioner's challenge to that decision is ripe for review, and the instant petition of appeal will be transmitted to the OAL for that purpose, and for the adjudication of any other violations of the Anti-Bullying Bill of Rights Act (Act) alleged in the petition.[1] As part of those proceedings, petitioner is entitled to discovery, including the video evidence. Further, any concerns that the Board has expressed regarding the privacy of other students who may appear in

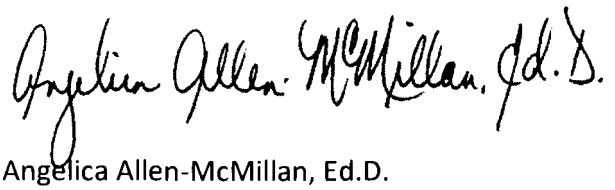
[1] I am exercising my discretion to transmit the instant petition of appeal to the OAL rather than requiring petitioner to file a new petition of appeal based on the Board's now-issued written decision, which would be a waste of judicial resources. Nor is the petitioner required to seek a hearing before the Board, as a board hearing is not mandated by the Act. Therefore, any argument that the petitioner has failed to exhaust her administrative remedies by proceeding with a petition of appeal in lieu of seeking a Board hearing is without merit.

the video have already been addressed by my directive that petitioner may not use the video for any purpose other than these proceedings.

I have also reviewed the materials filed in connection with petitioner's motion for partial reconsideration. Petitioner objects to the portion of the decision ordering a written decision because it would permit the Board to change its decision. The Board's written decision, however, did not change its decision and merely adopts the original HIB report. Accordingly, the motions for reconsideration are denied and this matter will be transferred to the OAL.

Petitioner's motion for clarification of the December 20, 2021 decision is also denied.

Sincerely,



Angelica Allen-McMillan, Ed.D.
Acting Commissioner

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OAL 0kt. No. EDU 10256-21
Agency 0kt. No. 237-12/21

New Jersey Commissioner of Education

Order on Emergent Relief

Board of Education of the Borough of Milltown, Middlesex County,

Petitioner,

v.

Egnita Pardo,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order[1] of the Administrative Law Judge (AU) have been reviewed. Upon such review, the Commissioner concurs with the AU - for the reasons thoroughly set forth in the recommended order - that petitioner Milltown Board of Education has demonstrated entitlement to emergent relief pursuant to the standards enunciated in *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, granting the Board's application for emergent relief, is adopted. Respondent is precluded from being sworn in as a member of the

[1] The Order was captioned as an "Order Granting Summary Decision Motion, and Denying Cross Motion Without Prejudice." However, this matter was heard on a Motion for Emergent Relief; accordingly, despite its caption, the Commissioner will consider this as an Order on Emergent Relief. *N.J.A.C.* 1:1-12.6.

board while a final a decision on the merits of this matter is pending, which should be decided on an expedited basis. Additionally, the Board is precluded from filling the respondent's seat on the Board while this matter is pending. This case, including the cross petition for indemnification[2], shall continue at the OAL on an expedited basis with such proceedings as the parties and the AU deem necessary to bring it to closure.3

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 19, 2022
Date of Mailing: January 19, 2022

[2] In her response to the motion for emergent relief, respondent filed a cross petition for indemnification against the Board. Under the circumstances, so as not to unduly delay the proceedings in this matter, the Commissioner deems the issue of indemnification to be a counter claim which will be decided as part of this matter.

[3] At oral argument, the AU inquired as to whether this matter should proceed as a contested case or as a request for declaratory ruling, pursuant to *N.J.A.C.* 6A:3-2.1. The Commissioner notes that this matter was filed as a petition of appeal and not as a petition for a declaratory ruling, and will accordingly proceed as a contested case at the OAL. Furthermore, to the extent that it could be construed as a request for declaratory ruling, the Commissioner exercises her discretion to decline the request.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING SUMMARY DECISION MOTION, AND DENYING CROSS MOTION WITHOUT PREJUDICE

OAL DKT. NO. EDU 10256-21S

AGENCY DKT. NO. 237-12/21

MILLTOWN BOARD OF EDUCATION, MIDDLESEX COUNTY,

Petitioner,

EGNITA PARDO,

Respondent.

Aron Mandel, Esq., for petitioner (Busch Law Group, attorneys)

Nicholas J. Repici, Esq., Michael J. Reilly Esq., (Lenox, Socey, Formidoni, Giordano, Lang & Casey, attorneys,) for respondent, Egnita Pardo

BEFORE **JOSEPH A. ASCIONE,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner, Borough of Milltown, Board of Education, Middlesex County, (Board) initially filed a Request for Emergent Relief (P-1), its petition alleging that respondent is in conflict of interest pursuant to N.J.S.A. 1BA:12-2 because she has an interest in a claim against the school district. Therefore, it seeks to decline to swear-in respondent, Egnita Pardo, (Pardo) as a board member. The matter was transmitted

to the Office of Administrative Law (OAL) on December 17, 2021, for a ruling on the emergent application. The matter was assigned to me on December 22, 2021. On December 27, 2021, respondent filed opposition and cross-moved for indemnification for costs. The matter was heard by a Zoom© teleconference for oral argument. At that time, the parties discussed certain procedures in order to convert the matter from a motion for summary decision to a request for declaratory ruling on the part of petitioner, pursuant to N.J.A.C. 6A:3-2.1. The parties did not address the significance of the questioned procedure, and requested the matter proceed as an emergent application, seeking injunctive relief. The Cross Petition seeks legal fees and cost to defend the application, the latter Cross Petition is deferred to the Department of Education to resubmit, as appropriate. The record with respect to the motion for emergent relief closed on December 28, 2021.

FACTUAL DISCUSSION

The essential facts in this matter have not been disputed, and may be gleaned by reviewing petitioner's Request for Emergent Relief (P-1), with attachments, respondent's answer with attachments, (R-1) and the Board's reply (P-2).

Petitioner is a board of education which is duly organized under the Statutes of the State of New Jersey and is subject to the specific statutes covered in Title 18A of the New Jersey Statutes.

Pardo was elected to the Milltown Board of Education at the November 2021 School Election and is due to be sworn in at the upcoming Organization Meeting on January 4, 2022.

Pardo, up until the present proceeding, had acted with her husband, as parents to her son, C.P., a minor, to file a Notice of Tort Claim against the Board in May 2017, for actions occurring during C.P.'s attendance at a school under the jurisdiction of the Board.

The Board's representative informed Pardo of the conflict, and its impediment to her acceptance of the oath of office and position.

Pardo has represented on December 15, 2021, she and her husband have withdrawn the claim, and has no interest in the claim of her son. Pardo represents no action has been filed in the Superior Court related to the Notice of Tort Claim.

LEGAL DISCUSSION AND ANALYSIS

Pursuant to N.J.S.A. 59:8-3(b), the necessity of a Notice of Claim has been removed for allegations related to C.P.'s claim. This fact does not remove the existing inchoate claim that C.P. has against the Board, which continues past his attainment of majority. Pardo's interest in the claim is for reimbursement of medical expenses incurred on behalf of her son.

In this matter, there is no dispute that in 2017, Pardo filed a Notice of Tort Claim on behalf of her child, C.P. Pardo now provides proof the Notice of Claim is withdrawn.

Pardo submits, Board of Educ. of the Twp. of Holmdel v. O'Connell, Commissioner of Education (May 1990), 1990 S.L.D. 674, for the proposition, that the withdrawal/absence of requirement of the Notice of Claim is sufficient to remove the impediment. Here, however, the claim is not of Pardo directly but that of her minor son. The true resolution cannot be accomplished prior to C.P.'s majority, except by Superior Court approval of the resolution of the minor's claim. See New Jersey Court Rules 4:44.3.

Arguably, Pardo and her husband's release of any claim for indemnification for expenditures made on behalf of C.P., and a release or assignment of their individual claims (which they deny), may place this matter under the guidance of matters such as directions of Board of Education of Wall v. Margadonna, EDU 2409-03, Initial Decision (April 25, 2003), dismissed as moot, Acting Comm'r (June 2, 2003), Stargell v. Snyder, 2015 WL 10428288, fn. 1 (App. Div. 2016), or Bd. of Educ. of Barnegat v. Houser,

Commissioner of Education Decision, Agency Dkt. No. 128-5/07 at p. 8 (July 30, 3007) . The mootness, the result of Margadonna's withdrawal of her claim. In the absence of the complete resolution of C.P.'s inchoate claims, or a release by Pardo and her husband of their reimbursement rights and their own inchoate claims, Pardo is untenably in the position of being unable to remove this impediment to her acceptance of her elected position and oath.

This matter arises from the concern on the part of the Board, "No board of education member shall be directly or indirectly involved in any contract with, or claim against the board" Do the provisions of N.J.S.A. 18A: 12-2, affect an about to be sworn, board member, as a result of an inchoate claim?

Conflicts of interest apply to membership, not candidacy, and that if a conflict may be cured prior to taking a seat, the successful candidate may be sworn in as a board member.

N.J.S.A. 18A:12-2, states as follows:

> "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall hold the office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county."

I agree with counsel that the leading case which gives significant guidance as to this issue is Board of Education of the Township of Holmdel v. O'Connell, 190 S.L.D. 674. In that case, the Commissioner of Education, in discussing the language of the Act, indicated that it is clear and unambiguous on its face and the words of the statute define the Legislature's intent. On its face, N.J.S.A. 18A:12-2 mandates that no board member may serve who is interested directly or indirectly in any claim against the Board. The Commissioner relies on Board of Education of the City of Newark v. Edgar Brown and Oliver Brown, 1984 S.L.D. 671, and indicates that the statute should be applied by making an initial determination as to whether the circumstances demonstrate

that the claim made by the member would result in a "substantial and material" benefit to him. Individual circumstances in each case are required to be examined to determine whether the claim is substantial and material so as to require disqualification. In the Matter of the Election of Dorothy Bayless to the Board of Education of Lawrence Township School District, 1974 S.L.D. 595, reversed, State Board 603.

In this matter, the notice of claim of respondent's son appears to seek reimbursement for psychological and/or medical bills which have accrued or could continue to accrue into the future. It may be inferred that the parents of C.P. are the individuals who are incurring these medical bills and to whom any reimbursement would be made. The initial notice of claim stated damages of an emotional and psychological nature and interference with a constitutionally protected right to his education in an amount of $250,000. This cannot be claimed to be insubstantial. It may be inferred that the parents have seen fit to notify the school district of the claim because it may be substantial. Pardo does have the potential to recover reimbursement for any medical and psychological bills, they expend or continue to expend related to the incident. This is a material and substantial claim in this matter. There is nothing in the record to suggest otherwise.

Because this matter involves a withdrawn Tort Claim Notice, the question is whether this is a claim which is sufficient to disqualify a member from his or her seat on the board of education.

N.J.S.A. 18A:12-2 specifically prohibits an interest in a "claim" against the board and not an "action" or "pending litigation".

Lack of conflicting interest is a qualification for board membership. See, Visotcky v. City Council of Garfield, 113 N.J. Super. 263 (App. Div. 1971). The interest which disqualifies is not necessarily a direct pecuniary interest, nor is the amount of such an interest of paramount importance; it is based on the moral rule that no man can serve two masters whose interests conflict. Aldom v. Borough of Roseland, 42 N.J. Super. 495, 502 (App. Div. 1956). In Taliafero vs. Hawthorne Board of Education. 94 N.J.A.R. 2d (EDU) 197 wherein a board member's indirect interest in his wife's lawsuit against a

board of education disqualified him from board membership.

In this matter, Pardo, as the parent of C.P., has at least an indirect interest, and more likely a direct interest in a claim made by her minor child against the school district. To hold otherwise would be to engage in a fiction which would be inappropriate. Pardo argues that the law no longer requires a Notice of Claim, her son's claim under the law can continue well past his majority, so the withdrawal serves to remove the impediment. This tribunal does not see the logic of this, if a successful candidate is aware of a claim and does not disclose it, that does not relieve the candidate of the integrity to acknowledge the conflict, and decline to accept the position.

Turning to the standards of Crowe v. DeGioia, 90 N.J. 126 (1982), it requires on any emergent application a consideration of the following: 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. See also, N.J.A.C. 1:1-12.6.

The Board will suffer **irreparable harm** if Respondent is illegally sworn in while still possessing a conflict of interest in contravention of N.J.S.A. 18A:2-2 and then later removed from the Board as a result. Once Respondent is sworn in and seated as a member of the Board, she will immediately gain access to confidential information to which the Board is privy, and also will be able to vote on matters pending before the Board. As the Commissioner has determined that refusing to swear in a newly elected member of the board would act as an impermissible removal of that board member (see Brown v. Newark Bd. of Ed., 1984 S.L.D. 671 aff'd St. Bd 1984 S.L.D. 684, and Wall Twp. Bd. of Ed. v. Margadonna, Commr., June 2, 2003). Petitioner is unable to resort to self-help in any manner that would prevent Pardo from being seated at the January 4, 2022. Organization Meeting, and is therefore dependent on the Commissioner's emergent guidance.

A subsequent determination that Pardo's vote was illegal as a result of being

improperly seated on the Board, actions taken by the Board would ipso facto be invalidated. It follows, that any official action emanating from the entire process could be subject to legal challenge. Depending on the nature of the action, the resultant harm could be irreparable. The potential uncertainty, creation of disputes and illegal exercise of government power and expenditure of limited government funds earmarked for childhood education that would likely occur if emergent relief is denied would amount to serious **irreparable harm.**

The Board relies on Bd. of Ed. Of the Bor. Of Hawthorne v. Taliaferro, OAL Docket No. EDU 4717-93; Agency Docket No. 132-5/93 (November 24, 1993, Initial Decision; December 30, 1993, Final Agency Decision; and, BOE of Borough of Berlin v. Lee, OAL Dkt EDU 6050-01-, Agency Dkt. 143-5/01 (Initial Decision Apr. 29, 2002, Comm'r Affd., June 14, 2002; 2002 WL 991700); for its support, in accord, the Board's legal right is well settled. This tribunal accepts the above as the outstanding precedent and **settled law** in the Board's favor.

The Board' position is the within action is taken to prevent the confusion which could result from third parties questioning the proper seating of Pardo in the presence of the conflict of interest. Rather, there is no bad faith motivation for this application. The case law is clear there exists a conflict of interest. Both these factors provide the Board with the **likelihood of success.**

The Board maintains it is only concerned with its obligation to abide by the requirements of N.J.S.A. 18A: 12-2, and, in so doing, to fulfill its duty to the taxpayers, students and other stakeholders in the Board's operations. It is only in furtherance of this objective, and in an effort to abide by the applicable laws and regulations, that the Board now seeks the Commissioner's determination of Pardo's qualifications to serve.

In **balancing the interests of the parties,** the potential harm to the Board, is that once Respondent is seated on the Board and gains access to otherwise confidential information, such information potentially could compromise the Board's legal position regarding Respondent's son's claim against it. Clearly, were such access to be granted, inadvertently or otherwise, once any compromising information is

revealed, it cannot be withdrawn and the Board would be disadvantaged in any ensuing litigation or settlement negotiations between the parties. Given the broad access to information by Board members, it would be difficult to monitor every bit of information that potentially might present some type of litigation advantage to Pardo. Board members, administrators and staff would need to be constantly on guard and the tension that would result between the Board, its staff and Pardo would significantly militate against a productive working relationship which, in the end, also would redound to the detriment of the public interest which Board members are sworn to protect, in short, pitting Pardo's private financial incentives against her fiduciary duties as an elected public official. If it were to be later determined by the Commissioner that Pardo is not disqualified, she could readily be sworn in at that time. Although she might not be able to recover the time in office that had elapsed, that would be the only apparent harm that she would have suffered. Pardo's counsel does properly claim this is denying the public in Milltown the services of a successfully elected candidate. However, the limited time Pardo does not serve because of the existing conflict, can arguably be remedied by the release by her and her husband of claim for reimbursement for expenses caused by the alleged injuries suffered by C.P. This tribunal is satisfied the Board has balanced the equities in its favor.

CONCLUSION

In reviewing the Crowe standards, this tribunal, **CONCLUDES** as follows:

The Board has shown it will be irreparably damaged if the requested relief is not granted;

The Board has shown the law is well settled warranting their application to not seat Pardo to her position as a member of the Milltown Board of Education;

The Board has shown there is a likelihood of success in pursuit of their application to deny Pardo her seat until her inchoate, claim on behalf of her son, C.P. is resolved.

The Board has show that the balance of the equities weighs in their favor.

Therefore, I **CONCLUDE** that respondent must resolve her right of reimbursement in her son, C.P.'s claim against the Board, and any claim she may have against the Board, prior to her duty to the public which elected her to be a member of the board of education. Under these circumstances, I **CONCLUDE** that respondent should be considered to be disqualified to be sworn as a member of the board of education based upon her interest in a claim against the school district on behalf of her son. Therefore, I **CONCLUDE** that petitioner's request for emergency relief as to this matter should be **GRANTED** and that it should be ordered Pardo is in conflict of interest pursuant to *N.J.S.A.* 18A:12-2 because she has an inchoate interest in a claim against the school district.

This tribunal took no action on the Cross-application for indemnification, due to the request of the Board to address the application separately; and the tribunal's concern the jurisdiction to consider such an application had not been transmitted to the Office of Administrative Law. Accordingly, this **ORDER** neither grants, nor denies Pardo's Cross Petition for indemnification, without prejudice.

ORDER

Based upon the foregoing discussion, it is hereby **ORDERED** that respondent is in conflict of interest pursuant to the provisions of *N.J. S.A.* 18A: 12-2 because she has an interest in an incohate claim made on behalf of her son against the school district.

I hereby file this **ORDER** with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

December 29, 2021 _' LO. c2

DATE **JJs. ASCIONE,** ALJ

E-Mailed to Parties:

December 29, 2021 _____

DATE DEPARTMENT OF EDUCATION

December 29, 2021 _____

DATE MILLTOWN, BOARD OF EDUCATION

December 29, 2021 _____

DATE EGNITA PARDO

APPENDIX

LIST OF WITNESSES:

For petitioner:

None

For respondent:

None

LIST OF EXHIBITS:

For petitioner:

P-1 Request for Emergent Relief with attachments

P-2 Reply Submission

For respondent:

R-1 Respondent's answer to petitioner's Request for Indemnification with attachment

12-22

OAL Dkt. No. EDU 01915-20
Agency Dkt. No. 16-1/20

New Jersey Commissioner of Education

Final Decision

A.N. and J.W. on behalf of minor child, **B.W.,**

Petitioners,

v.

Board of Education of the Northern Burlington County Regional School District,
Burlington County,

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT **IS SO ORDERED.**

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 20, 2022
Date of Mailing: January 20, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01915-20

AGENCY DKT. NO. 16-1/20

A.N. and J.W, on behalf of minor child, B.W.,

Petitioners,

NORTHERN HURLINGTON COUNTY REGIONAL BOARD OF EDUCATION, BURLINGTON COUNTY,

Respondent.

Howard Mendelson, Esq., for petitioners (David & Mendelson, attorneys)

Emily A. **Schrank,** Esq. for respondent (Parker McCay, attorneys)

Record Closer.l: December 16, 2021 Decided: December 23, 2021

BEFORE **KIM C. BELIN,** ALJ:

This matter was transmitted to the Office of Administrative Law on February 7, 2021, for determination as a contested case, pursuant to N.J.S.A. 52:148-1 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. A copy of the Settlement Agreement 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 &ignatures or their representatives• signatures on the attached settlement agreement. (J-1)

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

I **CONCLUDE** that this agreement meets the requirements of N,J.A.C. 1:1-19.1 and that the ieltlement 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 here;)y **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This rf'commended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a fir·al decision in this matter. If the Commissioner of the Department of Education dot!S **not** adopt, modify or reject this decision within forty-five days and unless such time limi!• is otherwise extended, this recommended decision shall become a final decision in ac,;ordance with N.J.S.A. 52:148-10.

December 23 2021
DATE

KI N,ALJ

Date Received at Agency: 12/23/2021

Mailed to Part:es: 12,27 /2021

mph

File No. 01263-4
LawOfllces
PARKER McCAY P.A.
9000 Mldla11tic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
(856) 596-8900
Attorneys for Respondent,
Northern Burlington County Regional School District Board o f Education

A.N. & 1.W. o/b/o B.W., Petitioners, v. NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: EDU 01915-2020 Agency Ref. No.: 16-l/20 SETILEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (the i•Agreement") is entered into by and between A.N. & J.W. o/b/o B.W., ("Parents" and/or "Petitioners"}. and the Northern Burlington County Regional School District Board o f Education ("District") with its mailing office located at 160 Mansfield Road East, Columbus, New Jersey 08022 (the Parents and District are collectively referred to as the ..Parties").

WHEREAS, a dispute arose regarding disciplinary action taken by the District with respect to student B.W., which culminated in the filing o f a Petition by Parents with the New Jersey Department o f Education Office o f Controversies and Disputes; and

WHEREAS t the Panics in good faith have negotiated concerning this matter and have a desire to settle this matter in an amicable way, hereby agree as follows:

!AW OFFICE
Parktt- MtC•J PA.

1. The District shall remove the October 15, 2019 and October 16, 2019 two (2) day out-of-school suspension from B.W.•s student record on July I, 2022, as long as B.W. does not engage in any conduct that rises to the level of a suspendable offense under the District's Code of Conduct. meaning a Level 2 offense or higher. and/or under N.J.S.A. ISA:37-2, from the date of this Agreement through June 30, 2022. It is understood that the District shall, however, comply in all respects with the District's Code of Conduct if and when the District ever has any infonnation and/or suspicion regarding B.W. potentially engaging in any conduct that the District would consider an offense for which B.W. could potentially be suspended. Specifically, and without limitation, it is understood that the District shall employ the procedural protections afforded public school students under New Jersey law including. but not limited to, the procedural protections included within the District's Code of Conduct (e.g., conflict resolution and student/parent grievance procedures) before an additional suspension is imposed upon B.W. Consistent therewith, it is understood that the District shall also fairly investigate and, when necessary, take action in response to any and all claims B.W. may, in the future, have regarding the behavior of other students, teachers, and/or administrators, without retaliation against B.W. for making such claim(s). It is understood that such claims will be considered, investigated, and acted upon in conformity with the District's Code of Conduct in a fair, reasonable, and non-discriminatory manner.

2. The Parties agree that the October 17. 2019 one (1) day in-school suspension for physical disrespect towards a staff member will remain part of B.W.'s student record, regardless of whether the October 15, 2019 and October 16, 2019 two (2) day out-of-school suspension is removed from B.W.'s student record pursuant to Paragraph l, above. The Parties further agree, however, that in accordance with N.J.A.C. 6A:32-7.7(d), Parents shall also be

permitted to submit a written statement regarding the disciplinary action taken by the District with respect to student B.W. for the incidents occurring in October 2019, which will be placed in 8.W.'s student file and produced to any third party, including prospective colleges. requesting student records referencing discipline, suspensions. etc. The Dislrict further agrees that B.W. will not be denied access to any class that he is othecwise academically qualified to take because of his prior suspensions.

3. In consideration of the above, Parents. individually and on behalf of B.W., hereby fully and completely release the District, its members, officers, administrators, agents, servants, employees, or assigns from any and all claims they have or may have accrued against the District, under any law, regulation, or legal theory, and including. without limitation, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.§ 794(a), §705(8), the Family Education Rights and Privacy Act, 20 U.S.C. §1232g. *et seq.*, 29 U.S.C. §794(a). 42 U.S.C. §1983, 42 U.S.C.§1988, 29 U.S.C.§705(20), the Individuals with Disabilities In Education Act ("IDEAj , 20 U.S.C. §1400, *et seq.*· the Americans with Disabilicies Act, 42 U.S.C.§12132, *et seq.*, the Rehabilitation Act of 1973, 20 U.S.C. §7801, Title Il of the Americans with Disabilities Act, 42 U.S.C. §12132, et *seq.*, N.J.A.C. 6A:14-1.l, et *seq.*, N.J.A.C. 6A:l4-3.7, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, *et seq.*, the Americans with Disabilities Act, 42 U.S.C. §621, *et seq.*, all as amended, any statutes of New Jersey including but not limited to the New Jersey Law Against Discrimination, N.J.S.A. 10:S-l, et *seq.*, or any other claims which have been or could have been asserted by B.W. or the Parents on behalf of 8.W., in any forum arising out of or coMccted with B.W.'s education by the District, including but not 1imited to, claims for attorney's and other professional fees and costs, or to the extent

pcnnitted by applicable law, through the date of this Agreement so long as the District fulfills the obligations set forth herein.

4. In consideration of the above, the District, its members, officers, administrators, agents, servants, employees, or assigns hereby fully and completely release Parents, individually and on behalf of B.W., (hereinafter "Petitioners") from any and all claims they have or may have accrued against Petitioners under any law, regulation, or legal theory, and including. without limitation, Section 504 of the Rehabilitation Act of 1973, 29 **U.S.C.§** 794(a), §705(8), the Family Education Rights and Privacy Act, 20 **U.S.C.** §1232g, *el seq.,* 29 **U.S.C.** §794(a), 42 **U.S.C.** §1983, 42 **U.S.C.** §1988, 29 **U.S.C.** §705(20), the Individuals with Disabilities In Education Act ("IDEA"), 20 **U.S.C.** §1400, *et seq.,* the Americans with Disabilities Act, 42 **U.S.C.** §12132, *et seq.,* the Rehabilitation Act of 1973, 20 U.S.C. §7801, Title II of the Americans with Disabilities Act, 42 **U.S.C.** §12132, *et seq.,* N.J.A.(;. 6A:14-l.1, *el seq.,* N.J.A..C. 6A:14-3.7, Title VII of the Civil Rights Act of 1964, 42 **U.S.C.** §2000, **el** *seq.,* the Americans with Disabilities Act, 42 **U.S.C. §621,el seq.,** all as amended, any statutes of New Jersey including but not limited to the New Jersey Law Against Discrimination. *N.J.S.A.* 10:5-1, *el seq.,* or any other claims which have been or could have been asserted by the District against the Petitioners in any forum arising out of or connected with B.W.'s education by the District, including but not limited to, claims for attorney's and other professional fees and costs, or to the extent permitted by applicable law, through the date of this Agreement so long as Petitioners fulfill their obligations set forth herein.

S. The Parents further agree, jointly and severally, to indemnify and hold forever hannless the District, its members, officers, employees. administrators, agents, servants, and

assigns from and against any and all claims, complaints, suits, demands, costs, expenses, evaluations, or legal fees, penalties, losses. damages, judgments, challenges, or liabilities of any kind, successful or unsuccessful, brought or made by anyone, including B.W. or anyone acting on behalf of B.W., at any time subsequent to the effective date of this Agreement, and in any judicial or administrative court, tribunal, or other forum, in connection with or in any way related to the duties and responsibilities of the District toward B.W. including but not limited to, claims or actions arising under the Individuals with Disabilities Education Act (..IDEA"), 20 U.S.C. § 1400 et seq., N.J.S.A. ISA:46-1 et seq., or any federal or state administrative regulations promulgated thereunder, 34 C.F.R. § 300.1 et seq., N.J.A.C. 6A:14-I et seq.• claims or actions arising under Section S04 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., or any federal or state administrative regulations promulgated thereunder, 34 C.F.R. § 104.1 et seq.• claims or actions for compensatory education, claims or actions arising under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, or any federal administrative regulations promulgated thereunder, 34 C.F.R. § 99 et seq., claims or actions arising under the New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 et seq., claims or actions arising under the New Jersey Law Against Discrimination (..NJLAD"), N.J.S.A. 10:5-1 et seq., claims or actions arising under the Anti-Bullying Bill of Rights Act (..ABBRA"), N.J.S.A. lSA:37-13 et seq.• claims or actions arising under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 et seq., claims or actions arising under 42 U.S.C. § 1983, claims or actions for personal injury or property destruction. or any other claims or actions whether brought pursuant to statute, common law, or otherwise, through the date of this Agreement so long as the District fulfills the obligations set forth herein.

6. The District, its members, officers, employees, administrators, agents, servants, and assigns further agree, jointly and severally, to indemnify and hold forever hannless the Petitioners from and against any and all claims, complaints, suits, demands, costs, expenses, evaluations, or legal fees, penalties, losses, damages, judgments, chaltenges, or liabilities of any kind, successful or unsuccessful, brought or made by anyone, including the District, its members, officers, employees, administrators, agents, servants. and assigns at any time subsequent to the effective date of this Agreement, and in any judicial or administrative court, tribunal, or other forum, in connection with or in any way related to the duties and responsibilities of the Petitioners toward the Distrid, its members, officers, employees, administrators, agents, servants, and assigns, including but not limited to, claims or actions arising under the Individuals with Disabilities Education Act ("IDEA"), 20 U.$.C. § 1400 et seq., N.J.S.A. 18A:46-1 et seq., or any federal or state administrative regulations promulgated thereunder, 34 C.F.R. § 300.I et seq.• N.J.A.C. 6A:I4-1 et seq., claims or actions arising under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 ct seq., or any federal or state administrative regulations promuJgated thereunder, 34 C.F.R. § 104.I et seq.• claims or actions for compensatory education, claims or actions arising under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. or any federal administrative regulations promulgated thereunder, 34 C.F.R. § 99 et seq., claims or actions arising under the New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:IA-I et seq., claims or actions arising under the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:S-I et seq., claims or actions arising under the Anti-Bullying Bill of Rights Act (..ABBRA"), N.J.S.A. ISA:37-13 et seq.• claims or

actions arising under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 et seq., claims or actions arising under 42 U.S.C. § 1983, claims or actions for personal injury or property destruction, or any other claims or actions whether brought pursuant to statute, common law, or otherwise, through the date of this Agreement so long as Petitioner fulfill their obligations set forth herein.

7. The Parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of a hearing and civil litigation. It is understood that the execution of this Agreement does not constitute an admission by the District and/or by Petitioners. The District and Petitioners specifically disclaim any liability to one another except as set forth in this Agreement.

8. This Agreement contains the entire Agreement and understanding between the Parents and Respondent and constitutes a full and final Agreement on any and all issues. This Agreement shall be governed by the laws of the State of New Jersey.

9. The Parties have entered into this Agreement freely and voluntari]y 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 reprosentative of their choice and I that they reviewed this Agreement in detail with their counsel or representative and fully f understand its requirements and limitations.

10. 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.

11. This Agreement shall fully resolve all issues between the Parties, including all issues that were raised, or could have been raised, in a petition filed by the Parents.

12. This Agreement represents the compromise of disputed claims and shall never be treated as an admission of liability by either party for any purposes whatsoever. This Agreement cannot be construed or interpreted as an admission on the part of the District.

13. The "WHEREAS" clauses of this Agreement are provided merely for background purposes, and it is expressly understood that such clauses are not material tenns and conditions of this Agreement and shall carry no legal force and effect.

14. The Parents acknowledge that they have read and understand the tenns of this Agreement, that they have had the opportunity to have the Agreement reviewed by counsel, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

1S. No party shall be deemed a "prevailing party" as a result of this Agreement.

16. The Parents agree that the tenns of this Agreement shall remain strictly confidential to the fullest extent pennitted by law, and they shall not share or communicate the tenns of same with any other individual, unless enforcement of same is sought by either party in a court of law. In the event that this term is violated. all responsibility of the District shall be void.

17. 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.

18. 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 shalt be affected by such a ruling and shall remain in full force and effect. This Agreement may only be amended in writing by way of a document signed by all Parties.

[INTENTIONALLY LEFT BLANK]

IN WITNESS HEREOF, the Parties have set their hands this _ day of___ _ 2021.

BY: _____ DATED: 12/13/21
Paul Narwid, President
Northern Burlington County Regional School District Board of Education

BY: _____ DATED: 12/13/21
Richard Kaz, Board Secretary
Northern Burlington County Regional School District Board of Education

BY: _____ DATED: 11/20/24
A.N. o/b/o B.W., Parent

BY: _____ DATED: __ f_l ,/_i_.__
J.W. o/b/o B.W., Parent

NORTHERN BURLINGTON COUNTY
REGIONAL SCHOOL DISTRICT
Columbus, New Jersey 08022

BOARD OF EDUCATION REGULAR MEETING MINUTES
12/13/2021

WHEREAS, a dispute arose regarding dlsciplinaiy action taken by the Northern Burlington County Regional School District Board of Education (hereinafter "Board") with respect to student B.W., which culminated in the filing of a Petition by A.N. & J.W.o/b/o B.W. {hereinafter, "Petitioners") with the New Jersey Department of Education Office of Controversies and Disputes;

WHEREAS, the Petitioners and the Board have negotiated in good faith concerning this matter and have a desire to settle this matter in an amicable way; and

WHEREAS, a settlement agreement was entered into and is attached as Exhibit "A:

NOW, THEREFORE, be it RESOLVED by the Northern Burlington County Regional School District Board of Education on this 13th day of December 2021, as follows:

1. The Settlement Agreement between the Northern Burlington Gounty Regional_School District Board of Education and Petitioners is hereby approved.

Motion: Mr. Spence **Second:** Mr. Nowak **Roll Call:** Unanimous

CERTIFICATION:

I hereby certify that the foregoing is a true copy of a Resolution passed by the Northern Burlington County Regional Board of Education on December 13, 2021.

Richard J. Kaz, Jr.
Board Secretary

Date: December 16, 2021

13-22

OAL Dkt. No. EDU 09791-20
Agency Dkt. No. 203-9/20

New Jersey Commissioner of Education

Final Decision

Guyberte Piverger,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

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. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that the Agreement references actions that were to take place in a time frame that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

ff IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 20, 2022
Date of Mailing: January 20, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09791-2020

AGENCY DKT. NO. 203-9/20

GUYBERTE PIVERGER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Stuart S. Ball, Esq., for petitioner

Arsen Zartarian, Esq., for respondent (Brenda C. Liss, Office of the General Counsel/Newark BOE, attorneys)

Record Closed: December 8, 2021 Decided: December 10, 2021

BEFORE **SARAH H. SURGENT, ALJ:**

On September 23, 2020, petitioner Guyberte Piverger filed a petition with the Commissioner of Education challenging the Board of Education of the City of Newark's (Board) June 23, 2020 decision to withhold her salary increment for the 2020-2021 school year. On October 9, 2020, the Board filed an answer to the petition. The

Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on October 13, 2020, to be heard as a contested case. Following three telephonic conferences with counsel, the matter was set down for a hearing in December 2021. On November 4, 2021, counsel for the Board submitted the fully executed Settlement Agreement (Settlement), along with the Board Resolution approving the Settlement, (C-1), which are attached hereto and fully incorporated herein.

Having reviewed the record, the terms of the Settlement with the parties on the record on December 8, 2021, and having heard the parties' oral waivers of the filing of any exceptions, 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; and

3. The parties have voluntarily waived their rights to file any exceptions.

I **CONCLUDE** that the 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 its 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(c).

Sarah H. Surgent

December 10, 2021
DATE

SARAH H. $URGENT, ALJ

Date Received at Agency:

Date Mailed to Parties:

SHS/mel

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

C-1 Settlement Agreement, received by the Office of Administrative Law on November 4, 2021

NEWARK BOARD OF EDUCATION
Office of General Counsel
765 Broad Street, 7th Floor
Newark, New Jersey 07102
(973) 733-7139
Attorneys for Respondent

GUYBERTEPIVERGER Petitioner, **v.** NEWARK BOARD OF EDUCATION, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDU-09791-2020 N Agency Ref. No. 203-9/20 **SETTLEMENT AGREEMENT**

The parties involved herein have voluntarily resolved all disputed matters and enter into the following Settlement Agreement (the "Settlement Agreement") that fully disposes of all issues in controversy between Guyberte Piverger ("Piverger") and the Board of Education of the City of Newark, County of Essex (the "Board"):

1. Piverger has resigned from her tenured position effective July I, 2021. Attached is a copy of Piverger's request for resignation. (Exhibit A). Piverger's separation from employment will be deemed a voluntary resignation in good standing. Other than as required by law, upon inquiry from any third parties, the Board will only confirm Piverger's employment, position, title, salary and dates of employment.

2. Piverger also agrees to withdraw with prejudice any and all claims or suits that he may have previously filed against the Board that are still pending in any and all comts and/or before any and all agencies with the exception of workers' compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the Board and Piverger, including this Petition, challenging Piverger' withholding of increment. Should Piverger fail to submit letters of withdrawals for any such pending claims or suits, this Settlement Agreement will serve as Piverger' formal written notice of withdrawal of those pending claims or suits, except for workers' compensation claims.

*t!.-J_*

3. In exchange, upon final execution of this settlement agreement by the Board, the Board will restore one-half of Piverger's salary increment for the 2020-21 school year through her date of resignation on July 1, 2021. As a result, Piverger will receive $1,000 minus standard withholdings and deductions, including required pension contributions.

4. As of the date of her resignation, all of Piverger's employment rights, including but not limited to salary, insurance coverage, tenure and seniority, have permanently ended.

5. Piverger agrees that she will not apply for reemployment with the Board at any time. Specifically, Piverger will be considered to have permanently resigned from her tenured position as a result of this Settlement Agreement. If Piverger does apply for reemployment with the Board and is approved for employment in any capacity, the terms of this Settlement Agreement shall control and be grounds for immediate termination of Piverger's employment.

6. This Settlement shall not constitute a precedent in any matters involving other employees.

7. Except as noted above, Piverger waives all claims of any nature against the Board with regard to her employment with and/or her separation from the District, including fees, or other monetary relief, with the exception of workers' compensation claims.

8. By entering into this Settlement Agreement, and in exchange for good consideration as set forth above, the sufficiency of which is hereby acknowledged by the parties, Piverger releases and discharges the Board, the Board Superintendent, its Board of Education and its Board members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that he has or may have against the Board regarding her employment with the District. 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 Piverger' employment with the Board and separation from the Board except for workers' compensation claims. It specifically includes, without limitation, all claims which

Piverger 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 Refo1m 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; New Jersey Wages and Hours Law, unemployment compensation laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/ contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment by and the termination of her employment with the District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for workers compensation claims. Piverger agrees to save, hold harmless and indemnify the Board for any legal costs and attorneys' fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

9. It is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any

other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the Board based upon any of the above-released claims, Piverger agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Piverger of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Piverger acknowledges that he: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives her right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty one days within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Piverger understands that he may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven-day period.

11. 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.

12. This Settlement Agreement constitutes the full agreement between the parties, and shall be construed and enforced in accordance with New Jersey law.

13. If any provision or portion of a 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 or remaining portions of a provision will continue and remain in full force and effect.

14. This Settlement Agreement is subject to final approval by the Board and will only become effective upon the approval of the Board. Any disapproval by the Board shall not interfere with the rights of either party to pursue the matter further.

Dated: 9/7, 01

GUYBERTE PIVERGER

Dated: ~~1/1/2, 01~~

Attorney for Guyberte Piverger

Dated: - - - - - -

DAWN HAYNES
Board President

Dated: 9/15/24

ARSEN ZARTARIAN
Attorney for Newark Board of Education

CERTIFICATION

I, GUYBERTE PIVERGER, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and tenns. I acknowledge that my attorney 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 tdh foregoing statements made by me are wil U¥ false, I-Zam subject to pums ment.

DATED 9'/7/::ZI ctGf-cc dt 'ctw9<-Y

E R U PIVERGER

Newark

REVIEW AGENDA ITEM

[Age"da] [« Previous] 12.4 Resolution of the Board of Education of the C v [Next Item»] t!lPrint

Meeting Date: 8/26/2021 - 6:00 PM

Category: General Counsel • Legal • Votes

Type: Action

Subject: 12.4 Resolution of the Board of Education of the City of Newark, County of Essex, Approving Settlement Involving Employee No. 33369 and Directing Its Implementation

Strategic Plans:

Enclosure

File **Attachment:**

Summary: WHEREAS Employee No. 33369 was a tenured teacher employed by the Board of Education of the City of Newark, County of Essex ("Board");
WHEREAS the Board withheld the salary increment of Employee No. 33369 for the 2020-2021 academic year;
WHEREAS Employee No. 33369 challenged the increment withholding by filing a Petition with the Commissioner of Education, and the matter Is currently pending in the Office of Administrative Law;
WHEREAS Employee No. 33369 submitted her resignation, effective July 1, 2021, and the Board accepted her resignation;
WHEREAS, subject to approval by the Board, the parties have resolved all matters In dispute by way of Settlement Agreement providing, among other things, for the restoration of one-half of the salary Increment withheld In exchange for a full release of any and all claims and rights;
WHEREAS this settlement is in the best interests of the Board and the public, since it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public.

Funding:

Recommendation to the Board: NOW THEREFORE, BE IT RESOLVED that the Board hereby authorizes and approves the settlement with Employee No. 33369 with the terms as set forth above and authorizes the President to execute said Settlement Agreement on its behalf; and the Board authorizes and directs implementation of the settlement In accordance with the terms of said Settlement Agreement.

Approvals:

Recommended By:

Signed By: *Signatme.*
Pamela Luke • Executive Legal Assistant

Signed By: *Si911.atul<1.*
Brenda Liss • General Counsel

Signed By: *Sl91iatm1t*
Roger **Leon** - Superintendent

Vote Results:

Original Motion
Member **Daniel Gonzalez** Moved, Member **Asia** J. **Norton** seconded to approve the **Original** motion 'NOW THEREFORE, BE IT RESOLVED that the Board hereby authorizes and approves the settlement with Employee No. 33369 with the terms as set forth above and authorizes the President to execute said Settlement Agreement on its behalf; and the Board authorizes and directs implementation of the settlement in accordance with the terms of said Settlement Agreement:. Upon a Roll-Call Vote being taken, the vote was:
Aye: 7 Nay: o.
The motion **Carried** 7 • 0

flohlsha Johnson	**Yes**
Dawn Haynes	Yes
Asia I. Norton	**Yes**
Shayvonne Anderson	Yes
A'Dorlan Murray Thomas	Yes
Hasanl **Council**	**Yes**
Daniel Gonzalez	**Yes**

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Strategic Plans

14-22
OAL Dkt. No. EDU 03010-21
Agency Dkt. No. 24-2/21

New Jersey Commissioner of Education

Final Decision

Alaric Chuey,

Petitioner,

v.

Board of Education of the City of Plainfield, Union County,

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. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that the Agreement references actions that were to take place in a time frame that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, 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: January 20, 2022
Date of Mailing: January 20, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03010-2 \
AGENCY REF. NO. 24-2/21

ALARIC CHUEY,
Petitioner,

v.

BOARD OF EDUCATION OF THE
CITY OF PLAINFIELD, UNION COUNTY,
Respondents.

Michael T. **Barrett,** Esq . for Petitioner (Bergman & Barrett, attorneys}

Ramon E. **Rivera,** Esq., for Respondent (Scarinci & Holenbeck, attorneys)

Record Closed: November 30. 2021 Decided: December 9, 2021

BEFORE **JOHN P. SCOLLO,** ALJ:

NATUREOFPROCEErnNGS

Petitioner alleges that he has been wrongfully suspended by the Respondent, Board of Education, City of Plainfield.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (GAL), where it was filed on March 17, 2021.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached Stipulation and Settlement Agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that Petitioner's petition is withdrawn 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.

December 9. 2021
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: 12-15-21

Date Mailed to Parties: 12-15-21
db

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Release (hereinafter referred to as the ..Agreement") is entered into this ")..) r ay o f f) Nht/ 2021 between the Plainfield Board o f Education (hereinafter referred to as the '·Board", '·Employer" or the -District"), and Alaric Chuy (hereinafter referred to as ·Thuy", or the ··Employee'·).

WHEREAS, Chuy is a tenured teacher who has been employed by the District since 2007; and

WHEREAS, on or about October 26, 2020, Chuy was evaluated by Dr. Allison Myles, D.O. of Alexander Road Associales in Princeton, New Jersey ("Evaluation'·); and

WHEREAS, on or about December 7, 2020, on the basis of the Evaluation, Dr. Myles deemed Chuy was not fit for duty and as a result. Chuy was subsequently placed on sick leave; **and\VHEREAS,** Chuy filed the instant matter on February 16, 2021 ("Verified Petilion"), contesting the determination that he is unfit and demanding, inter alia, that he be permitted to return to his position immediately ("Matter'"');

WHEREAS, Choy i,ubrnittcd to a Fitness for Duty Evaluation with Dr. Shankar Srinivasan, M.S.W., M.D. and has been deemed fit to return (a true and accurate copy o f the report is attached hereto as Exhibit A);

WHEREAS, the Parties. \\ishing to O\ltd the time, effort and expense o f litigation, have reached a mutual ag1ccmcnt to settle the above Malter with prejudice; and

NOW "'HEREFORK in .:onsideration of covenants, agreements and representations cnntained herein. the parties hereto, subject !ti tl·e tcnllS and conditions hereof and intending to be legally bound. hereby, agree as follows:

I. TERMS.

a. Chuy will be returned to work within the District within ten days of this Agreement.

b. Chuy will recei\:e his back pay salary retroacti\"e to September J, 2021, subject to any applicable withholding(s).

c. Fifteen (l 5) sick days will be reinstated to Chuy's sick bank together with any days to which he is entitled under the contract for the 2021-2022 school year; and

d. Chuy will withdraw or dismiss the Verified Petition with prejudice within five {5) days of the full-execution of this Agreement.

2. **COMPLETE RELEASE.**

In further consideration of the settlement hcrcinabove, the Employee, his heirs, assigns and agents (hereinafter referred to collecti\'ely as '·Relcasor") voluntarily cn1cr into this Agreement, and certify that Releasor has ncit been threatened or coerced into signing this Agreement, on the tenns which follow:

a. Releasor hereby releases, waives an~l discharges the Board, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the .. Releasees") from each and every claim. demand, cause of action, obligation, damage, complaint. expense. compensation or action or writ of any kind. nature, character of description that Releasor had, now hm:, or may in the future lmvc against the Rclcasec on account of or arising out of the E\·aluati011. This Complete Release includes, but is not limited to, any claim, demand, cause of action. obligation. damage, complaint. c pense, compensatio11, or m.:tion or writ of any kind, nature, charndcr lWdescription arising out or or under Fcdcrd. Slate or municipal srntutc cwordimrncc and any other law lwhether such he comnh\11 law, decisi0nal l:m or

statutory law). rule. regulation, executive order or guideline. and any and all claims for attorneys' fees and costs arising from the above acts including. but not limited to:

i. Any claim, cause of action. demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an indi\'idual's race, creed. color, religion, sex. national origin, ancest1y, age, marital status, affecllonal or sexual orientation, familial status, handicap. atypical hereditary cellular or blood trait or liability for service in the Anned Forces of the United States.

ii. An) clmm, cause of action, demand or complaint arising out of or under Title Vll of the Civil Rights Act of l964 (Title VII) or the Civil Rights Act of l991, as amended, which, among other things, prohibits discrimination in employment on account of a pcrson·s race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which, among other things. prohibits discrimination in employment on account ofa pcrson·s age.

iv. Any claim, cause of action. demand or complaint arising out of or under the Federal Amcticans with Disabilities Act (ADA) which, ,m10ng other things. prohibits discrimination in cmpln>·ment on account of a person·s di ability or handicap.

v. Any claim, cause of act inn, de1•u111d or C\implaint arising out of or under the Federal Fam,:y -nd Medical LeCT\e Act (F\11 ,\) which, among other things, entitles an employee to take re;;isonabk leave for medical rea nns for the bi11h or ·doption of" child. and for the can: of a child. spouse or parent "ho has a seriouj health condition, and any dai111, cause of action. dem,111d or complaint arising under the Ne,, Jersey family Leave Act.

, 1. Any claim. cause of action, demand or complaint arising out of or under the Federal Older Worker Benefit Protection Act (0 \ \ BPA) which, among other things. amends pro\'isions of ADEA and prohibits discrimination in employment and employment benefits on account of a person· s age.

vii. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among other things, prohibits retaliatory action by an employer against an employee who objects to practices that he/she reasonably believes are incompatible with a clear mandate of law or public policy concerning the public health, safety or welfare.

The afore<;ai<l list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2.a. shall not be diminished thereby. The above release of claims contained in 2.n. slrnll not apply to bar En:ployec from the filing of a worker·s compensation claim.

b. Rcleasor has not and slwll not hereafter seek money damages against the Board or the Relc,,sces in nny n:atter lodged within t:lc New Jersey Division on Civil Rights, the L.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local corn1 or agency\\ hich has been settled herein_

If Releaso1 violates 1his Complete Relea e by tiling any claim. charge or compla1111 011 account of, or arising out ot the fl.latter a, prohibited above, Rclcasor agrees to pay all i.:usts nnd expenses of defending agal'11st the suit '111curr..:d by Board al1d·or the Relcasccs, including rc:asona b k attorney· fres.

J. t\O DISPARAGING STATE♦IENTS.

Chuy agrees that he will not make any statemcnt(s) that has, have or can be expected to have the effect of disparaging the Board or any of its representatives, agents and employees.

4. CONFIDENTIALITY

Chuy shall keep the tenns and conditiom of this Agreement completely and strictly confidential, unless the disclosure is mandated by a court order, subpoena. enforcern ent of this Agreement or as may otherv,ise be required under law. Neither the tenns or conditions of this Agreement nor the fact of its existence shall be dh;closcd by C'huy to any person or entity, legal or natural, except for members of Emplo) e ·s financial consulta,:t:::., tax advisors and attorneys.

5. STIPliLATION OF DISMISSAL WITH PREJUDICE.

Within five (5) days of the execution of this Agreement by all parties, Chuy agrees to withdrawal or dismiss the Verified Petition with prejudice.

6. NON-ADMISSION

This Agreement is executed, and all consideration is given in final selllcment o f disputed claims arising from and/or related to the Ev.1luation, Verified Petition. and Matier action and shall 1101be co11strued as an admi5'.inn of any allcgn11on or ofliabili1:,.· by the Board. by whom any !:,1ch obligation or liability is expressly denied.

7. CONSULTATION WITII ATTORNEY.

Chuy has consulled \\ 1lh his Union and an attomcy with respect lo this Agreement and reviewed with them all the tcnns and conditions of thi5 1\grcemcnt prior to executing this Agreement.

8. CO\1PLETE AGREE:\IENT.

This Agrel.'rncnt contain the entire agreement hl.'tl1 cl•11Chuy and the Board. and cach of them. \\ ith respect to the subject mailer and supersedes all prior agreements N understandmgs

dealing with the same subject matlt:!r. Tht:!re is no agreement on the part of the Board to d o anything other than us 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. **1\-IODJFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

10. SEVERABILITY.

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, tenns, or provisions shall not be affected thereby and said illegal, unenforceable nr invalid part, tcnn, or provision shall be deemed not to be a part of this Agreement.

I L. CHIJY ATTESTS.

Chuy represents and warrants that he has carefully rend each and every provision of this Agreement and that he folly understands all of the tenns and conditions contained in each provision of this Agreement. Chuy represents and wammts that he enters into this Agreement voluntarily, of his own f'ee will, \\'ithout any pressure or coercion f'om nny person or entity including. hut not limited to, the Board and the Releasees.

12. ACCEPTANCE PERIOD

Chuy has the right 10 review and c,,nsidcr !his Agreement for u period of twenty-one (21) cakndur days after recci\·ing it. Chu} is a<h iscd to seek the ad\'icc of legnl counsel regarding this Agreement. lfChuy igns this Agreelm:111 hcfore twcnl)'•(mc t2 l) days hm c elaps tl fnm1 lhc date

1/25/2021

WAIVER

[illegible]

MARIE CURIE

[illegible]

Batista, Diana [OAL]

From:	mbar97@aol.com
Sent:	Tuesday, November 30, 2021 8:18 AM
To:	Batista, Diana [OALJ
Cc:	mhicks@sh-law.com
Subject:	[EXTERNAL] Chuy v Plainfield Bd of Ed
Attachments:	Chuy Settlement 11-29-21.pdf

Ms. Batista - Could you please forward the below communrcation to Judge Scollo. Thank you.
Michael T. Barrett, Esq./sd

Re: Alaric Chuy v Plainfield Bd of ED
OAL Dkt No.: EDU 03010-2021N
Agency Ref. No.: 24-2/21

Dear Judge Scollo:

With regard to the above matter, the parties have reached an agreement and I enclose a fully executed copy of the Settlement Agreement. The language in the agreement references a withdrawal or dismissal of the Verified Petition. I am prepared and would to prefer to withdrawal the Petition but await Your Honor's preference or directive.

Respectfully,
Michael T. Barrett. Esq./sd

15-22

Agency Dkt. No. 220-11/21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of Richard Wilder, School District of the City of Camden, Camden County.

For the Petitioner, Louis R. Lessig, Esq.

No appearance by or on behalf of Respondent, Richard Wilder

This matter was opened before the Commissioner of Education on November 24, 2021, through tenure charges of unbecoming conduct certified by Katrina T. McCombs, Superintendent of the Camden City School District ("District"), together with supporting evidence against respondent, Richard Wilder, a tenured teaching staff member in the District's employ. The District provided respondent with written notice of such certification at the respondent's current address, via certified and regular mail, on November 23, 2021.

On November 29, 2021, the Commissioner directed the respondent via regular mail to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.JA.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are /Ued with the Commissioner to file a written response to the charges with the Commissioner,* " and that failure to answer within the prescribed period would - absent granting of an extension for good cause shown - result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent was employed by the District as a tenured teacher. On June 25, 2021, the Principal of Camden High School was made aware that the respondent was

investigated by the Pennsylvania Department of Human Services for allegations of causing sexual abuse or exploitation of a child through any act or failure to act; the investigation concluded that respondent was "indicated" for sexual abuse and/or exploitation of a child. A determination of "indicated" means that sufficient evidence was obtained to support the conclusion that the alleged abuse occurred.

Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against him, the Commissioner finds that the District's charge of unbecoming conduct has been proven and overwhelmingly warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from his tenured position with the Camden City 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.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 20, 2022
Date of Mailing: January 20, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

16-22

Agency Dkt. No. 221-11/21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of Cory LaBov,
School District of the Borough of Woodbine,
Cape May County.

For the Petitioner, Michael P. Stanton, Esq.

No appearance by or on behalf of Respondent, Cory LaBov

This matter was opened before the Commissioner of Education on November 23, 2021, through tenure charges of unbecoming conduct certified by Dennis J. Anderson, Interim Superintendent of the Woodbine School District ("District"), together with supporting evidence against respondent, Cory LaBov, a tenured teaching staff member in the District's employ. The District provided respondent with written notice of such certification at the respondent's current address, via certified mail.

On November 29, 2021, the Commissioner directed the respondent via regular mail to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,* " and that failure to answer within the prescribed period would - absent granting of an extension for good cause shown - result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent was employed by the District as a tenured teacher. The

Statement of Evidence outlines various violations of board policy by the respondent, including respondent's failure to report to the District three separate arrests for violating a Judicial Order.

Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against him at the District level and before the Commissioner, the Commissioner finds that the District's charge of unbecoming conduct has been proven and overwhelmingly warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from his tenured position with the Woodbine 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.[1]

(LL Wv . fi.'6.

A C ; COMMISSIONER OF EDUCATION

Date of Decision: January 20, 2022
Date of Mailing: January 20, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.JSA.* 1SA:6-9.1. Under *N.JCtR.* 2:4-l(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

19-22

IN THE MATTER OF TENURE BETWEEN

Marguerite Simpson

-And-

Bayonne Board of Education

Agency DKT. NO. 184-8/19

Arbitrator: Kinard Lang

Hearing Dates: June 8-9, July 12-13, and August 4, 2021

Hearing Location: Bayonne School District Offices

PARTIES: Ryan Carey, ESQ. and Deborah J. Bracaglia - Bayonne Board of Education

Colin Lynch, Esq. - Marguerite Simpson

ISSUE: Is the Settlement Agreement facilitated by the Arbitrator, and finally ratified by the parties on January 6, 2022 in conformance with the standards established in the matter entitled *In re Cardonick,* State Board decision of April 6, 1983 {1990 *School law Decisions* (S.L.D.) 842, 846?

The Settlement, evidence and arguments in this Matter have been appraised in light of the following *Cardonick Standards:*

I. *'Accompaniment by documentation as to the nature of the charges.*

The record in this matter contains detailed documentation of the charges against the Respondent.

II. *(Explication of the circumstances justifying settlement or withdrawar'.*

The following provisions of the parties' Agreement describe appropriate circumstances for their Settlement:

3. ***Terms*** *vi.- b.*

The Board of Education and Simpson have indicated their mutual desire to resolve the matters of I/MIO Bayonne Board of Education and Marquerite Simpson, Agency Docket No. 184-8/19 and Simpson v. Bayonne Board of Education, Docket No. HUD-L-2439-20 now and without the parties incurring the additional time, effort and expenses of continued litigation, including any potential appeals, attorney fee applications and any and all other claims, charges, complaints, grievances, disputes or other potential actions of any kind whatsoever."

III. *consent of both the charged and charging parties."*

The Settlement Agreement contains the signatures of the Respondent and President of the Bayonne Board of Education, showing their acceptance.

IV. */ndication the charged party entered into the agreement with a full understanding of his or her rights.*

Respondent affirms with her signature and acceptance of Settlement item 21, ***'ADEA Waiver",*** extracted below, full cognizance of her rights:

"... */ acknowledge that I am releasing all rights and claims arising under the Age Discrimination in Employment Act. To satisfy the requirements of the Older Workers' Benefit Protection Act, 29 U.S.C. 626(f), the parties agree as follows:*

i. /acknowledge that I have read and understand the terms of this Agreement"

V. *"A showing the agreement is in the public interest."*

Public interest is vouchsafed in Agreement section II above, as well as the following language in Agreement provision h.:

"This Agreement is in the public interest for the reasons cited above and because it is intended to save public monies that would otherwise be spent on such matters, ends the contention that surrounds this matter, and ***frees Board staff to pursue the education of the students of Bayonne*** *as opposed to addressing issues related to this litigation.* (Emphasis added)

VI. *"If the charged party is a teaching staff member, a showing 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".*

Item ***"3. Terms*** *vi.- i."* of the parties' Settlement Agreement fully and clearly addresses State Board of Examiners contingencies; saying in pertinent part:

> *"Simpson is hereby advised (and has been advised by her counsel prior to entering into this Agreement) 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..."*

AWARD

I find the parties' **SEPARATION AGREEMENT AND UNCONDITIONAL RELEASE,** DOCKET NO.: HUD-L-2439-20- SUPERIOR COURT OF NEW JERSEY HUDSON COUNTY- LAW DIVISION, in full conformance with the *"Cardonick Standards".*

Kinard Lang, Arbitrator/ Mediator January 22, 2022

MARGUERITE SIMPSON Plaintiff, vs. BAYONNE BOARD OF EDUCATION; JANE DOE r.v (these names being fictitious as their present identities are Wlknown); JOHN DOE 1-V (these names being fictitious as their present identities are unknown); XYZ CORPORATION I-V (these names belng fictitiouss thetr present identities are unknown) Defendants.	SUPERIOR COURT OF NEW JERSEY HUDSON COUN1Y - LAW DMSION DOCKET NO.: HUD-L-2439-20 CivilAction SEPARATION AGREEMENT AND UNCONDffIONAL RELEASE

1. Releasor an<l B,elras : This SETTLEMENT AGREEMENT and GENERAL RELEASE (the "'Release" or"Agreement"), is given by the releasor(s). The Releasor is: MARGUERITE SIMPSON, referred to as "I","Me", "My" or "Simpson". The Releasees, hereinafter referred to as "Releasees", "You/' or "Board of Education" are: the BAYONNE BOARD OF EDUCATION and all of the BAYONNE BOARD OF EDUCATION'S departments, divisions, agencies, officials, employees, insurers, third-party administrators, agents, and attorneys past and present.

Re!M$e; I release and give up any and all claims and rights which I may have against You. This releases all claims, demands, damages, causes of action, or suits which have been or could have been brought related to the events that ga1/e rise to the Complaint, including claims for attorney's fees and costs; any claims of which I am not aware; and any claims not mentioned in this Release. This Release applies only to claims resulting from anything which has happened from the firstdate of my employment with You up through the present date. This Release and encompasses all claims resulting from or arising out of:

i. My employment relationship with You; including claims for breach of contract or promise, real or implied; claims for fraud. misrepresentation, physicalor personal injury, emotional distress, libel, slander, defamation, tortious interference, and similar or related claims; claims for wrongful termination; claims for discrimination, harassment or retaliation of any kind (including any claim of retaliation for reporting a work-related injury or filing bis workers' compensation claim); claims arising under the Fair Labor Standards Act and state wage and hour laws, the Employee Retirement Income Security Act (except for vested ERISA benefits}, the O>nsolidated Omnibus Budget Reconciliation Act, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, ntle VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Rehabilitation

Act, the Reconstruction Era Civil Rights Acts, including 42 U.S.C. §1981 and 42 U,S.C. §1983, the Equal Pay Act and any similar state laws, the Family and Medical Leave Act and any similar state laws, the Fair Credit Reporting Act and any similar state laws, all New Jersey state wage and hour laws, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, and any amendments to any of the above laws; and claims under any constitution, common law or any other federal, state or local law, including those not specifically listed above which were the subject of a suit captioned Marguerite Simpson v. Bayonne Board of Education et al. in the Hudson County Superior Court, Docket No. HUD-L-2439-20, or which claims could have been raised in that suit.

ii. Any and all claims and/or liens, past current and/or future arising out of this litigation or asserted against the proceeds of the settlement and I agree that such claims and/or liens fl.re to be satisfied by me, including but not limited to any Medicare or Medicaid claims and/or liens, Worker's C.Ompensation 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.

iii. I further release all claims which might otherwise have been brought in the future by my &tate or my family members under Mauro v. Raymark Industries, 116 HJ.. 126 (1989) and Alfone y. Sarno, 87 NJ:. 99 (1981) for past, present, or future losses, damages, or injuries. This includes all possible future claims for wrongful death.

3. Terms: Upon approval of this Agreement by the Bayonne Board of Education, the terms of this Agreement are as follows:

i. In consideration of my releasing the claims enumerated in this Release, You have agreed to pay me, in full satisfaction of all of my claims, including my claims for ba k pay, costs and attorney's fees, a total of **$150,000.00** within **30** days from when the Board of Education and Arbitrator approve this Agreement, **whichever is later. I acknowledge that this is consideration to which I am not** otherwise entitled. This sum represents full payment, including all attorney fees, costs, and expenses. I agree **that** I shall not seek anything further from You. Payment shall not be made unless counsel for Releasees has received this Release signed by Me and notarized, W-9 and 1099 forms, a Charlie Jones search, a Medicare lien search. and a signed Stipulation of Dismissal with Prejudice. Checks shall be remitted by the Releasee's insurance carrier and be payable as follows:

   a. **$150,000.00** for Marguerite Simpson issued in a check made payable to the law firm of O'Connor, Parsons, Lane & Noble, LLC as Counsel for Plaintiff, Marguerite Simpson.

ii. By signing this Agreement, I hereby tender my irrevocable resignation effective December __ , 2021, which is annexed hereto as Attachment A My resignation and revocation of any and all tenure rights and seniority to any **position I may have had or shall have** rights to **on** the effective day of my

resignation shall be effective and irr.evocable upon execution and approval of this Agreement by the Bayonne Board of Education.

iil. As of the date of my resignation, all of my employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end. This Agreement shall not constitute a precedent in any matters involving other employees.

iv. The :Bayonne Board of Education agrees to respond to any inquiries from potential employers regarding Simpson's employment history Nib a neutral reference, limiting all such responses to the dates of her employment with the Board, positions, titles, salary and resignation date.

v. I shall authorize and instruct my legal counsel of record to sign a Stipulation of Dismissal with Prejudice and Without Costs and Attorney Fees as to all claims and as to all Board employees and officers named in Marguerite Simpson v. Rayonne Board of Educationetal,, Docket No. HUD-L-2439-20 and to provide same to counsel for the Board at the time of execution of this Agreement. The Stipulation of Dismissal shall be filed by my counsel upon receipt of the settlement check.

vi. The Bayonne Board of Education shall withdraw its action before the ComIDissioner of:Education captioned I/M/O Bayonne Board of Education and Marguerite Simpson, Agency Docket No. 184-8/19, subject to the approval of Arbitrator Kinard Lang.

In accordance with N.J.A.C. 6A 3-5.6 and In re Cardonick. State Board decision of April 6, 1983 (1990 School Law Degsions (S.L.D.) 842, 846), the Bayonne Board of Education agrees to withdraw the tenure cuITently pending against Marguerite Simpson based on consideration of the following:

a. A copy of the tenure charges currently pending against Simpson, which are annexed to this Agreement, as Attachment B.

b. The Board of Education and Simpson have indicated their mutual desire to resolve the matters of I/M/O Bayonne Board of Education and Marguerite Simpson. Agency Dock No. 184-8/19 and Slmpson v. 2ro:onne. Board of f;duc;atjon. Docket No. HUD-L-2439-20 now and without the parties incurring the additional time, effort and expense of continued litigation, including any potential appeals, attorney fee applications and any and all other claims. charges, complaints, grievances, disputes or other potential actions of any kind whatsoever.

c. While no party admits any liability or wrongdoing as to any othl?r party, the Board of Education and Simpson thus have good and valid reasons to desire prom.Pt and-amic.able resolution of the pending matters, including, but not limited to, to avoid the costs, risks and uncertainties of continued litigation.

d. Simpson enters into this Agreement to resign from her employment in consideration of the terms of this Agreement, her current age and her

conclusion that her continued employment with the. Board would not serve her personal **or** professional interests going forward.

e. Any and all medical records produced by Simpson during the course of discovezy **and the subject** of the Confidentiality **Agreement, shall** remafa confidential and shall be returned to Simpson care of her a.wgned attorney, Colin M. Lynch, **Esq.,** and/or destroyed.

f. Both parties consent to the within Settlement as evidenced **by** their signatures to the within Agreement.

g. As more specifically set forth in paragraph 21, Simpson enters into this Agreement with the advice of counsel and with a full understanding of her **tights.**

h. This Agreement is in the public interest for the reasons cited above and beeause **it** is intended to save public monies that would otherwise be spent on such matters, ends the contention that surrounds this matter, and frees **Board staff to pursul;"!** the education of the students of Bayonne as opposed to addressing issues related **to** this litigation.

i. Simpson is hereby advised (and has been advised **by** her counsel prior to **entering into tbis** Agreement) **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. In that regard, the Board will send the attached correspondence, Attachment C, to the State Board **of Examiners.** It **is** understood that the Board may need to communicate further with the State Board of Examiners with respect to the resolved Tenure Charges. The Parties acknowledge and agree that the Board must coopetate with any such request.

j. Simpson reserves all rights, if necessaey, to assert no action whatsoever should be taken **against** her certificates by the State Board of Examiners. In this regard, should such circumstances arise, Simpson asserts that she will contiriue to claim in that setting that all of her absences addressed via the tentire Charges were due to a disability for which she bas received medical trea,ment, and the Parties agree that her doing so will not constitute a **violation of this Agreement.**

vii. I agree and understand that as part of this Agreement I am separated from emplo yment, tenure and seniority rights with the Bayonne Board of Education, **and fUrther agrees** and understands **that I** will not **seek employment or** reemployment with the Bayonne Board of Education at any time now or in the future, in any capacity, including employee, independent contractor, volunteer, **and/ot vendor. I understand** that the Bayonne Board of Education has no obligation to consider any application for any position or to rehire, employ or otherwise permit me to volunteer in any capacity at any time hereafter.

viii. The payment of the foregoing Settlement Amount to Releasor **by** Releasees' **insurance earner shall** only be made **upon** the acceptance, **approval** and

ratification of this Agreement by Releasees and Arbitrator and subsequent to Releasor's fulfillment of all contingencies and obligations that are contained in this Agreement.

4. : I shall be solely responsible for the payment of appropriate taxes on this settlement; if any, and I agree and understand that the Releasees have not made any representation to Me regarding the tax: treatment of the sums paid pmsuant to this Release. In the event a claim for such truces, and/or penalties and interest, is assessed by any taxing authority, I agree to, and do hereby hold the Releasees harmless and indemnify Releasees against any and all tax liability, interest and/or penalties due from Me.

5. : I shall be solely responsible for the payment of any claims or liens that may be asserted st the proceeds of this settlement. In the event a claim or lien for such payment is asserted by anyone, including Medicare and/or Medicaid, I agree to make those payments and to defend and indemnify Releasees against any such claim or lien, including the payment of any fines, charges and attorney's fees. Failure to satisfy any such lien shall constitute a breach of this Release and I agree to pay all costs, interest and attorney's fees associated with any such claim or lien.

6. Attorney's fees: This Release includes all claims for attorney's fees and costs.

7. No Admission of Liability: This Agreement is not and shall not in any way be considered or construed as an admission of wrongdoing and/or liability by Releasees of any kind, including, but not limited to discrimination, retaliation, tortious conduct, or of any violation: of any laws, common laws, or federal, State, and local laws, statutes, regulations, or of any employment policies, Board policies, Board regulations, standard operating procedures, practices, contracts, or agreements, or of any alleged duties owed by Releasees, or of any unla'wful or wrongful acts whatsoever by Releasees. Releasees wholly deny wrongdoing of any kind. The Parties understand and agree that this settlement is the compromise of disputed claims, and that all payments made by the Releasees' insurance carrier on behalf of the Releasees are not to be construed as an admission of liability on the part of any party or parties hereby released, and that **the Releasees wholly deny any and ell liability whatsoever and intend merely to avoid** litigation and buy the peace. Accordingly, this Agreement shall not be used as an admission by any Party in any proceedings; however, this Agreement may be introduced in any proceedings to enforce the terms and conditions of the Agreement and/or used by any Party in connection with any proceeding and/or other enforcement or other action by or before any local, State, or federal agency and/or other like entity.

Releasor declares and represents that the injuries which she has alleged to have sustained are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite and in making this Agreement, it is understood and agreed that Releasor relies entirely upon her own judgment, belief and knowledge of the nature, extent and duration of any and all alleged injuries and liability therefor and is made without reliance upon any statement or representation of Releasees and/or Releasees' representatives.

Releasor further declares and represents that there may be unknown or unanticipated injuries to her that result from her employment by the District and, in making this

Agreement, Relea.sor understands and agrees that this **Agreement** is intended to seule her claims for any and all such injuries.

8. Dismissal **ofh)l Pending Matters** & **Covenant Not to Sue:** **I** hereby authorize **and** instruct **my legal counsel of** record **to sign a Stipulation of** Dismissal 'With Prejudice and. Without Costs and Attorney Fees as to all claims and as to all Releasees named in Maz:guerlte Simpson v, Bayonne Board of Education et al , Docket No. HUD-1 2439-20, and to **provide** same to counsel for Releasees at the time of **execution** of this Release. The **Stipulation** of Dismissal shall be filed **by** counsel for Releasees upon receiptofthe **settlement** cheeks as outlined above by my attorney. The Stipulations of Dismissal shall be filfld **by counsel** for Releasees upon tender **of** the **settlement check.** to **Releasor's** attorney. **Releasor** agrees not to appeal from the dismissal of, re-file, revive and/or reopen the above-referenced matters.

Releasor further agrees that neither she, nor any person, representative, organization, agency, or other entity acting on her behalf, will file, charge, claim or sue, or cause to **be** fil **charged,** claimed or sued, **any** other lawsuit(s), legal proceeding(s), action(s), grievance(s), or claim of any nature with any court, agency, and/or tribunal (including any actions for damages, attorneys' fees, injunction, declaratory, monetary, equitable, or other **relief)** against Releasees, based on any matter, fact, and/or event occurring prior to the effective date ofthis Agreement, whether now knovm or unknown, and/or involving any **continuing** effects of any acts or practices which may have arisen or occurred prior to the effective date of this Agreement, whether now known or unknown.

9. Confidentiality: I acknowledge thatthe terms ofthis Agreement, and the fact ofthis settlement, are confidential to the extent permitted by law. Accordingly, except as specifically permitted under **this** Agreement, or required **by** force oflaw, I agree not to disclose or cause to be disclosed, either directly or indirectly, to any person or **organization** (including but not limited to **any** current, fonner or future employee of Yours, and on any social media or Internet site) any infonnation regarding the settlement amount **or** other terms of **this** Agreement (collectively, "the Confidential Information"), and to respond to any inquiries regarding **the** disposition of the claims **contained in the Complaint** by **stating, ·The case is** over **[N] or Hit bas been resolved," and** nothing more.

i. I further agree that:

   a. I may disclose the Confidential Information to only **My** spouse, My family, My Counsel and **financial** advisors, and shall direct them to keep such **information** confidential, and shall inform them that I may be held responsible for any disclosure by them. and shall accept full and legal responsibility for any such disclosures;

   b. I may disclose the terms ofthis **settlement** to the extent necessary to enforce or challenge the terms of this Agreement, or to comply with a legal requirement that the Confidential Information be disclosed.

ii. ffl E PARTIES ACKNOWLEDGE THAT . ANY SETI'LEMENT PROVISION THAT MAY REQUIRE m E M TO KEEP 'IHE

SETTLEMENT AND UNDERLYING FACTS CONFIDENTIAL IS UNENFORCEABLE AGAINST THE EMPLOYER IF THE EMPLOYEE PUBUCLY.REVEALS SUFFICIENT DETAII.S OF ffl E CLAIM SO THAT THE EMPLOYER IS REASONABLY IDENTIFl.ABLE.

iii. The parties acknowledge that this Settlement .Agreement is considered to be a public document under the laws of New Jersey. Nothing shall prohibit the Board from disclosing the Agreement at its regular meeting as may be required .by the Open Public Records Act, N.J.S.,A. 47:1A-1 _gt, .s.eg. ("OPRA").

iv. Nothing herein shall restrict Me from discussing my job duties with the Bayonne Board of Education with potential future employers.

v. This Agreement shall not bar such disclosure as may be compelled by statute, court order, subpoena, or other lawful process; for compliance with applicable law or regulation; or in order to enforce this Agreement.

10, Non-Disparagement: Except as pennitted by Paragraph 9, Simpson agrees not to make critical, negative or disparaging remarks about the Releasees to any person ot entity, or on any social media or Internet site, including but not limited to comments about their related services, or business, or employment practices. The Bayonne Board of Education agrees that it will not authorize its Board members, agents, employees or representatives to make any disparaging statements about Simpson, and that it wm not ratify any disparaging statements about Simpson made by any party. If either party breaches this provision, it shall be a material breach of this Agreement and this provision shall no longer apply to the non-breaching party.

11. Ratification by l}oarg and [\rbitrQtor: This Agreement shall be subject to ratification by the Bayonne Board of Education and is without prejudice to any party if the terms are not ratified. Releasor is not bound by this Agreement until it has been ·.ratified by the Bayonne Board of Education and executed by all Releasees.

This Agreement is subject to final approval by the Arbitrator and will only become effective upon final approval by both the .Arbitrator and the ratification and formal approval by the Board.

12. References; It is understood and agreed that if the Bayonne Board of Education receives a request for reference for Me, it shall act pursuant to N.J.S.A. 18A:6-7,6 - 7.13 and regular policies and provide the following information in response: (a) My dates of employment with the Bayonne Board of Education; and (b) U t of all positions held by me.

13. Non-Assignm¢nt: I acknowledge that none of the proceeds given herein have been assigned.

14. Counterparts: This Release may be executed in any number of counterparts, each of which when executed and delivered shall constitute a duplicate original, but all counterparts together shall constitute a single Iu!lease.

15. Wh9i s,Doung: I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my-heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities} such as your heirs or the executor of your estate.

16. Seyerabiljtt: The provisions of this Release are severable and if any part of it is found to be illegal or unenforceable for any reason, the other provisions shall remain fully valid and enforceable.

17. Choisa, o f La.W: This Release shall be governed, construed, and enforced in accordance with the laws of the State of New Jersey, without regard to that state's conflict oflaws rules and principles.

18. Obligation to Meet and Confer: Any disputes arising out of this Settlement Agreement and General Release relating to the enforcement of its terms, including any issues axising after the date execution, shall be first be communicated between the parties through counsel in an effort to resolve such issues. In the event that issues arise requiring the parties to meet and confer, the parties agree to proceed in good faitb and make reasonable efforts to resolve such issues. You retain all enforcement rights in accordance with New Jersey law. Itl the event the terms of this Agreement are breached, the non-breaching party may move to enforce its rights in a court of law and the prevailing party shall be entitled to reasonable attorney fees and costs.

19. Child Supnort Certification: I hereby acknowledge and understand my obligation to comply with the legal requirements of N.J.S.A. 2A:17-56.23b, including, but not limite.d to, the requirement to perform a certified child support judgment lien search d to provide Releasees with said documentation prior to the Releasees' disbursement of the Payment. I agree that I shall direct my attorneys to perform the judgment search required by N.J.S.A, 2A:17-56.23b, and deliver a copy of the certification to Releasees' counsel. I further understand and acknowledge that, (a) no settlement fundsdue to me under this Release shall be released prior to the receipt of the judgment search certification, and (b) any fees incurred, and payments made, by Releasees in connection with N.J.S.A, 2A:17-56.23b shall be deducted from the payment prior to its disbursement to me.

20. Entire Agregment: This Release contains the entire agreement between the Releasor and Releasees and supersedes any prior written or oral agreements, understandings 0r arnmgements.

21. ADEAWaiver: I acknowledge that I am releasing all rights and claims arising under the Age Discrimination in Employment Act. To satisfy the requirements of the Older Workers' Benefit Protection Act, 29 U.S.C. § 626(f), the parties agree as follows:

i. I acknowledge that I have read and understands the terms of this Agreement.

ii. I represent that I have consulted with my attorney of record in the Action and have received all advice I deem necessary concerning this Agreement.

ill. I acknowledge that l have twenty-one (21) days to consider this Agreement, although I may, in the exercise of my own discretion, sign or reject it at anytime

before the ,expiration of the twenty-one (21) day period. I ackno..iedge that I have taken ~nmch time a necessarv to consider wheth•t' to enter into this Agreement and has chosen to enter-this Agreement freely, kno'"–ingly, and voluntarily.

i•t. For a seven (7) day period following the execution of this Agreement, I may TelOke this Agreement by delivering a written revocation to the law firms of O'Connor, Parsons, Lane & Noble, LLC. attention: R. Daniel Bause, &q.; •\.nderson. St Shah. LLC, attention: Shana T. Don. Esq. This .4.greement "'ill not become e.ffecUve or enforceable until after the end of this revocation period.

22. &ei'PeatioD P§'.i94: Releaser understands that oorsuant to the Older Workexs Benefit Pl'otectionAct of 1990, she is entitled to consult „.1th an attOrl1<'y of her choosing and that she will have twe.nty-one (21) days within which to fully c-onsider this -ement. Releasor shall have seven (7) days fo1lowing her signing of this Agreement to revoke this Agrecm.ent. and she agrees and understands that a revocation of this Agreement shall be submitted to Rcfoasees in '\\Titing '6ithin this seven (7) day revocation period. :Releasor may not waive this sc-.c-n (7) day revocation pe.riod, but Releasor may wai\re the twcnty•one (21) day period within whkh to consider the Agreement.

23. Simatm:g: 1 lmderstand and agree to the terms of this F.elease, have, had sufficient qpportunit;y to nwiewit 'lth counsel of my choi and sign it knowingly and -.."Olumadly. I have had sufficient opportunity to review· this Relea including but not limited to an opportunity to rC1ried\, it ,...,ith my attomer, seek his guidan<–e: and h we him aDS\\ter xny questions. I warrant that I am oflegal e nnd under no legal disability of any kind and I am fully competent to execute this Release. r agree and ac.wowledge that I have received at least 21 days to consider this Release. I agree and acknowledge that Imay rei.-oke this Release –..vitbiu 7 days of signing it. I agree and acknov.'1edge that this Release will nol become effecth- until the 7–day period bas elapsed.

IN 'WITNESS WHEREOF, and intending to be legally bound, thf Parties .ha,-e .executed this Settlemt:-nt. Agreement and Unconditional Release as· of the dates set forth below.

Marguerite Simpson
Dated: _____

STATE OF NEW JERSEY,
COUN!YOF : SS.:

I CERTIFY that on the 4 dayof_=/)_('t»\· _b_t_r_ _, 2021

Marguerite Simpson personally caine before me **and** acknowledged under oath, to satisfaction, that this **person** (or if more than **one,** each **person):**

(a) is name4 in and personally signed this document; and

(b) signed, sealed and delivered this document as her act and deed.

WmaryS ' •**Notary Public**

Bayonne Board of Education

By:
Dated: 1/6/22

CERTIFICATION

I- MARGUERITI-: SIMPSON hereby cenify that I have reviewed thi Settlement Agreement. and fully understand its meaning and terms. I acknovlledge that my representative questio d my und rstanding and verified my acceptance of the t('rms of this Settlement AgreE-ment. I am satisfied with my r rescntation and I enter into this Settlement. Agreement voluntarily.

r certify that the- foregoing statements made by me ar< tn1e. I am aware that if any of tbt foregoing statements made by me are ,"IJillfully false, I am subject to punishment.

DATED: 12/17/2021

MARGUERITE SIMPSON

Exhibit A

IRREVOCABLE IETTER OF RESIO,:ATION

the Bayonne Board of F.ducation
669 Avenue A
Bayonne, NJ 07002

Dece-mber. . , :·, 2021:

To ·whom It May Concern:

Effective on the above date. 1. Marguerite Simon, resign from my tenured position with the Bayonne Board of Education. 'fhis irrevocable resignation is in accordance with the Settlement Agtee.ment and Gcn<:"ral Release e."i:ecuted simultaneously on or about December ..i:../., 2021. I intend by $Ubmitting this irrevocable letter of r!tsignation from my employment -Yith the Bayonne Board of Education to also permanently and irrevocahly waive any tenure1 seniority or other employment rights I may have, effective Jii&iQP1t;J' 1 1, 2021.

Very truly yours,

Marguerite Simpson

Exhibit B

APRUZZESE, McDERMOTT,
MASTRO & MURPHY P.C.
25 Independence Boulevard
P.O-Boxll2
4 Comer, New Jmey 07938
(908),580-1776
Attome;-s for Bayonne Board o fEducation

IN lliEMATTBR. OF ITTI BAYONNE BOARD OF EDUCATION and MARGUERITE SIMPSON.	:	TENURE CHARGES

COUNTI

EXCESSIVE ABSENTEESIM AND CONDUCT UNBECOMING

1. **Marguerite Simpson has been employed as a Special Education Teacher for the Bayonne School District ("District") since September 1. 2004.**

2. **She achieved tenure as a teacher as o f September 2, 2007.**

S. **For the 201.8-2019 school year. Ms. Simpson was assigned to the Lincoln Community School as a Teacher o f the Handicapped. While her assigm:nents have varied over the years, including elementary and high school assignments, she has always taught special education stUdcnts.**

4. Ms. Simpson **has** been excessively absent for the past :five (5) school years. D.uing the **period from September 1, 2014 through April 30, 2019, she was out a whopping 325 days - the equivalent o f almost two (2) full school years.**

   a. **During the cur.rent,** 2018/2019 **school year, she has** been **absent 62.5 days as o f April 30, 2019, including 10 sickd,ys, 2 personal days and 50.5 unpaid sick days.**

Ms. Simpson remains out as of the date of the within tenure charges. Her anticipa:ted return date is May 28, 2019.

b. Outing the 2017/2018 school yeaz\ Ms. Simpson was absent on 117.5 days including 10 sick days. 2 personal day:s, 76.S unpaid sick days and 29 donated sick days.[1] She was out just about two-thirds (2/3) of the school days, the majority of the 20171'2018 school year

c. During 2016/2017. Ms. Simpson was absent 63.Sdays, or more than one-third (113) of the school days, including 10 sick days, 2 personal days,, 4 7 5 unpaid sick days and 4 coverage. $d_{a\ y}$$

d. During the 2015/2016 school year, Marguerite Simpson was out 38 days, in.eluding IO sick days, 2 personal days. 2S unpaid sick days and one coverage day.

e. Durlng2014/201S,Ms. Simpson was a,bsentor:143,S days, including39 sick.days, 2 personal days, 1.5 unpaid sick days and 1 professional day.

S. On or about March 5, 2019, Ms. Simpson requested another leave of absence from March 5, 2019 through May 28, 2019, The request for·leave indicates that Ms. Simpson will be attending an in.tensive outpatient treatment program at CPC Behavioral Health in Red Bank, New Jersey begjnniog on March 27, 2019. The CPC intensive outpatient program is offered on Monday. Wednesday and Thursday. There is an option for: a daytime program which runs from 10:00 am to 1:00 pm or en evening program which

[1] Tbs Bcyonm Soard afEducadon u d the SaYQnnc T Association (BTA) have agrted to establish a sicl;: ltiVlll back. To pltl.I a Stiff member inll-St donate at least.o ne day each year. The dona.ted dayuri:: then dlstributed to ln'A member, by the: Sick Lea,,,,. Bank Coml'nitlff. Au individual frlll&t al! of bis or hir aocumulated sick da)'S fbuow.d by thin)' (30) school da;'1 of unpaid kia.before thi:y ar.. di,glble ror sic:lc:Ollk days. No !Mivfdual cs%d 'llkS more than oce hundred eighty (1 SO)si"- leave bank da)'S.in any five (S) year period.

runs from 6:00 pm to 9:00 pm. Ms. Simpson chose the day program despite the fact that the evening program would have allowed her to report to work.

a. Despite being unable to report to work, Ms. Simpson has been seen in the City at social events.

6. Ms. Simpson has received several written reprimands and/or notices regarding her attendance..

a. On March 8, 2019, Ms. Simpson received a written Attendance Notice from Principal Keith J. Makowski advising that as of that date, she had beeo out 31.5 days and reminding her of the importance of daily attendance to the success of the District's programs.

b. On February 11,2019, Ms. Simpson was again absent, but she failed to notify the district. Principal Makowski notified her by em.ail regarding her failure. to adhere JO district policy.

c. **On or about January** 16. 2019. Ms. Simpson failed to **provide the proper** documentation from her medical provider in order to return to work.

d. On November 14, 2018, Ms. Simpsqnreeeived a written Attendance Notice from Principal Keith J. Makowski advising **that** as of that date, she had been out 8 days and remindmg her of the importance *of* daily· attendai1ce to the success of the District's programs.

e. On April 24, 2018. Assistant Supe:rbrtendent Kenneth Kopacz wrote to Ms. Simpson again requesting infon:natio.n xegarding her excessive absences and requesting specifically when her healthcare provide+ reasonably anticipated she would be able to return to work on a <:omistent basis.

f. On February 16, 2018, Assistant Superintendent Kenneth Kopacz wrote to Ms. Simpson to inquire as to when her healthcare provider reasonably anticipated her w be able to return to work, the probability that the stated date was realistic and any accommodations she would require upon her ret:un).. At .that point; Ms. Simpson bad been out continuously since January 22. 2018. In fact, Ms. Simpson was out through the remainder of the 2017/2018 sehool year.

g. **On Jan'LUlt' 8, 2018,** Ms. Simpson received a written Attendance Notice from Stacey Janeczko, Principal of the Philip G. Vroom Conun\lltlty School advising her that as of that date she had been out 22 days and noting the negative impact on her job perfonnanee.

h. On March 23, 2017, Ms. Simpson received a written Attenda.-iee Notice from Sharon Colasurdo, Supervisor of Special Services. As of that date, Ms. Simpson had been out 34 ys, with 22 of those days being without pay. M3. Simpson w z s advisad to 'make ecy effort to improve [her] attendance moving forward."

i. On December 14, 2016, Marguerite Simpson received a written notice from Sharon Colasurdo, SuperYisor of Special Services. for failing to call in when she was absent on December 7, 2016. As.a result, no sub was assigned to cover Ms. Simpson's homeroom and/or her classes. In addition, when the District tried to contact Ms. Simpson, they did not get any response even after leaving voicer.nails.

7. A:!, a result of her excessive absenteeism, Ms. Simpson was placed on a Professional Action Plan on November 19, 2018. The goal of the plan was "to decrease the amount of days absent for the 2018/2019 school year to ensure that students receive high quality miste.nt iastruction." Despite the Pro&ssional Action Plan. Ms. Simpson continues

to be excessively-absent. Since the Plaio was instituted, she has been out an additional fifty four (54) days, aa of April 30, 2019 and it is anticipated that she will be out at lease another eighteen (18) days. assuming that she returns on May 28. 2019 as stated on her leave request That cenaix,J.y does not represent an improvement 111 her attendance.

8. On or about Jamw:y 7, 2019, the principal of Lincoln School where Ms. Simpson is assigned, received an email from the inclusion teachen expressing concerns based on Ms. Si.mpson•s excessive absences. The teachers noted that it has been difficult to meet the needs **of** the inclusion students when the teacher is repea.1edly abse!lt.. The teachers further noted that "'the students this year are extremely low functioning and need the c:onstant guidance, supervision and modifications of an inclusion teacher...

On February 13, 2019, the same teachers again emailed Principal Kehh Makowski requesting a meeting with the Special Services Department with regard to their concerns. The inclusion teachers noted that Ms. Simpson had been absent for the open house in November 2018 and she was again absent for bac:k to school night in February 2019.

9, Ms. Simpson's excessive absenteeism has had a negati'-'e impact on her special education stu.den1s.

a. In an observation report of Plaintiffdated F'ebru.acy 5 20 I9. Principal Makowski commented as folloM:

"'However, the main issue, as identified by Ms. Simpson herself, is her anendance. It must be improved upon in order for her students to receive the academic consistency that is need,ed for their success, There is C\lttently an attendance CAP in place to be followed, and will be revisited as appropriate.

Ms. Simpson needs to adhere to the Board pollcies and regulations in regards to her attendance...

b. Similarly, in her 2016/2017 evalua:tions, she was "again reminded to be diligent in reporting absences following district protocol and in improving overall attendance." The 2016/2017 evaluation repon also notes that "regular attendance is e:iq>ected from all teachers, and can be detrim.eo.t:aJ. to students with significant di.sabilitieswho benefit from routine and consistency."

10. Given Ms. Simpson's excessive absenteeism over the past five schoo] years, the District has no reason to belie'Ve that Ms. Simpson will be able to return to work to perform the duties o f her position. with or without a reasonable accommodatiop, on a regular and consistent basis.

11. Ms. Simpson's excessive absenteeism constitutes condu t unbecoming a professional teaching st.a.ffmember.

'WHEREFORE, the foregoing excessive absenteeism and unbecoming ·conduct wmants Marguerite Simpson'$ dismissal from the Bayonne School District. in accordance with N,J.S.A., 18A:6-10.

COUNT II

NEGLECT OF DUTY

I. Toe District repeats the allegations of Count I and incorporates same herein.

2. Ms. Simpson bas neglected and failed to perform her duties and responsibilities with regard to her special education students. On or a.bout March 6, 2019. Ms. Simpson. was q a i n abm:u. Ms. Simpson had been absent on March S, 2019 but had advised the principal in an =mail that she would "be in tomorrow for lEPs."

01':Spito saying she would be in, Ms. Simpson did not show up on March 6, 2019 and she did not call or otherwise notify the principal or anyone in the district that she would be absent again. Ms. Simpson's Annual Review meetings for her special education students were scheduled for March 6, 2019. By the time the school principal and the child study team realized that Ms. Simpson "WOuldnot be coming to school on that date, 8TQund 8:50 a.m., it was too late to reschedule the parent meetings. Accordingly, the Supervisor of Special Services advised the child study team to print out Ms. Simpson's IBP Annual Review documents so that the parents could meet with the child study team and the gene:ral ed'.lcation teachers in Ms. Simpson's absence. Unfortunately, when the team went to retri e the mP Annual Review documents, they found that the documents were not complete and, therefore, an lEP could not be presented to the parents who attended.

a. Ms. Simpson \V8S respo:o:sible for completing these documents in their entiret)' prior to the scheduled meetings .with the parents. This has been the ptocedure in Bayonne for many years and Ms. Simpson was well aware of this requirement.

b. Ms. Simpson's absence, coupled with her failure to have the requisite Aimual. Review dOC1.lments completed, placed the clnld study team and school personnel in a very awkward and unprofessional situation with the parents.

c. The parents!guai:dians of five (S) .students had to be inconvenienced by coming to school for not reason. Due to Ms. Simpson's absence as well

as her failure to have her IBP documents completed on time. an of the Annual Review meetings bad to be rescheduled, thus requjring these parents to come to school on another additional date.

d. As a result of the aforesaid siruation. Ms. Simpson was issued a reprimand. dated March 11, 2019 by Sup.ervisor of Special Services Kim T. De Medici.

3. Ms. Simpson's conduct as set forth above constitutes neglect of duty and failure to perform her duties and responsibilities.

WHEREFORE. the foregoing conduct warrants Marguerite Simpson•s dismi from the,Bayonne School District in accordance with ***N.1.S.A.*** l SA:6-10.

COUNTIII

INABILJ.TY TO PERFORM DUTIES AND OTHER JUST CAUSE

1. The District repeats the allegations of Counts I and II and incorporates same.herein.

2. Based upon her excemve absences from work for the last five school years, v.rith no improvement despite a professional action plan and multiple reprimands/attendance notices, it seems that Ms. Simpson is no longeT able to perform the duties aad responsibilities ofherpositi.on as a teacher.

wmmEFORE. the foregoing (X)nduct warrants Marguerite Simpson's dismissal from the Bayonne School Dlstrletin accordance withNJ.S.A. lSA:5-1O.

I hereby certify that the foregoing represents the Tem:ae Charges against Marguerite Simpson.

D'EMichael Superintendent

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LAURA A. ZIEWNICKI
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Exhibit C

TOBETYPEDONBOARDLETTERHEAND

[INSERT DATE)

State Board of Examiners
Department of Education
200 Riverview Plaza
Trenton, New Jersey 08625

Re: Bayonne Board of Education (Board) and Marguerite Simpson (f/k/a Baber)

To Whom It May Concern:

Please be advised that I am the Superintendent **for the Board and on whose behalf, I am writing in accordance with N.J.A.C. 6A:9B-4.3 in order to** advise **on the** following circumstances. Ms. Simpson resigned her position during **the** pendency of Tenure Charges **against her, a copy of which are** included **with this** letter.

It is our understanding that Ms. Simpson possesses an instructional certificate of Teacher **of Special. Education, among other** certificates issued **by the State Department of** Education. Kindly **contact me if should you** require **any further information.**

Sincerely,

Superintendent

276401

20-22

New Jersey Commissioner of Education

Final Decision

Stephanie Angus,

Petitioner,

v.

Board of Education of the Borough of Metuchen, Middlesex County,

Respondent.

Synopsis

Petitioner is a teacher in the Metuchen school district. In April 2021, petitioner was exposed to the Covid-19 virus and was advised by representatives of the respondent Board that, based on guidance from the New Jersey Department of Health and school nurses, she was required to quarantine for 14 days. Petitioner's request to use accumulated sick leave for the days on which she did not work was denied, and she filed the within appeal. The parties filed opposing motions for summary decision.

The AU found, *inter alia,* that: there are no material facts at issue in this case and the matter is ripe for summary decision; on April 6, 2021, petitioner reported to her building principal that she had been exposed to Covid-19; she was subsequently advised that due to the potential exposure, the New Jersey Department of Health guidance as well as the school nurses required that petitioner quarantine at home for fourteen days; petitioner's request to use accumulated sick leave was denied and the respondent used petitioner's personal and family illness days to cover the mandatory quarantine period. The AU concluded that petitioner was excluded from school by the recommendation of the school district's medical authorities because of her possible exposure to Covid-19, a contagious disease; further, petitioner's subsequent absence qualified as sick leave under the express provisions of N.JS.A. 18A:30-1. Accordingly, the AU granted summary decision to petitioner and denied the Board's cross motion.

The Commissioner concurred with the findings and determination of the AU herein. Accordingly, petitioner's motion for summary decision was granted and the Board was directed to place petitioner on sick leave with pay for the period of April 7, 2021 to April 19, 2021, and to restore the personal and family illness time previously charged for that period.

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

20-22
OAL Dkt. No. EDU 05918-21
Agency Dkt. No. 91-6/21

New Jersey Commissioner of Education

Final Decision

Stephanie Angus,

Petitioner,

v.

Board of Education of the Borough of Metuchen, Middlesex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Metuchen Board of Education (Board) pursuant to *N.J.A.C.* 1:1-18.4, and petitioner Stephanie Angus' reply thereto, have been reviewed and considered.

Petitioner is a teacher who was exposed to the Covid-19 virus in April 2021 and was advised that, based on guidance from the New Jersey Department of Health and school nurses, she must quarantine for 14 days. Petitioner's request to use accumulated sick leave for the days on which she did not work was denied, and she appealed. Following cross-motions for summary decision, the Administrative Law Judge (AU) concluded that petitioner was excluded from school by the recommendation of the school's medical authorities because of her possible exposure to a contagious disease, and that her absence therefore qualified as sick leave pursuant to *N.J.S.A.* 18A:30-1.

In its exceptions, the Board argues that *N.J.S.A.* 18A:30-1 does not apply because petitioner had not contracted a contagious disease, and because her quarantine was not due to a disease in her immediate household. In reply, petitioner argues that *N.J.S.A.* 18A:30-1 does not require an employee to have a contagious disease, but only that she be excluded from the school by its medical authorities on account of a contagious disease.

Upon review, the Commissioner concurs with the AU that petitioner is entitled to use sick leave. The Commissioner does not find respondent's exceptions, which reiterate arguments made below that were considered and rejected by the AU, to be persuasive. The plain language of *N.J.S.A.* 18A:30-1 defines sick leave, in part, as an absence because the employee "has been excluded from school by the school district's medical authorities on account of a contagious disease." While the Board interprets this language as requiring that the employee actually contract a contagious disease, the statute does not include that requisite. The Commissioner does not have the authority to mandate such a requirement when the Legislature did not include it in the express language of the statute. The phrase "on account of" is most commonly used to mean "because of"; here, the district's medical authorities excluded petitioner from school because of Covid-19, which is indisputably a contagious disease. Nor is it relevant that petitioner's exposure was not from a member of her immediate household, as that provision pertains to a different part of the definition of sick leave.

Accordingly, petitioner's motion for summary decision is granted, and the Board's motion for summary decision is denied. The Board is directed to place petitioner on sick leave with pay for the period of April 7, 2021 to April 19, 2021, and to restore the personal and family illness time previously charged for that period.

IT IS SO ORDERED.[1]

. 9J.'6.

A G COMMISSIONER OF EDUCATION

Date of Decision: January 27, 2022
Date of Mailing: January 27, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 05918-21
AGENCY NO. 91-6/21

STEPHANIE ANGUS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Ashley E. Malandra Esq, for respondent (Methfessel & Werbel, attorneys)

Record Closed: November 4, 2021 Decided: December14,2021

BEFORE **KIM C. BELIN,** ALJ:

STATEMENT OF THE CASE

Petitioner, Stephanie Angus, challenges respondent Board of Education of the Borough of Metuchen's (respondent or Board) decision denying her request to use sick

leave instead of personal and family illness leaves for a mandatory fourteen-day quarantine period because of exposure to a family member who tested positive for the Covid-19 virus.

PROCEDURAL HISTORY

In an email dated April 9, 2021, the respondent denied petitioner's request to reduce the fourteen-day quarantine period if she tested negative after ten days of being quarantined. The petitioner filed a petition dated June 8, 2021, with the Commissioner of Education (Commissioner). The Department of Education transmitted this matter as a contested case to the Office of Administrative Law where it was filed on July 13, 2021. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On June 28, 2021, the respondent requested an extension until July 12, 2021, to file an answer or responsive pleading. On July 9, 2021, respondent filed a motion for summary decision with certifications in lieu of an answer. N.J.A.C. 6A:3-1.5(g). Petitioner filed a response and cross-motion for summary decision dated October 18, 2021.[1] Respondent requested a one-week extension to respond and filed a letter brief dated November 4, 2021, in opposition to petitioner's cross-motion for summary decision. The record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

The following FACTS are undisputed and I, therefore **FIND:**

1. Petitioner is a tenured teacher employed by the respondent. (Petitioner's petition, ¶1.)
2. On April 4, 2021, petitioner was exposed to the Covid-19 virus. at ,i2.

[1] Petitioner's response and cross-motion was filed out of time pursuant to N.J.A.C. 1:1-12.5(b). However, the respondent did not object and a hearing date had not yet been scheduled.

3. Petitioner reported her exposure to her building principal on April 6, 2021. (Certification of Edward Porowski.)

4. Respondent advised that due to the potential exposure, the New Jersey Department of Health guidance and school nurses recommended that petitioner had to quarantine for fourteen days. (Petitioner's petition, Exhibit A.)

5. Petitioner was unable to work remotely because the respondent had only in-person programming for the 2020-21 school year. (Certification of Vincent Caputo.)

6. The respondent used petitioner's remaining seven and a half personal days, and a half family illness day for a total of eight days of leave to cover the quarantine period. (Petitioner's petition, Exhibit A.)

7. Petitioner received a negative test result on April 10, 2021. (Petitioner's Cross-motion for Summary Decision, Exhibit B.)

8. Petitioner returned to work on April 19, 2021.

LEGAL ANALYSIS AND CONCLUSIONS

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact, and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1: 1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2 (c) of the New Jersey Court Rules.

The motion judge must "consider whether competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Insurance Company of American, 142 **N.J.**

520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." kL at 536.

The Commissioner of Education (Commissioner) is given jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State Board or of the Commissioner. N.J.S.A. 18A:6-9. Here, the petitioner challenges the respondent's denial to use her accrued sick leave in accordance with N.J.A.C. 18A:30-1. Accordingly, the current controversy is appropriately before this administrative tribunal.

Petitioner herein asserts that her cross-motion for summary decision must be granted because she was absent from work because she was excluded from school by the school district's medical authorities on account of a contagious disease or being quarantined for such a disease in her immediate household. As such, she was eligible to use her accumulated sick leave.

Conversely, the respondent contends that its motion for summary decision should be granted because petitioner was exposed to the Covid-19 virus by her nephew who is not a member of petitioner's immediate family as required by the relevant sick leave statute.

I **FIND** there are no material facts in dispute and this matter is ripe for summary decision.

The statute at the heart of this controversy, N.J.S.A. 18A:30-1, provides:

> Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

This statute contains three options that allow an employee to use sick leave. First, the employee can use sick leave if the employee is absent from work because of the employee's personal disability due to illness or injury. Second, the employee can use sick leave if the employee is excluded from school by the school district's medical authorities on account of a contagious disease. Third, the employee can use sick leave if the employee is quarantined for such a disease in his or her immediate household. Any one of these events entitles the employee to use unused accumulated sick leave.

Here, the petitioner qualifies for sick leave under the second option. She appropriately reported to her supervisor her exposure to a contagious virus. The superintendent stated in an email to the petitioner that the school's nurses were recommending quarantining for fourteen days. There is no dispute that the Covid-19 virus is contagious. There is no material factual dispute that the petitioner was directed not to work by the school district's nurses.

Thus, I **CONCLUDE** that the petitioner was excluded from school by the recommendation of the school district's medical authorities because of her possible exposure to Covid-19, a contagious disease. Accordingly, I **FURTHER CONCLUDE** that the petitioner's subsequent absence qualifies as sick leave under the express provisions of **N.J.S.A.** 18A:30-1.

ORDER

For the reasons set forth above, I hereby **ORDER** that the petitioner's cross-motion for summary decision is **GRANTED.** Accordingly, the respondent's motion for summary decision is **DENIED.**

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

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

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

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

Kim C. Belin

December 14, 2021
DATE

KIM C. BELIN, ALJ

Date Received at Agency: December 14, 2021

Date Mailed to Parties: December 14, 2021

KCB/lam

APPENDIX

WITNESSES

For petitioners:

None

For respondent:

None

EXHIBITS

For petitioner:

- Petitioner's petition of appeal, dated June 8, 2021
- Petitioner's cross-motion for summary decision, dated October 18, 2021

For respondent:

- Respondent's motion for summary decision, dated July 9, 2021
- Respondent's letter brief in opposition to petitioner's cross-motion for summary decision, dated November 4, 2021

21-22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Teaching Certificates of Mary Jo Reid, Board of Education of the City of Summit, Union County.

Synopsis

This matter was opened before the Commissioner of Education in June 2021, by way of an Order to Show Cause (OTSC) served by the petitioner, the Board of Education of the City of Summit, upon Mary Jo Reid, requiring respondent to show cause why an order should not be entered suspending her "teaching certificate 1-09-6610" pursuant to *N.J.S.A.* 18A:26-10 for retiring from her position as a Behaviorist without giving the 60 days' notice required by her contract because of health and safety concerns with regard to the Covid-19 pandemic. Respondent asserted that the OTSC sought suspension of her Board Certified Behavior Analyst (BCBA) Certification, under which she was employed by the respondent, and that this matter should be dismissed because the Commissioner of Education lacks jurisdiction to suspend this certificate. Respondent filed a motion to dismiss, which was opposed by the petitioning Board.

The AU found, *inter alia,* that while the Board argues that it intended to seek the suspension of respondent's educational services certificate, the certificate 1-09-6610 referenced in the OTSC corresponds to respondent's Board Certified Behavior Analyst (BCBA) certification. Respondent's BCBA certificate was issued by the Behavior Analyst Certification Board, Inc., and not by the Department of Education. The AU found that the Commissioner does not have the authority to suspend respondent's BCBA certificate. Accordingly, the respondent's motion to dismiss was granted and the AU ordered the OTSC dismissed.

Upon review, the Commissioner agreed that she does not have jurisdiction to suspend respondent's BCBA certificate, which was not issued by, and is not regulated by, the Department. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the OTSC 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.

21-22

OAL Dkt. No. EDU 06568-21
Agency Dkt. No. 98-6/21

New Jersey Commissioner of Education

Decision

In the Matter of the Suspension of the Teaching Certificates of Mary Jo Reid, Board of Education of the City of Summit, Union County.

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.

In this matter, the Board filed an Order to Show Cause (OTSC) to suspend respondent's "teaching certificate 1-09-6610" pursuant to *N.1.5.A.* 18A:26-10 for resigning without giving the notice required by her contract. Respondent was employed by the Board as a Behaviorist since 2012 and retired with less than 60-days' notice because of health and safety concerns with regard to working in the school during the COVID-19 pandemic. While the Board argues that it intended to seek the suspension of respondent's educational services certificate, the certificate 1-09-6610 referenced in the OTSC corresponds to respondent's Board Certified Behavior Analyst (BCBA) certification. Respondent's BCBA certificate was issued by the Behavior Analyst Certification Board, Inc., and not by the Department. As such, the AU found that the Commissioner does not have the authority to suspend respondent's BCBA certificate.

Upon review, the Commissioner agrees with the AU that she is without jurisdiction to suspend respondent's BCBA certificate, which is not issued or regulated by the Department. [1]

[1] The Commissioner need not decide whether respondent's educational services certificate should be suspended because it is not at issue in this matter.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the OTSC is hereby dismissed.

IT IS SO ORDERED. [2]

AC;I COMMISSIONER OF EDUCATION

Date of Decision: January 27, 2022
Date of Mailing: January 27, 2022

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-l{b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06568-21
AGENCY DKT. NO. 98-6/21

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE(S) OF MARY JO REID, BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY.

Janelle Edwards-Stewart, Esq. for petitioner Summit Board of Education (Porzio, Bromberg & Newman, attorneys)

Philip Stern, Esq., for respondent Mary Jo Reid (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, attorneys)

Record Closed: November 12, 2021 Decided: December 16, 2021

BEFORE **SUSANA E. GUERRERO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Summit Board of Education (the Board or petitioner) filed a motion for an Order to Show Cause with the New Jersey Department of Education (NJDOE), on or around June 11, 2021. On June 24, 2021, the Acting Commissioner of Education granted the motion and ordered that Mary Jo Reid (respondent) show cause before the Commissioner of Education why an Order should not be entered suspending "the

teaching certificate 1-09-661 O . . . for unprofessional conduct pursuant to N.J .S.A. 18A:26-10." Respondent filed an Answer to the Order to Show Cause (OTSC) on July 29, 2021, together with a Notice of Motion seeking the dismissal of the OTSC with prejudice. Petitioner opposed the motion to dismiss, and oral argument was held on October 28, 2021. The record closed on November 12, 2021, upon receipt of additional information requested from the parties at the oral argument.[1]

FACTUAL DISCUSSION

In respondent's Motion to Dismiss, she asserts that the OTSC seeks the suspension of her Board Certified Behavior Analyst (BCBA) Certification, under which she was employed by the respondent, and that this matter should be dismissed because the Commissioner of Education lacks jurisdiction to suspend this certificate. The parties concede that Reid, who is now retired, was employed by the Board since around 2012 as a Behaviorist. Respondent asserts that she only served under the BCBA certificate while employed by the Board, and that the BCBA certificate is not sanctioned by the Commissioner of Education but by the Behavior Analyst Certification Board, Inc., which is outside the jurisdiction of the NJ DOE and the Board of Examiners.

The Board filed an opposition to respondent's motion to dismiss, asserting that the Board actually seeks an order to suspend respondent's educational services certificate due to her alleged unprofessional conduct, and that this does fall within the jurisdiction of the Commissioner of Education. Petitioner asserts that the educational services certificate was required to serve as a Behaviorist.

In her reply brief, Reid challenges the Board's .assertion that New Jersey certification is required to work as a behaviorist for a school district, and she asserts that the Board excluded the requirement of an educational services certificate in respondent's

[1] Pursuant to my request on October 28, 2021, I received and considered Reid's Job Description and Certification on October 29, 2021. I also requested any legal authority relied on by the Board to support its position that an Educational Services Certificate is required of all Behaviorists working for the District or any New Jersey public school district. In response to my request, I received and considered a letter brief and certification on behalf of the Board, received on November 8, 2021; a November 9, 2021 letter and certification from counsel for Reid; and a November 12, 2021 letter from counsel for the Board responding to the November 9, 2021 letter.

job description in order to prevent district behaviorists from obtaining tenure. Reid did not accrue tenure as a Behaviorist in the District, and she argues that since she never served under her educational services certificate when employed by the Board, she should not be sanctioned with its suspension.

Oral argument was held via Zoom on October 28, 2021. The parties agree that Reid was employed as a Behaviorist with the Board; that she maintained a BCBA certificate when employed with the District; that the Commissioner and Department of Education lack jurisdiction to suspend her BCBA Certificate; that the Board's job description for a Behaviorist does not require an educational services certification; and that Reid also holds an educational services certification, with a social worker endorsement.

While the Order to Show Cause that was signed by the Commissioner of Education requires that Reid show cause why an Order should not be entered suspending "the teaching certificate 1-09-6610," counsel for the Board asserts that the reference to certificate 1-09-6610 (which pertaining to Reid's BCBA certificate) was a typo and that since the affidavit signed by the district's superintendent and the certification prepared by counsel for the Board, submitted in support of the Board's application to the NJDOE, reference the suspension of Reid's educational services certification, the matter should not be dismissed.[2] The Board also argues that while its job description for a Behaviorist only requires a BCBA certificate, an educational services certificate is req ired to work as a Behaviorist in any New Jersey public school district. Despite my request for legal authority supporting this position, the Board failed to provide any regulation or statute illustrating that Behaviorists employed by New Jersey public school districts must maintain an educational services certificate.[3]

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2 The affidavit signed by the superintendent references that Reid possesses a BCBA and an educational services certificate. He only attaches a copy of Reid's BCBA certificate to the affidavit, and the superintendent does not indicate in the affidavit that Reid was employed by the Board under the educational services certificate.

3 In response to my request i counsel for the Board referenced one sentence found in the NJ DOE website which states that New Jersey certification is required for "any professional staff member employed in New Jersey public schools" (https://nj.gov/education/license/overview/); a decision issued by the Commissioner of Education twelve years ago that does not address the position of a behaviorist and is not informative for purposes of this motion; and N.J.S.A. 18A:26-2, none of which dictate that behaviorists must maintain certification through the NJDOE to work for any public school. In fact, N.J.S.A. 18A:26-2 only applies to

Respondent asserts that the Board only required that Reid possess a BCBA certification when she worked for the Board as a behaviorist; she was never employed under the educational services certificate; and the law does not require that she maintain an educational services certification when employed by a school district as a Behaviorist.[4] The Board's job description for a Behaviorist does not require any other certification other than a BCBA, and Reid maintains that this allowed the Board to hire BCBAs, such as herself, without having them accrue tenure rights. Reid asserts that since she was not employed under the educational services certification, she did not accrue tenure during the eight years that she worked for the Board.

Based on my review of the documents in support of, and opposition to, respondent's motion to dismiss, together with my consideration of the oral argument on the motion, I **FIND** that the Order to Show Cause issued to Reid does not reference her educational services certificate, and it only requires her to show cause why her BCBA certification should not be suspended; and the NJDOE does not have authority to suspend her BCBA certificate. While there may be a reference to an educational services certification in a supporting affidavit and certification, it is the OTSC that Reid is required to answer to. I also **FIND** that while respondent possessed an educational services certification with a social worker endorsement while she was employed by the Board as a Behaviorist, there is insufficient evidence that Reid was ever employed by the Board under this certification. Her job description as a Behaviorist did not require NJDOE certification, the Board did not provide adequate legal authority to support its claim that Reid was required to hold NJDOE certification when she worked as a Behaviorist; and the record is unclear as to whether she was ever employed by the Board under any certification other than her BCBA certificate.

"teaching staff member," and a teaching staff member is by statutory definition a certain professional staff member who is required to hold a certain certificate issued by the State Board of Examiners. See N.J.S.A. 18A:1-1. There is no evidence that Reid was a teaching staff member, or a professional staff member required to maintain a certain certification issued by the NJOOE.

[4] Following oral argument, and to support her position that Reid did not, and was not required to possess an educational services certificate, Reid referenced a guidance document provided by the NJDOE's Office of Special Education Programs in which it acknowledges that BCBAs employed by public school districts in the State "do not always obtain" NJDOE certification, and that for that reason, the NJDOE added a job code to NJ SMART to collect data about those BCBAs who do not hold certification.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 3:1.10 provides, in relevant part:

> At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason. kl

"To exercise jurisdiction over a dispute, an administrative agency must have specific legislative authority." Dolan v. Centuolo, Nos. A-2470-10T4, A-2710-10T4, at *11 (App. Div. July 9, 2012), http://njlaw.rutgers.edu/collections/courts/ (citing Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 426 (App. Div. 2002)). As the OTSC seeks to suspend Reid's BCBA certificate, and it is undisputed that the Commissioner of Education and NJDOE lack the authority to suspend a BCBA certificate, I **CONCLUDE** that the petitioner has advanced no cause of action and that the respondent's Motion to Dismiss should be **GRANTED.**

ORDER

It is hereby **ORDERED** that the Order to Show Cause 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.

12/16/21
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: 12/16/21

Date Mailed to Parties: 12/16/21

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i\NCiELICA ALLl:N·MCM!Ll.:\N, Ed.D.
Acting Commissioner

January 27, 2022

VIA EMAIL ONLY

Thomas 0. Johnston, Esq.
Johnston Law Firm, LLC
151 Forest Street, Suite A
Montclair, NJ 07042

Sydney Finkelstein, DAG
Office of the Attorney General
Division of Law
25 Market Street, P.O. Box 112
Trenton, NJ 08625

Re: *In the Matter o(Tamour Kousha, Community Charter School of Paterson, Passaic County, Agency 0kt. No. 156-8/21, Commissioner Decision No. 238-21SEC.*

Dear Parties:

I have reviewed the materials filed in connection with respondent's motion for reconsideration of and motion to stay the Commissioner's October 14, 2021 decision, removing respondent as a member of the Community Charter School of Paterson Board of Trustees for failure to timely complete board member training required by the School Ethics Act.

Pursuant to *N.J.A.C.* 6A:3-l.15(b)(2), a motion for reconsideration shall be determined based upon the following:

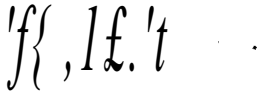
i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have 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.

Upon review and consideration of the submissions, I have determined to grant respondent's request for reconsideration of the Commissioner's decision. In his papers, respondent indicates that he did not receive emails from the School Ethics Commission. In the absence of any explanation for or opposition to respondent's statement in the response to the motion filed by counsel for the SEC, the Commissioner accepts respondent's representation that he did not receive the emails. As respondent did not receive notice of the Order to Show Cause or the SEC's decision, and accordingly did not have the opportunity to respond, the Commissioner finds that the standard for reconsideration has been met. Accordingly, the motion for reconsideration is hereby granted.

Similarly, in light of these facts, the Commissioner concludes that it is appropriate to grant respondent's motion to stay the October 14, 2021 decision.

Respondent further states that he is willing to complete the required training as soon as possible. Respondent is directed to submit proof of completion of the required training to the Office of Controversies and Disputes on or before February 28, 2022. Following respondent's submission, or his failure to do so by February 28, 2022, an amended decision will be issued.

Sincerely,



Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

AAM/jkh
c: State Law Library
Board Secretary, Community Charter School of Paterson Board of Trustees
School Ethics Commission

22-22SEC

24-22

New Jersey Commissioner of Education

Final Decision

Eleanor Elcock,

Petitioner,

v.

Essex County Regional Educational Services, Commission,

Respondent.

Synopsis

The petitioner - a tenured certified student assistance coordinator (SAC) employed by the respondent Essex Regional Educational Services Commission (ERESC) prior to a Reduction in Force (RIF) - challenged ERESC's decision to abolish her position. The petitioner argued that the Board violated *N.1.5.A.* 18A:40A-18 when it distributed her former duties to other existing staff members and contended that she is entitled to reinstatement as a SAC, with back pay and benefits. The ERESC contended that its actions were consistent with law and regulations, and filed a motion for summary decision which was opposed by the petitioner.

The AU found, *inter a/ia,* that: there is no genuine issue as to any material fact in this case and the matter is ripe for summary decision; *N.1.5.A.* 18A:40A-18 does not require districts to provide a designated SAC employee; districts may instead provide SAC services through other certificated staff; the two employees - both guidance counselors - assigned to perform SAC-related duties after petitioner's SAC position was eliminated are properly certified to perform said duties; petitioner does not hold any other certifications besides an educational services certificate with a SAC endorsement and therefore does not have any bumping rights over other employees. The AU concluded that petitioner's tenure and seniority rights were not violated and she is not entitled to reinstatement or back pay. Accordingly, the AU granted the ERESC's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the findings and conclusions of the AU, 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.

24-22
OAL Dkt. No. EDU 17294-19
Agency Dkt. No. 298-11/19

New Jersey Commissioner of Education

Decision

Eleanor Elcock,

Petitioner,

v.

Essex County Regional Educational Services Commission,

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.

The petitioner, a certified student assistance coordinator (SAC), challenges the decision of respondent Essex Regional Educational Services Commission (ERESC) to terminate her employment as part of a reduction in force (RIF). The petitioner argues that the elimination of the SAC position and reassignment of the duties to other less senior employees who do not hold SAC certifications violated her tenure and seniority rights. The Administrative Law Judge (AU) found that ERESC did not violate petitioner's rights by eliminating the position of SAC and assigning the duties to two school guidance counselors because *N.J.S.A.* 18A:40A-18 does not require districts to provide a designated SAC employee and may instead provide SAC services through other certificated staff. Additionally, the petitioner does not hold any other

certifications besides an educational services certificate with a SAC endorsement, so she does not have "bumping" rights over other employees.

Upon review, the Commissioner agrees with the ALJ that ERESC did not violate petitioner's tenure and seniority rights when it eliminated the SAC position as part of a RIF and assigned the duties to existing employees. *See Kate Romeo v. Board of Education of the High Point Regional High School District, Sussex County,* Commissioner's Decision No. 32-19, decided January 29, 2019, *affirmed, New Jersey Superior Court Appellate Division,* A-2602-18T4 (July 23, 2020); *Morris Lucky v. Board of Education of the City of Englewood, Bergen County,* Commissioner's Decision No. 82-19, decided March 27, 2019.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 4, 2022
Date of Mailing: February 7, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 17294-19

AGENCY DKT. NO. 298-11/19

ELEANOR ELCOCK,

Petitioner,

v.

ESSEX COUNTY REGIONAL

EDUCATIONAL SERVICES COMMISSION,

Respondent.

Gail Oxfeld Kanef, Esq., for Petitioner (Oxfeld Cohen, PC, attorneys)

Sandra N. Varano, Esq., for Respondent (Nirenberg & Varano, LLP, attorneys)

Record Closed: November 9, 2021 Decided: December 21, 2021

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

STATEMENT OF THE CASE

Petitioner Eleanor Elcock (Elcock), is a certified student assistance coordinator (SAC), formerly employed by the respondent, the Essex Regional Educational Services Commission (ERESC). She appeals the action of ERESC terminating her employment, effective August 2019, pursuant to a reduction in force (RIF). Elcock alleges that this was

done without regard to her tenure and seniority rights. She seeks reinstatement and back pay. ERESC claims that its actions were consistent with the applicable law and regulations.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal by Elcock on November 15, 2019. The matter was transmitted to the Office of Administrative Law on December 9, 2019, as a contested case.

Multiple status conferences were held, and in a June 2020 conference, the parties advised that they were still exchanging discovery, and requested a January 2021 hearing, anticipating that in-person hearings would return by then. January dates were scheduled, but subsequently adjourned in a December 20, 2020, telephone conference at the request of the parties, who indicated a preference for an in-person hearing.

Respondent ERESC filed a motion for summary decision on September 21, 2021. On October 25, 2021, Elcock filed a brief in opposition to ERESC's summary decision motion. ERESC filed a reply to Elcock's opposition on November 9, 2021.

ISSUES PRESENTED

The petition raises the following issues:

1. Whether the employees assigned to perform the SAC-related duties formerly done by Elcock are authorized to do so by N.J.S.A. 18A:40A-18 and N.J.A.C. 6A:9-13.2?

2. Whether ERESC's elimination of the full-time SAC position and subsequent reassignment of SAC-related duties to existing certificated employees violated Elcock's tenure and seniority rights?

FINDINGS OF FACT

The following facts are not in dispute, and I **FIND:**

1. Elcock holds a standard New Jersey Educational Services Certificate endorsed as a Student Assistance Coordinator (SAC). She holds no other endorsements.

2. Elcock was employed by ERESC as a SAC from 1998 to August 31, 2019. She worked exclusively as a SAC during her twenty-one years at ERESC.

3. In June 2019, Elcock was advised that a recommendation had been made to non-renew her employment for the 2019-2020 school year due to a lack of funding.

4. In July 2019, Elcock was informed that ERESC eliminated her SAC position and as she held no certifications other than as a SAC, that her employment was terminated, effective August 31, 2019. At the time of her termination, Elcock was the most senior SAC employed by ERESC.

5. Since the RIF eliminating the SAC positions, ERESC has not employed any full-time, dedicated SACs.

6. After Elcock's termination, the SAC-related duties were assigned to two guidance counselors for the 2019-2020 school year. Both hold School Counselor certifications and one has a SAC certification.

7. ERESC also employed two social workers and a school psychologist during the 2019-2020 school year. The school counselors and one social worker provided counseling to students on drug and alcohol abuse.

ANALYSIS AND CONCLUSIONS OF LAW

To prevail on a motion for summary decision, the moving party must show that there is no genuine issue of material fact, and that they are entitled to prevail as a matter

of law. N.J.A.C. 1:1-12.1 et seq. To prevail, a nonmoving 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. Ibid. The motion judge must "consider whether component evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the nonmoving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536.

1. The employees assigned by ERESC to perform SAC-related duties after the SAC position was eliminated are properly certified to perform said duties

In her petition, Elcock contends that in September 2019, she learned that "less senior employees" were performing the duties she previously performed as a SAC, and that these employees were not sanctioned by statute to provide SAC services.

N.J.S.A. 18A:40A-18 does not preclude districts from providing SAC services through other properly certified staff. Romeo v. Bd. of Educ. of the High Point Reg'l High Sch. Dist., 2020 N.J. Super. Unpub. LEXIS 1479, at *4. The statute was enacted in 1987 as a vehicle through which to pilot the introduction of SAC services to local school districts. Id. at *14. The statutory language provides districts with the option to participate in this program. Id. at *15. If they do so, the statute stipulates that the SAC position must be separate and distinct from other district positions. Ibid. However, nowhere does the statute preclude districts from providing services through other certified staff. Id. at *17. Thus, Elcock's argument that ERESC employees are performing SAC-related duties in contravention of the statute is unavailing. Redistributing Elcock's duties among existing staff who are properly certified is clearly permitted. Romeo, at *9.

2. Elcock's tenure and seniority rights were not violated and Elcock is not entitled to reinstatement or back pay

Elcock's main argument is that ERESC's assignment of her former SAC duties to employees "who do not hold the proper certification" and who were "less senior than Ms. Elcock" violated her tenure and seniority rights. ERESC argues that the district is not required to have a designated SAC position, and thus cannot be prohibited from reassigning SAC-related duties to certified employees when such position is abolished.

The purpose of the Tenure Act, N.J.S.A. 18A:28-1 to -18, 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)). A district may reduce the number of teaching staff members for reasons of economy or in response to a decline in student enrollment, referred to as a "reduction of force" (RIF). N.J.S.A. 18A:28-9. Any dismissals resulting from a RIF must be made based on seniority. N.J.S.A. 18A:28-10. Seniority is determined based on the number of academic or calendar years of employment in the school district. N.J.S.A. 18A:28-13; N.J.A.C. 6A:32-5.1 (b).

The prerogative of a school district to reduce force is well established. School districts may reduce ranks or reorganize the delivery of services to its students. Eliminating and consolidating positions are among the actions within a local board's authority. Francin v Maywood Bd. of Educ., EDU 09131-08, Initial Decision (July 6, 2009), adopted Commissioner (August 20, 2009), <http://njlaw.rutgers.edu/collections/oal/>, citing Dunellen Bd. of Educ. v Dunellen Ed. Ass'n. 64 N.J. 17, 30 (1973).

First, it should be noted that Elcock is not a tenured teacher; she is tenured exclusively as a SAC under an educational services certificate. The employment of SACs in certain school districts is governed by N.J.S.A. 18A:40A-18 and N.J.A.C. 6A:9B-14.2. The statute specifies that the SAC position must be separate and distinct from any other employment position in the district, including - but not limited to - district guidance counselors, school social workers, and school psychologists. N.J.S.A. 18A:40A-18(b).

Tenure accrues to teaching staff members under a certificate *only* if they have served in a position under that same certificate for the requisite period. Dennery v. Bd. of Educ., 131 N.J. 626, 638 (1993). Thus, any tenure and seniority rights an employee possesses are restricted to positions in that certification. Aiello v. Bd. of Educ. of Westwood Reg'l Sch. Dist., 2009 N.J. Super. Unpub. LEXIS 1690, at *5.

The SAC endorsement authorizes the holder to perform the functions of a SAC in preschool through grade 12. N.J.A.C. 6A:9B-14.2(a). Such functions may include:

1. Assisting with training of school staff on how to combat substance abuse;
2. Serving as an information resource for substance abuse prevention, curriculum development, and instruction;
3. Assisting with district in revising and implementing substance abuse and related policies and procedures;
4. Developing and administering substance abuse and related intervention services;
5. Providing counseling and referral services to students regarding substance abuse and related problems; and
6. Cooperating with community service providers or other officials in the rendering of substance abuse and related treatment services. N.J.A.C. 6A:9B-14.2(a).

In Lucky v. Bd. of Educ., the Commissioner found that a school employee, who lost his job when his position as a full-time SAC was abolished and the duties of that position were combined with the duties of a School Counselor in a new position, failed to establish that such conduct violated the employee's tenure and seniority rights. EDU 13727-17, Initial Decision (February 14, 2019), adopted Comm'r (March 27, 2019), < https://njlaw.rutgers.edu/collections/oal/. The Commissioner agreed with the ALJ that the employee was not certified as a school counselor, that such certification was needed to serve in that position, and that the board presented valid educational reasons for combining the two positions, including efficiency and the delivery of better integrated counseling services. Id. Because petitioner admittedly did not possess the requisite School Counselor endorsement to serve in the position, he did not have entitlement over the SAC/School Counselor position, and it was properly filled by someone who did. Id.

Here, there is no dispute that Elcock achieved tenure in her position as a SAC. However, the district has subsequently eliminated all designated SAC positions due to budget constraints. For the 2019-2020 school year, the district assigned the SAC-related duties to two school counselors, Brenda Moretti and Patricia Cuttino. Moretti previously held the positions of Secretary and Educational Coordinator. Cuttino previously held the positions of Instructional Aide, Home Instructor, and SAC. Moretti has a School Counselor educational services certification and Cuttino has both a School Counselor *and* SAC certifications. According to the record, Moretti and Cuttino currently work solely as school counselors in the district.

Therefore, despite Elcock's many years of service as a dedicated SAC for the district, she does not have tenure or seniority in any existing district position that entitles her to "bumping rights" over other employees. The SAC endorsement is the only endorsement on her educational services certificate, and no other positions are available that require only this endorsement.

Second, Elcock has not alleged or provided evidence that the RIF was undertaken by ERESC in bad faith, such as combining positions to "defeat" Elcock's tenure and seniority rights. A local board of education may engage in a reduction of the work force, even if tenured positions are affected, if done for reasons of economy. Klinger v. Cranbury BOE, 190 N.J. Super. 354, 357 (App.Div. 1982); Trigani v. Monmouth Beach BOE, EDU 8644-00 and 8645-00, Initial Decision, (Oct. 11, 2002), <http://lawlibrary.rutgers.edu/oal/search >, adopted, Comm'r (Dec. 2, 2002) <http://lawlibrary.rutgers.edu/oal/search >. Such decisions are subject to review to determine whether a position has been abolished or merely transferred in violation of the tenure statutes. Viemeister v. Prospect Park BOE, 5 N.J. Super. 215 (App. Div. 1949).

The controlling statute, N.J.S.A. 18A:28-9, provides that

> [n]othing 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 such positions for reasons of economy or because of a

> 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 provisions of this article.

In sum, a local board of education may reduce its teaching staff so long as it "is genuinely for reasons of economy." Impey v. Shrewsbury BOE, 142 N.J. 388,398 (1995).

Deciding to reduce the teaching force by abolishing specific positions need not eliminate the services related to those positions. See Impey, 142 N.J. at 399; see also Klinger, 190 N.J. Super. at 357 (concluding that a local school board may alter the full-time status of a tenured employee to restructure a department to meet financial constraints while continuing to provide identical services). Whether services are eliminated, reduced, or modified may be relevant in determining whether abolishing the position genuinely helps advance the goals of economy and efficiency, and was done in good faith. Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949) (the "substance" rather than the "form" of the change controls; if a Principal, for example, was replaced with an identical position but different title, it would not be a valid reduction in force).

After the RIF eliminated the SACs, ERESC did not employ anyone else in those positions. Rather, the SAC-related duties were assigned to two school guidance counselors. One of the counselors has a SAC certification. Both counselors and a social worker provide counseling to students regarding drug and alcohol abuse. And all three were already employed by ERESC prior to Elcock's termination.

I therefore **CONCLUDE** that the record reveals nothing improper in the ERESC's action in eliminating Elcock's SAC position. I **CONCLUDE** that the position was abolished as part of an overall reorganization for legitimate reasons of economy, and her duties were distributed among existing certificated staff. Elcock offers no legal support or any evidence to the contrary. I further **CONCLUDE** that the ERESC did not violate Elcock's tenure and seniority rights and there are no indications in the record of bad faith or arbitrariness on part of ERESC in taking such actions.

ORDER

Based on the foregoing, it is **ORDERED** that respondent's Motion for Summary Decision is **GRANTED** and 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.

December 21, 2021
DATE



LESLIE Z. **CELENTANO,** ALJ

Date Received at Agency: December 21, 2021

Date Mailed to Parties: December 21, 2021

dr

HOWARD C. EDELMAN ADR, INC.

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January 10, 2022

Angelica Allen-McMillan, Ed. D.
Acting Commissioner
New Jersey Department of Education
PO Box 500
Trenton, NJ. 08625

Re: **Hamilton Township Board of Education**
v. Joseph Smith - Tenure Charges

Dear Dr. Allen-McMillan,

I am the arbitrator designated to hear and decide the charges in the above referenced matter. A settlement agreement has been reached in this case (see attached). After review, I find that this Agreement comports with relevant statutory requirements. It frees the District from having the student complainant testify at trial, thereby saving her and her family from embarrassment and stress.

Also, since it involves an immediate resignation it saves the Board the expense of trial costs and guarantees that Respondent will not service as teacher/counselor at Hamilton in the future.

Consequently, I find the settlement serves interests of all interested parties.

DATE: 1/10/22

Howard C. EdeC=an, Esq.

State of NY)
) ss:
County of ---!=N'--+)

On this, the 10th day of May 2021, before me the undersigned Timothy Carl Malpersonally appeared, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

Notary Public

MARY HALBERSTADT
NOTARY PUBLIC, STATE OF NEW YORK
No. 01HA6301768
Qualified in Nassau County
Commission Expires November 1, 2021

SETTLEMENT AGREEMENT, RESIGNATION AND GENERAL RELEASE

This SETTLEMENT AGREEMENT, RESIGNATION AND GENERAL RELEASE **("Agreement")** is being entered into among and between JOSEPH SMITH **("Mr. Smith"** or **"Releasor")** and HAMILTON TOWNSHIP BOARD OF EDUCATION **("HAMILTON** shall be referred to as **"Releasees."** Mr. Smith, HAMil.,TON shall be collectively referred to herein as the **"Parties."**

WHEREAS, Mr. Smith is and has been employed by HAMil.,TON as a tenured teacher; and

WHEREAS, HAMILTON certified tenure charges against Mr. Smith to the Commissioner of Education on October 20, 2021 (the **"Action");** and

WHEREAS, the Commissioner of Education transmitted the matter for hearing and determination by an arbitrator; and

WHEREAS, the Parties wish to resolve the tenure charges in the interest of the public without the need for further litigation, and all of Mr. Smith's claims and potential claims against HAMIT.,TON, hereby stipulate to settle same, subject to the terms and conditions set forth herein and

WHEREAS, the meaning, effect and terms of this Agreement have been fully explained to Mr. Smith, who understands that this Agreement settles, bars, and waives any and all claims that he could possibly have against Releasees as of the date of this Agreement;

NOW, THEREFORE, in consideration of the mutual promises, covenants, agreements and representations contained herein, the legal sufficiency of which is acknowledged by the Parties, and intending to be legally bound hereby, the Parties agree as follows:

L Settlement of Tenure Charges. The Board agrees upon execution of the within Settlement Agreement, Resignation and Release by the parties, the subject tenure charges shall be moot and shall be deemed to be withdrawn and abandoned by HAMil.,TON.

2. Resignation: Mr. Smith, by signing this Agreement, hereby tenders his immediate and irrevocable resignation. The resignation shall be irrevocable upon acceptance and approval of this Agreement by HAMILTON.

3. Compensation. The Board shall compensate Mr. Smith as follows:

(a) Mr. Smith shall be a total sum of $75,000 (seventy-five thousand dollars) within thirty-days of Board Approval. Said payment shall be a settlement for which a 1099 shall be issued.

(b) Mr. Smith shall be entitled to no further payments, benefits or emoluments of employment.

4. No Admissions. The parties agree that neither the resignation of Mr. Smith, nor the Board's approval of this Agreement, constitute an admission of liability or wrongdoing by either party.

5. Mr. Smith's General Release of Claims. In consideration for Releasees promises and representations made herein, Mr. Smith, individually and on behalf of his heirs, representatives, immediate family members (including but not limited to his spouse and children), agents, successors and assigns, hereby releases Releasees, their parents, board members, subsidiaries, shareholders, directors, officers, employees, agents, attorneys, insurers, affiliates, predecessors, successors, assigns, heirs, and all persons acting by, through, under or in concert with any of them (collectively, the **"Released Parties"),** from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which Mr. Smith now has, claims to have, owns, holds or which Mr. Smith at any time heretofore had, held, or claimed to have based on events occurring through the date of execution of this Agreement, to the fullest extent allowed by law, except for the claim specifically referenced in Paragraph 5 of this Agreement. This release includes, without limitation, claims arising under 42 U.S.C. § 1981, Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, the National Labor Relations Act, the Employee Retirement Income Security Act (save for claims related to vested benefits, which are exempted from this release), the Equal Pay Act, the New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, as well as any other federal, state, local, or municipal statute, ordinance or regulation that prohibits improper discrimination, harassment or retaliation in the workplace or othenvise relates to or regulates employment relationships. In addition, this release extends to and covers claims for tortious conduct or breach of express or implied contract, including wrongful discharge, breach of covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, breach of contract or implied contract, negligence, misrepresentation, fraud, detrimental reliance, promissory estoppel, defamation, invasion of privacy, breach of laws governing safety in the workplace, loss of consortium, or any claims under federal, state, and local statutory and common law relating in any manner whatsoever to his employment with HAMILTON or the termination of that employment relationship. Mr. Smith represents and warrants that he has not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand or cause of action, including any claim for attorneys, fees, against Releasees that relate to the matters stated above. Nothing in this paragraph, nor this Agreement, shall waive any claims of Mr. Smith arising under N.J.S.A. 18A:16-6 and/or N.J.S.A. 18A:16-6J.

6. Post-Employment Inquiry. HAMil..TON agrees, through its Administration, to respond to post-employment inquiries regarding Mr. Smith by providing the information required by N.J.S.A. 47: lA-10, including his name, title, position, last salary, payroll record, length of service in the District, date of separation, that Mr. Smith resigned from his employment, and the amount, if any, of any pension received. The Board shall also provide fully and truthfully all such information as it may be legally required to provide to any governmental agencies or pursuant to Court Order.

7. No Rehire. Mr. Smith understands and agrees that his employment relationship with HAMILTON has ended. Mr. Smith understands and agrees that he is no longer entitled to

any wages, salary, health benefits, emoluments, or any other payments other than those specifically and explicitly set forth in this Agreement. Releasees shall be under no obligation to reinstate, hire, rehire or consider Mr. Smith for future employment with the HAMJLTON. Mr. Smith acknowledges that he will not be eligible for rehire with the HAMILTON, including but not limited to full-time, part-time, temporaiy employment, as a non-payroll worker, or any other form of contract work at any time in the future. Accordingly, Mr. Smith agrees that he will not seek or apply for employment with Hamilton or any successor or assign of Hamilton. Mr. Smith acknowledges that if he applies for such employment notwithstanding his representations in this paragraph and is rejected, the decision will be based solely on this paragraph and not for some other reason, unlawful or otherwise.

8. Public Interest Served. The within settlement will serve the public interest, eliminating additional litigation costs. The within settlement further avoids the need to require a student that initiated a complaint against Mr. Smith to testify in the tenure charge hearing. The settlement further avoids uncertainty for both sides on an issue where the law is unsettled.

9. No Other Legal Action by Mr. Smith. Mr. Smith confinns he does not have any charge, complaint or action pending in any forum or fonn against any of the Released Parties as of the date of hereof. Further, Mr. Smith covenants and agrees not to bring any charge, complaint, action, suit, or administrative proceeding in any forum before any federal, state, or local administrative agency or in any federal, state or local court against any of the Released Parties for any actions that could or did arise or accrue prior to and including the date of this Agreement. This covenant extends to, but is not limited to, proceedings to negate, modify or reform this Agreement, though nothing in this paragraph is intended to limit Mr. Smith from instituting legal action for the sole purpose of enforcing Releasees' obligations to him under this Agreement. Further, nothing in this paragraph is designed to interfere with or limit Mr. Smith's protected rights to file a charge with or participate in an investigation by or proceeding before the Equal Employment Opportunity Commission or any similar state or local commission that investigates and enforces anti-discrimination laws. Nonetheless, Mr. Smith understands that, by signing this Agreement, he waives any rights he may have to recover money or other relief in any lawsuit or proceeding he brings, or that is brought on his behalf, by any agency or third party against any of the Released Parties based on events arising out of or relating to his employment with HAMILTON through the date of this Agreement. Except where otherwise pennitted under this paragraph, Mr. Smith agrees that any action he may file against any of the Released Parties based on events that transpired on or before the effective date hereof shall be dismissed with prejudice upon presentation of this Agreement. Mr. Smith further agrees that, to the extent allowed by law, he will not participate in any litigation, complaints, or claims brought by other individuals against Releasees.

10. Assent to Tenns. The parties hereby acknowledge that they have entered into this Agreement with a full understanding of their rights and obligations and that they were fully informed of the implications of this Agreement by their respective attorneys, and they do so without duress, of their own free will and volition.

11. Additional Covenants and Acknowledgments Pursuant to N.J.A.C. 6A:3-5.6.

(a) The parties agree that settlement of this case is justified for an expeditious and final resolution. As a result of Mr. Smith's immediate resignation, the Board

will achieve a guaranteed result, in an expeditious manner, at a comparatively low cost and will avoid the uncertainty of litigation before an arbitrator. Additionally, the within matter involves extensive testimony of witnesses, both employees and a student, whose interests would be better and permanently served by resolution through this Agreement.

(b) The parties further agree that the proposed settlement will serve the public interest. As a result of Mr. Smith's resignation from employment with HAMITLON, HAMILTON will not have to incur any further expenses associated with arbitration or any subsequent action related to this matter. Further, HAMILTON will avoid the expenditure of substantial future administrative time and effort and avoid the disruption to the educational day for employees and student witnesses.

(c) Mr. Smith acknowledges has that he has the right to contest the charges against him and seek an adjudication of the charges by the arbitrator.

(d) Mr. Smith acknowledges that he has the right to consult any attorney and has, in fact, consulted an attorney prior to signing this Agreement.

(e) Mr. Smith acknowledges, as a teaching staff member, that the Superintendent and Commissioner of Education have a duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

12. Entire Agreement. This Agreement sets forth the entire agreement between Mr. Smith and Releasees. All other prior agreements between the Parties are hereby terminated and shall have no other force or effect. Mr. Smith acknowledges and agrees that Releasees have not made any promises to him other than those set forth in this Agreement. This Agreement may be modified only upon an express written agreement between the Parties. Because counsel for Mr. Smith had a full opportunity to review this Agreement with him before he signed it, the language 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.

13. Disputes. The validity, performance, construction, and effect of this Agreement shall be governed by the substantive laws of the United States and the New Jersey. The Superior Court of New Jersey shall retain jurisdiction to implement and enforce the Agreement and its terms.

14. Severability. The invalidity or unenforceability of any provision of this Agreement, whether in whole or in part, shall not in any way affect the validity or enforceability of any other provision contained herein.

15. Counterparts; Exchange by Electronic Means. This Agreement may be executed in counterparts, which shall be taken together as the entire agreement of the Parties hereto. This

Agreement may also be exchanged by the Parties via electronic mail for the purposes of securing signatures and will be fully enforceable as an original document.

MR_ SMITH ACKNOWLEDGES THAT HE HAS READ THIS **AGREEMENT, UNDERSTANDS IT AND IS ENTERING INTO** IT KNOWINGLY AND VOLUNTARILY AND NOT AS A RESULT OF ANY PRESSURE, COERCION OR DURESS.

MR. SMITH AGREES THAT HE HAS HAD A REASONABLE AND SUFFICIENT TIME AND OPPORTU1'UTY TO CONSULT WITH COUNSEL, AND THAT HE HAS FULLY DISCUSSED AND REVIEWED THE TERMS CONTAINED IN THIS AGREEMENT Willi COUNSEL PRIOR TO EXECUTING IT, OR FREELY CHOSEN NOT TO DO SO.

MR. SMITH FURTHER UNDERSTANDS, ACKNOWLEDGES AND AGREES THAT THIS AGREEMENT CONTAINS A GENERAL RELEASE OF CLAIMS AS TO ALL RELEASED PARTIES, AND THAT THIS AGREEMENT SETTLES, BARS, AN'D WAIVES ANY AND ALL CLAIMS THAT HE HAS OR COULD POSSIBLY HAVE AGAINST THE RELEASED PARTIES THROUGH THE DATE OF TIIIS AGREEMENT.

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IN "'\\'ITNESS \'\ttfEREOF. ◆mJ inti::-nding to be legaHy m:mnd, the: Parties agree 10 the tcnns o fthis Agn.x:mcnt.

JOSEPH SMITH

Dated: 1/3/2022

HAMILTON TOWNSHIP BOARD OF EDUCATION.

NA?-,lE:

T!Tt,E:

Dated:

CERTIFICATION Oii' CONSENT TO SETTL&\.IENT TBRMS PURSUANT TO N_J.A.C. 6A:3-5 6(n).

Dtited:

Patrick Carrigg, Esq.
General Counaef
HamHton Tvtp. Bd. of Educ2:tfon

-4..PPROV.ED:

Dntcd: Jan 4, 2..o.a 2,..

Howard Edelman, Arbitrator

Joo Smith
25 Cottage Street
l..t\mbertville, N.J 08530
C! (609)-414.2575
P: j;' 3 ·Lst">fi(»··· ; : 1i 1 J:·[s;·M!,

December 23, 2021

D r. Scott Rocco, Supe.rinc,:,mi'i.'-nt
Hamilton 'I\;,'"·n::-hip Schoof Di:–,tr-ict, H<xn-d of ti:duc��limm
};{) Park Av(:
Ifo.milton Tovrn;::ihip . N,J 08Gfl0

Re: Lett.er o f Resignation

Doar Supe:rinrondc:nt Rocco:

Sullje<.:t to the term _ anti <:tlml'.Uchii of tu.:r Sen.tlement A���nu:mt., fw.tii-n@ti,Jn, fllld Rc-k@ise ("Agreement"), and the approval of &'tmc by the Boo.rd of Education. I h@rehy tE:mJ:'r mv ir:revocable ::re@@:..@tion effet1ive .fi'ebr,,1:.uy l. 2022 from all f:mpkiy1nenl wh.h r,he Hsmih.on Townshi1> Berard of Edu{::-H,frm. T 6Ulnnit thii:;, re-::tignation ""ith the understanding that the Bo@.rd of Edtication has ,;nri·ved its right to 60 days' notice of my rnfl-ignatfon, in whieh it tH tmt.itif'.d pm@uant tn N.,,J.S-A, IBA:28-8..

Very truly yours,

Joseph Smith

29-22

OAL Dkt. No. EDU 12061-19
Agency Dkt. No. 190-8/19

New Jersey Commissioner of Education

Final Decision

Dragan Ninoski

Petitioner,

v.

Board of Education of the City of Hackensack, Bergen County,

Respondent.

The record of this matter, the proposed Employment Settlement Agreement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement

IT IS SO ORDERED.

A;TQG COMMISSIONER OF EDUCATION

Date of Decision: February 15, 2022
Date of Mailing: February 15, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12061-19
AGENCY DKT. NO. 190-8/19

DRAGAN NINOSKI,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Christopher J. **Buggy,** Esq., for respondent (Florio, Perrucci, Steinhardt, Cappelli, Tipton & Taylor, attorneys)

Record Closed: January 4, 2022 Decided: January 4, 2022

BEFORE **MARGARET M. MONACO,** ALJ:

Petitioner Dragan Ninoski filed a Petition of Appeal alleging that the Board of Education of the City of Hackensack (the Board) violated his tenure and seniority rights when it terminated his employment. The Department of Education transmitted the matter

to the Office of Administrative Law, where it was filed for determination as a contested case. Following conferences with counsel, the parties amicably resolved the matter and submitted the attached Employment Settlement Agreement and Release under letter dated December 29, 2021, along with a Resolution of the Board approving the Settlement Agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures 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. 52:148-10.

January 4, 2022
DATE

MA :r Sf YJfoiL
M. MONAe{),ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____
jb

nECEIVED

EMPLOYMENT SETTLEMENT AGREEMENT AND RELEASE

ZOZZ JAN - '-1 A 9: 5 0

This Employment Settlement Agreement and Release (the "AgreemeS.if liEJiif f effective as of the ., 1 1-4 day of J.{lae.r:dir- '2021 ("the Effective Date⁰ f, ibr fuBbe'fwden' . DRAGAN NINOSKI ("Ninoski") and the HACKENSACK BOARD OF EDUCATION (the "Board").

WHEREAS, the Board is a body public and corporate, organized and existing by viitue of the laws of the State of New Jersey, N.J.S.A. 18A: 11-1 which is entrusted with maintaining and governing the public schools of the City of Hackensack School District;

WHEREAS, the Board has its administrative offices located at 191 Second Street, Hackensack, New Jersey 07601;

WHEREAS, Ninoski is a former employee of the Board, currently residing at 145 Holt Street, Hackensack, New Jersey 07 60 l;

WHEREAS, Ninoski filed a Petition with the New Jersey Commissioner of Education, captioned Dragan Ninoski v. Hackensack Board of Education, Bergen County, OAL Docket No. EDU-l 2061-2019 N, Agency Docket No. 190-8/19, asserting that the Board violated bis tenure rights; and, Ninoski and his union filed an Unfair Practice Charge with the New Jersey Public Employment Relations Commission, bearing docket number CO-2020-059, assetting that the Board violated his rights under the New Jersey Employer-Employee Relations Act (hereinafter "the Actions");

WHEREAS, the palties desire to resolve and settle all outstanding matters between them pursuant to the terms and conditions set forth in this Agreement; and,

NOW, THEREFORE, intending to be legally bound hereby and in consideration of the muttlal covenants and conditions set forth in this Agreement, the Parties agree as follows:

1. Settlement Terms

Ninoski and the Board agree that the Board shall pay the gross amount of Seventy-Five Thousand Dollars and No Cents ($75,000.00), minus usual and customary withholdings, including FICA, State and Federal taxes, union membership fee contributions, pension contributions, and other legally required deductions, in full satisfaction of all claims in the Actions for compensatory damages known or unknown, asserted or unasserted including, but not limited to, claims for legal or equitable relief, reinstatement, back or front pay, lost benefits, and contract claims. Ninoski agrees to waive all claims asserted or that could have been asselted in the Actions. This sum shall be paid within thirty (30) calendar days of the date the Commissioner of Education approves this

Agreement as follows:

a. The sum of Seventy-Five Thousand Dollars and No Cents ($75,000.00), less usual and customary withholdings, including FICA, State and Federal taxes, union membership fee contributions, pension contributions, and other legally required deductions in the form of a check made payable to Ninoski. The Board will cause to be issued an IRS Form(s) W-2 regarding such payment.

b. Ninoski agrees that Ninoski is responsible for all applicable taxes, if any, as a result of the receipt of the money. Any employer-side payroll taxes and/or penalties relating thereto, if any, are the sole responsibility of the Board.

2. Stipulation of Dismissal

Ninoski and the Board agree that by executing this Agreement, it (and a Board resolution) shall be submitted to the Administrative Law Judge for issuance of an Initial Decision approving the settlement. If the settlement is approved by both the Administrative Law Judge and the Commissioner of Education, Ninoski's pending Petition will be dismissed with prejudice and Ninoski's Unfair Practice Charge, CO-2020-059, will be withdrawn with prejudice.

Ninoski further agrees that he will not seek future employment or reinstatement with the Board, or pursue any claims for reinstatement of employment, backpay, benefits and emoluments, and violation of tenure rights against the Board.

3. **Release**

Upon the fulfillment by the Board of the terms and conditions of the Agreement, Ninoski, his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any and all claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, all officers and administrators, its attorneys, agents and employees, as well as their successors, and assigns, including, but not limited to any and all claims for attorneys' fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 6, et seq. ("ADEA"); Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e, et -, ("Title VII"); the Reconstruction Era Civil Rights Act, as amended, 42 U.S.C. §§ 1981, § 1983, et filrn, ("Civil Rights Act"); the Civil Rights Act of 1991, as amended, 42 U.S.C. § I98 la, et seq. ("CRA of 1991 "); the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et filrn, ("ADA"); the Family and Medical Leave Act, 29 U.S.C. §§ 2601, seq. ("FMLA"); the Fair Labor Standards Act, 29 U.S.C. § 201, et ("FLSA"); the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § I001, et ("ERlSA"); the Equal Pay Act, 29 U.S.C. § 201, et (EPA"); the Rehabilitation Act, 29 U.S.C. §§ 701, et seq. ("RA"); the Pregnancy Discrimination Act, 42 U.S.C. §§ 2000, et seq. ("PDA"); the Whistleblower Protection Statutes, l0 U.S.C. § 2409, 12 U.S.C. § 1831j, 31 U.S.C. § 5328, 41 U.S.C. § 265, (collectively as "WPS"); the New Jersey Civil Rights Act, N.J.S.A. 10:6 I, et seq.; the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ("LAD"), the New Jersey Family Leave Act,

N.J.S.A. 34:11B-1, et fil:9.. ("FLA"); the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. ("CEPA"); New Jersey Worker Freedom from Intimidation Act, N.J.S.A. 34:19-9 et ; ___ the New Jersey Wage and Hour Law, N.J.S.A. 34:1 I-56a, et seq. ("WHL"); the New Jersey SAFE Act, N.J.S.A. 34:11 C-1, et seq.; the New Jersey Discrimination in Wages Law, NJ.S.A. 34:11-56.1, et seq. ("OWL"); and the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq. ("WPL); any collective negotiations agreement; any common law claim and any and all other claims, that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim, up to the date of this Agreement. Ninoski expressly understands and acknowledges that it is possible that unknown losses or claims exist or that present losses may have been underestimated in amount or severity. Ninoski expressly accepts and assumes the risk of such unknown or underestimated losses or claims and acknowledges and agrees that the benefits to be provided to him pursuant to this Agreement fully compensate him for such risks.

4l. **Assent to Terms**

Ninoski and the Board hereby acknowledge that they entered into this Agreement with a full understanding of their rights and that they were fully informed of the implications of this Agreement. Ninoski has reviewed this Agreement with Richard A. Friedman, Esq., and Albert J. Leonardo, Esq. and acknowledges he is satisfied with the quality of the services received. The patties enter into this Agreement without duress and of their own free will and volition and acknowledge that they were given a full and fair oppo1iunity to fully consider this Agreement. This Agreement must be formally approved by the Board and this Agreement will be deemed null and void without said approval. All reasonable efforts will be made to timely obtain approval from the Board.

Ninoski acknowledges that he has been offered twenty-one (21) days to consider this agreement and that he has seven (7) days from the execution of this document to revoke this Agreement by delivering written notification of revocation to Dora Zeno, Hackensack Board of Education Interim School Business Administrator/Board Secretary. It is understood that if this Agreement is revoked, it will not be effective or enforceable. This Agreement shall become effective on the eighth (8th) day after delivery of this executed Agreement by the Parties, provided that Ninoski has not revoked acceptance or rescinded the Agreement.

5. No **Admission of Liability**

This Agreement does not in any way constitute an admission of liability or wrongdoing by the Board concerning the allegations raised in the Actions.

It is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy or procedure of the Board.

6. .[yccessors and Assignees

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors, assignees, heirs, officers, employees, officials and agents.

7. Amendment; Severability; No Waiver

This Agreement shall not be amended, changed or modified except in a writing signed by all patties. The provisions of this Agreement are severable. If it is determined by a comt or administrative agency of competent jurisdiction that a specific clause of this Agreement is i!legal or unenforceable, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect unless doing so would destroy the essential nature of this Agreement. Any failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or of any other provision.

13. Non-Disparagement

Each paity to this agreement agrees not to disparage or make or solicit any comments, statements, or the like to the media, the public or to others that may be considered derogatory or detrimental to the good name or business reputation of the other.

9. **No Further Consideration**

Ninoski and the Board each expressly acknowledge and represent that neither party will seek nor be entitled to any fu1ther consideration from the other in connection with this Agreement other than the consideration as detailed herein.

10. Entire Agreement

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. Each patty acknowledges that neither the other pa1ty, nor any agent or attorney of the other party, has made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

11. Construction

The terms of this Agreement are not to be construed against any one party but are to be construed as if all parties prepared it equally.

12. Counterparts

This Agreement may be signed in counterparts and shall be binding as if all Parties executed the original thereof. A facsimile or electronically-transmitted signature shall have the same effect as an original signature.

13. Law Governing

This Agreement shall be governed by the laws of the State of New Jersey.

{Remainder of Page Left Intentionally Blank]

IN **WITNESS WHEREOF,** the parties have executed this agreement consisting of this and five (5) preceding pages on the dates set forth below.

Witness:

Dragan Ninoski

12-13-2021

Dated: 12.-(;:> '-.2Ut/

Dated:

STATE OF NEW JERSEY)

ss:

COUNTY OF Bt71M)

I certify that on _____, 2021, Dragan Ninoski personally came before me and acknowledged under oath, to my satisfaction, that he:

(a) is named in and personally signed this document; and
(b) signed this document as his voluntary act and deed.

DANIEL SERAPHIN
NOTARY PUBLIC OF NEW JERSEY
COMM. NO. 2440898
MY COMMISSION EXPIRES 11/25/2023

ture

HACKENSACK **BOARD OF** EDUCATION

Attest:

By: _____
Lancelot Powell, President

Dora Zeno, Board Secretary

Dated:

Dated:

EXCELLENCE IN EDUCATION

191 Second Street, Hackensack, NJ 0760 J
Phone: (201) 646-8000
Fax: (20 l) 646-0415
,vww.hackensackschools.org

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HACKENSACK BOARD OF EDUCATioiZZ JAN - Ii A 9= 5 0
RESOLUTION

S'f:ffE OF NEVY JEII SEY

FL **WHEREAS,** the Hackensack Board of Education (the "Board") is Q futy Qfiifft,ftYdi n.JafrJ;- captioned Dragan Ninoski v. Hackensack Board of Education, Bergen County, OAL Docket No. EDU-1206 I-20 19 N, Agency Docket No. 190-8/19, and an Unfair Practice Charge filed with the Public Employment Relations Commission, Docket No. CO-2020-059; and

WHEREAS. in order to avoid the time and expense of protracted litigation the parties thereto endeavor to amicably resolve the matter in difference;

NOW THEREFORE **BE** IT **RESOLVED,** by the Board as follows:

i. The Board hereby approves the settlement in the within captioned matter in the gross amount of $75,000, minus usual and customary withholdings, including FICA, State and Federal taxes, union membership fee contributions, pension contributions and other legally required deductions.

2. The Superintendent, Interim Business Administrator/Board Secretary, Board Presidenl and/or legal counsel are authorized to execute any documents in furtherance of the within approval.

3. This Resolution shall take effect immediately.

I New Business FJ				
I fifotiou: ***Tmstee Powell***	***Second: Tmstee Oates***			
i	***Yes***	***No***	***Abst<iin***	***Absent***
Gcndczu (Julio)				X
l Mr. Coleman (Christopher)	X			
I Ms. DeNully (Detra)	X			
Mr. Goodman (Ira)	X			
Ms. LeSane (Zonie)				X
Mr. Oates (Michael)	X			
Mr. Rodriguez (Anthony)	X			
Mr. Velez (Carlos)				X
Mr. James-Vickery (Scott), Vice President	X			
Mr. Powell (Lancelot), President	X			

L Dora E. Zeno, Board Secretary of the Hackensack Board of Education, hereby ce1tify that the foregoing is a true copy of a motion duly adopted by said Board at a Regular Meeting held on Monday, December 13, 2021.

IN 'WITNESS WHEREOF, I have set my hand and the sea! of the Hackensack Board of Education, Tuesday, December 14, 2021.

Dora E. Zeno, Interiin Board Secretary
Hackensack Board of Education

30-22E

OAL Dkt. No. EDU 00325-22
Agency Dkt. No. 2-1/22

New Jersey Commissioner of Education

Order on Emergent Relief

L-A.M. and J.M., on behalf of minor child, J.M.,

Petitioners,

v.

Board of Education of the Township of Allamuchy, Warren County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (AU) have been reviewed. Upon such review, the Commissioner concurs with the AU that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* GA:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the AU deem necessary to bring it to closure.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: February 15, 2022
Date of Mailing: February 15, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING EMERGENCY RELIEF
OAL DKT. NO. EDU 00325-22
AGENCY DKT. NO. 2-1/22

L-A.M. & J.M. ON BEHALF OF J.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF ALLAMUCHY, WARREN COUNTY,
Respondent.

L-A.M. and **J.M.,** petitioners, pro se

Michael A. Pattanite, Jr., Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Lang, Carrigg & Casey, attorneys)

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

STATEMENT OF THE CASE

Petitioning parents challenge the suspension of their child by the Allamuchy Board of Education.

PROCEDURAL HISTORY

On January 7, 2022, petitioners filed a Petition of Appeal and a motion for emergent relief, consisting of a one-paragraph "emergent basis statement."

The Department of Education transmitted the case to the Office of Administrative Law (OAL) 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. The case was filed at the Office of Administrative Law (OAL) on January 12, 2022.

On January 20, 2022, respondents filed a letter brief in opposition to petitioners' motion for emergent relief, and petitioners thereafter filed an email reply. Oral argument was heard on January 21, 2022.

FACTUAL DISCUSSION

The Petition of Appeal alleges, inter alia, that an incident occurred in school on December 17, 2021, wherein, J.M. "was beat up in the hallway by an older eighth grade student;" "earlier that day during lunch an eighth grade boy who has bothered him many times before, calls him retarded repeatedly, and has repeatedly bullied him, approached his lunch table which is four tables away . . . and dumped garbage on his head all in the sight of the lunchroom teachers who did absolutely nothing;" he came "back a second time and smashed more garbage onto his forehead;" "during dismissal, . . . the boy then approached [J.M.] again in the hallway . . . at his locker" and "repeatedly pushed him down the hallway, threw him into the lockers, punched him in the face, and ripped his shirt apart;" "when [J.M.] was thrown into the lockers he managed to swing out of self-defense not really aiming at anything and struck the boy . . . merely defending himself after he had been attacked;" and "the boy 'went insane and started slamming [J.M.] against the lockers and punched [J.M.] in the face.'" The Petition of appeal further alleges that J.M. was

detained, but "this boy was sent home on the bus and not detained;" that L-A.M. contacted the State Police who dispatched troopers to the school; that the troopers reviewed the cameras and "concurred that the other student was the aggressor;" that the superintendent stated that "due to the code of conduct and the fact that [J.M.] had managed to strike the other boy that regardless of the circumstances he had to be suspended because they did not tolerate violence at any time;" that J.M. was "not allowed back into school until he served his punishment" and the parents made the . . . "decision to send [J.M.] back in for the next day . . . and deal with it afterwards;" that the superintendent advised that "after their investigation it was determined that this was in fact an HIB or harassment intimidation and bullying case . . . after she had already punished" J.M.; and that '[i]n this instance the code of conduct policy has no bearing as it was obvious after reviewing the videotape that [J.M.] was in imminent danger of being harmed . . . and [h]is only course of action was in fact to defend himself."

LEGAL STANDARD

Where authorized by law and where irreparable harm will result without an expedited decision granting or prohibiting some action or relief connected with a contested case, emergency relief pending a final decision on the whole contested case may be ordered upon the application of a party. N.J.A.C. 1:1-12.6(a). With respect to school laws in particular, the Commissioner has jurisdiction to hear and determine all controversies and disputes arising under school laws, except higher education, or under the rules of the State board or of the Commissioner. N.J.S.A. 1BA:6-9. Where the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case. N.J.S.A. 6A:3-1.6(a). A motion for a stay or emergent relief must be accompanied by a letter memorandum or brief which must 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.

N.J.S.A. 6A:3-1.6(b)

DISCUSSION AND CONCLUSIONS OF LAW

In petitioners' initial emergent basis statement, petitioners contend that emergent relief is required because:

> Our son will suffer irreparable harm if the requested relief is not granted based on the attached documents. He will have this false suspension on his record as he goes into the high school. He is also suffering from the fact that all trust and accountability in the school administration is now nonexistent since that they have punished him for being a victim of an assault. He has been taught that when in imminent danger he has no right to defend himself and that he can not trust the adults to protect him or take morally right action.

Additionally, petitioners' reply to respondent's opposition to the motion for emergent relief states:

> We are requesting emergent relief because this incident is now in our son's file. It will follow him over to the high school where he will start his high school career. It has harmed his character, caused emotional damage, and extreme distrust of school officials to which he is subject to every day.

J.M.'s school records presently reflect a one-day in school suspension, which suspension has already been served, and he is not yet in high school. Thus, this is not a situation where - if ultimately the petitioners prevail - J.M. might be irreparably harmed by his current student record being sent to a prospective college or by being excluded

from a graduation ceremony. Accordingly, I **CONCLUDE** that petitioners have failed to establish any irreparable harm warranting emergent relief.

In order to prevail on an application for emergent relief, a petitioner must meet all four conjunctive prongs set forth in Crowe. Since, petitioners have failed to establish irreparable harm, the other criteria are not addressed, and I **CONCLUDE** that their application for emergent relief should be denied. The facts should be fully developed at an evidentiary hearing, which will afford an opportunity to assess the credibility of any witnesses and weigh the testimony and evidence presented.

ORDER

It is hereby **ORDERED** that the petitioners' application for emergent relief is **DENIED.** It is also **ORDERED** that the respondent shall file an answer to the Petition of Appeal no later than February 4, 2022, and that a telephone prehearing conference is scheduled for February 10, 2022 at 3:00 p.m. to address procedures and schedule a hearing date.

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.

Kelly J Kirk

January 24, 2022
DATE

KELLY J. KIRK, ALJ

db

33-22SEC
Agency Dkt. No. 7-10/21A
SEC Dkt. No. T-22-21

New Jersey Commissioner of Education

Final Decision

In the Matter of Carlos lejnieks, Hoboken Dual language Charter School, Hudson County.

This matter involves an appeal of the School Ethics Commission's (SEC) August 30, 2021 determination that appellant Carlos lejnieks - a charter school trustee for the Hoboken Dual language Charter School - violated the School Ethics Act (Act) for failure to timely complete charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* GA:28-4.1, and *N.J.A.C.* GA:11-3.l(a). The appellant ultimately completed the training after the issuance of the SEC's July 27, 2021 Order to Show Cause (OTSC), but prior to its August 30, 2021 decision. The SEC recommended a penalty of reprimand for the violation, and the appellant appealed the SEC's determination. Having carefully reviewed the SEC's decision and the record in its entirety, the Commissioner finds that the SEC's decision is supported by sufficient, credible evidence, and that the appellant failed to establish that the SEC's finding of a violation of the Act is arbitrary, capricious or contrary to law. *N.J.A.C.* GA:4-4.l(a). However, as set forth below, while the Commissioner would ordinarily agree that a penalty of reprimand is appropriate in matters such as this, due to the unique circumstances specific to appellant's case, the Commissioner finds that no penalty is warranted.

Pursuant to *N.J.A.C.* GA:28-4.1, charter school trustees must annually complete a training program offered online by the New Jersey School Boards Association (NJSBA). Appellant was required to complete his Governance 1 training by June 30, 2021. Exhibit A to the SEC's decision

- a certification by an NJSBA employee – indicates that on May 19, 2021[1], the NJSBA sent an email to appellant with the link to access the training, along with an additional email about the training on June 11, 2021. According to Exhibit A, the NJSBA sent additional notices to appellant on June 17 and June 28, 2021, along with notices to the school Business Administrator on June 11 and 21, 2021 indicating that appellant had not completed the training.[2]

The documents provided in appellant's appendix provide that on June 25, 2021, prior to the June 30, 2021 deadline, appellant began communicating with the Business Administrator about trouble accessing the training. (Aa12-Aa25). When appellant logged into his account, he could only see training events for dates that had passed, but did not have access to the online training, and he indicated that he had not received a link for the online training from NJSBA. (Aa21-Aa25). On June 30, 2021, the Business Administrator contacted the NJSBA call center and asked for the training links to be resent to appellant. (Aa26). A response email by the NJSBA on the same date indicated that the training links were resent, but that "You can do the training when you have time don't rush to finish today." (Aa29}.

Thereafter, the NJSBA sent notices to both appellant and the Business Administrator on July 7, 2021 and July 15, 2021. (Exhibit A). The SEC then issued its OTSC on July 27, 2021. The following day, the Business Administrator resumed communication with the call center about appellant's required training. (Aa30-Aa34). The Business Administrator then reached out to appellant, informing him that his "email address was incorrect with **NJSBA** - the correct email has been given." (Aa35). On August 13, 2021, appellant communicated with the NJSBA that

[1] The certification indicates the year of this communication was 2020, which is presumably a typographical error.

[2] Copies of the emails referenced in Exhibit A are not included in the record.

while he could now login to his account, he still could not access the training because he was getting a blank portal screen when he tried to click "take class." (Aa39). That same date, appellant submitted his resignation from the Board rather than face disciplinary action. (Aa44-Aa45). On August 16, 2021, the NJSBA responded, "We have corrected this error that you have been encountering. Please try and access the course one more time." (Aa46). Appellant successfully completed his training on that same date and retracted his resignation. (Aa47-Aa49). Thereafter, the SEC issued its decision on August 30, 2021, finding that appellant violated the Act and recommending a penalty of reprimand.

In his appeal to the Commissioner, appellant argues that the SEC's decision was not supported by sufficient credible evidence and is therefore arbitrary, capricious and contrary to law. First, appellant argues that the SEC decision states that the NJSBA sent multiple communications to appellant regarding the training. While the certification attached as Exhibit A details dates that emails were purportedly sent, no copies of the emails are included in the record. Furthermore, on July 28, 2021, it was discovered that NJSBA had an incorrect email address for appellant. (Aa35). Additionally, while the SEC decision states that appellant did not respond to the OTSC, such statement is inaccurate because appellant did submit proof that he completed the training, along with a transcript, as the OTSC directed him to do. (Aa8; Aa49). Finally, while the SEC decision indicates that there was no reasonable basis for appellant to have failed to complete the training by June 30, 2021, appellant argues that he faced multiple technical flaws with the online training platform, which were not resolved until August 16, 2021. Moreover, the NJSBA told appellant on the due date that he could complete the training when

he had time and did not need to rush to finish that day. Accordingly, appellant requests that the Commissioner reverse the SEC finding of a violation of the Act.

In opposition, the SEC argues that its decision should be affirmed because it is supported by sufficient credible evidence in the record. The SEC reiterates that appellant received multiple notifications to complete the training but failed to do so in timely manner, by the due date of June 30, 2021. The SEC argues that appellant does not provide proof that NJSBA had the wrong email address on file. Additionally, the SEC points out that there is a one-month gap in appellant's emails regarding training from June 30, 2021 to July 28, 2021 (the day after the OTSC was issued), without any explanation as to why he did not attempt to complete the training during that time. The SEC contends that appellant's explanations do not excuse the fact that he failed to complete the training by the June 30, 2021 deadline, and instead completed the training on August 16, 2021. As such, the SEC argues that it applied a clear and straightforward application of the statute and regulations and its decision must be affirmed.

In reply, appellant points out that he did provide proof that he did not receive the NJSBA's emails. Specifically, appellant provided an email from the Business Administrator indicating that NJSBA had an incorrect email for him. Appellant further contends that the SEC provides no proof that the NJSBA used a correct email address. Additionally, appellant argues that he should not be faulted for the one-month gap between communications as he was attending to urgent personal matters and the NJSBA had advised him that he did not need to rush to finish the training. Appellant maintains that he ultimately completed the training before the final deadline set by the OTSC.

Upon a comprehensive review of the record, the Commissioner finds that the SEC's determination that the appellant is in violation of the Act is supported by sufficient credible evidence, and the appellant has not established that the SEC's decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-4.l(a). Pursuant to *N.J.A.C.* 6A:28-4.l, appellant was required to complete the Governance 1 training program by June 30, 2021. There is no dispute that appellant ultimately completed the training on August 16, 2021. As such, appellant failed to timely complete his charter school trustee training in accordance with *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.l, and *N.J.A.C.* 6A:11-3.l(a).

With respect to the appropriate penalty, the Commissioner is sympathetic to appellant's arguments that he attempted to complete the training before the June 30, 2021 deadline, dealt with technological issues in accessing the training, and was told by the NJSBA that he did not need to rush to complete it. An email in the record demonstrates that the NJSBA had an incorrect email address for respondent. The SEC does not provide any evidence to the contrary, and the July 28, 2021 email from the Business Administrator indicating that appellant's email address with the NJSBA was incorrect, but that the correct email had now been given, demonstrates that the email address had been incorrect until that date. As such, the evidence in the record demonstrates that appellant never received the link to access the training on May 19, 2021, or the other warning notices from the NJSBA. There are emails prior to the June 30, 2021 deadline in which appellant was attempting to access the training, did not have the link, and could only see dates for trainings that had passed rather than the option to take the training online. When the NJSBA was advised of this, they told him, "You can do the training when you have time don't rush to finish today." (Aa29). While the SEC argues that the one-month gap between

communications cannot be excused, the Commissioner notes that the problem with the portal was not fixed until August 16, 2021, and appellant completed the training that same day.

Pursuant to *N.J.A.C.* 6A:28-10.12(a), when a violation of the Act is found, the SEC may recommend that the Commissioner impose a penalty of reprimand, censure, suspension, or removal of a school official. Additionally, the SEC may decline to issue a penalty when it finds that the violation was de minimis. *N.J.A.C.* 6A:28-10.12(a). The Commissioner notes that ordinarily, school board members or charter school trustees who complete the training after the issuance of the OTSC but before the SEC's meeting receive a penalty of reprimand. However, the unique circumstances in this matter - in which the appellant did not receive the link to access the training due to an incorrect email address, attempted to complete the training prior to the June 30, 2021 deadline before running into technological difficulty, and was directed by the NJSBA that he did not need to complete the training by the deadline - render this matter different from ordinary cases. As such, the Commissioner finds that appellant's violation of the Act was de minimis and no penalty is warranted.

Accordingly, although respondent is a school official found to have violated the School Ethics Act, no penalty shall be issued.

IT IS SO ORDERED.[3]

C4LCjJVVv .fi.'b.

:NiNG COMMISSIONER OF EDUCATION

Date of Decision: February 23, 2022
Date of Mailing: February 23, 2022

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.l. Under *N.J.Ct.R.* 2:4-l(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T22-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/MIO Carlos Lejnieks,
Hoboken Dual Language Charter School, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on July 27, 2021, directing Respondent, a "board member" as defined in *N.J.S.A.* 18A: 12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A: 12-21 *et seq.,* to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.l, and *N.J.A.C.* 6A:l l-3.l(a).

In the OTSC that was served on July 28, 2021, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. [1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and in local school administrators. By virtue of N.J.S.A.18A:12-23.l, the breadth of the Act was expanded to include charter school trustees.

Respondent is a trustee of the Hoboken Dual Language Charter School, located in Hudson County. Pursuant to *N.J.S.A.* 18A:12-23.l, the provisions of the Act were made applicable to administrators and members of a board of trustees of a charter school. As a result of his position as a charter school trustee, Respondent is required, pursuant to *N.J.S.A.* 18A: 12-33, *N.J.A.C.* 6A:28-4. l, and *N.J.A.C.* 6A:l l-3.l(a), to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis. For convenience and ease, the training is offered online so any charter school trustee may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by June 30, 2021.

On July l, 2021, the NJSBA provided the Commission with the names of those charter school trustees who failed to complete mandated training by June 30, 2021, and the list provided by

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[1] Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

the NJSBA included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from the NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In addition to the communications from the NJSBA, the Commission's staff also sent electronic correspondence to ***all*** charter school leads on July 2, 2021, and July 21, 2021, advising that charter school trustees who failed to complete training prior to the Commission's meeting on July 27, 2021, would be the subject of an Order to Show Cause.[2] Again, notwithstanding this correspondence, Respondent did not complete the required training. As a result, an OTSC was issued by the Commission on July 27, 2021, and served on Respondent thereafter.

To date, there is no dispute that Respondent did not complete his required training by June 30, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on August 16, 2021, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.SA.* 18A: 12-33, as well as *N.J.A. C.* 6A:28-4.1 and *N.J.A. C.* 6A: 11-3. l(a). Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

In addition, the Commission readily acknowledges and is sympathetic to the fact that the Coronavirus (COVID-19) has had a significant impact on the daily lives of all people, and believes that reasonable accommodations and extensions of deadlines are appropriate and warranted in certain circumstances. However, the Commission notes that training is completed annually, can be completed from any computer or device with an internet connection, and that the Commission was only required to issue an OTSC to thirty-six (36) charter school trustees throughout the State for failure to comply with the statutory obligation to complete training. As such, there is no reasonable basis for Respondent, based on the current record, to have failed to comply with this mandate.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A. C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand.**

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[2] Again, due to the ongoing Coronavirus (COVID-19) pandemic, this communication was also sent via electronic transmission.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: I) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: August 30, 2021

[3] An electronic submission may also be sent to contro\crsicsdisput.:slilinl.'.:-cidoe.ni.l.'.o\.

EXHIBIT 1

I, Vincent Delucia, of full age hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Director of Training/Educator in Residence. I am responsible for working with NJSBA staff to assure accuracy of charter school trustee mandatory training records.

2. As part of my responsibilities, I assure the accuracy of the reports given to the New Jersey School Ethics Commission (NJSEC) regarding charter school trustees who do not complete the annual mandatory training.

3. On July 1, 2021, NJSBA delivered the Report of charter school trustees who had not completed their mandated training for year 2020-2021 to the NJSEC, due by June 30, 2021.

4. Prior to preparing the July 1, 2021 report, NJSBA communicated with district Business Administrators (BAs) and charter school trustees about mandated training through an email to all charter school trustees and BAs on June 11, 2021, June 17, 2021, June 28, 2021, July 7, 2021, and July 15, 2021.

5. On May 19, 2020, Carlos Lejinieks was registered to take Governance 1 training and an email with the link was sent to their registered email address. An additional email was sent to all charter school trustees about mandated training on June 11, 2021.

6. An additional notice was sent to the Hoboken Dual Language Charter School Business Administrator on June 11, 2021, June 28, 2021, July 7, 2021, and July 15, 2021 advising that Carlos Lejinieks had not completed the Governance 1 training.

7. On June 17, 2021, June 28, 2021, July 7, 2021 and July 15, 2021, NJSBA communicated through email with Carlos Lejinieks with the link and instructions for completing Governance 1.

8. All charter members received information about mandated training requirements in the weekly update on December 15, 2020, January 4, 2021, January 11, 2021, January 18, 2021, January 25, 2021, February 1, 2021, February 8, 2021, February 15, 2021, February 22, 2021, March 1, 2021, March 8, 2021, March 19, 2021, April 12, 2021, April 19, 2021, May 3, 2021, May 17, 2021, June 7, 2021, June 14, 2021, June 21, 2021, and July 12, 2021.

9. Carlos Lejinieks did not complete Governance 1 training.

August 12, 2021

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T22-21

Whereas, pursuant to *N.J.S.A.* 18A:12-23.1, all charter school trustees, including Respondent, are subject to the provisions of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*; and

Whereas, Carlos Lejnieks (Respondent) is a charter school trustee of the Hoboken Dual Language Charter School; and

Whereas, the Act requires Respondent to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his Governance 1 training program by June 30, 2021; and

Whereas, at its meeting on July 27, 2021, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by June 30, 2021, as required by *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a); and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by June 30, 2021; and

Whereas, at its special meeting on August 30, 2021, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33, *N.J.A.C.* 6A:28-4.1, and *N.J.A.C.* 6A:11-3.1(a) by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on August 30, 2021, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on August 30, 2021, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson
School Ethics Commission

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on August 30, 2021.

Kathryn A. Whalen, Director

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

February 23, 2022

VIA EMAIL ONLY
Brett Holeman
14 Crandall Drive
East Brunswick, NJ 08816

Sadia Ahsanuddin, DAG
Office of the Attorney General
Division of Law
25 Market Street, P.O. Box 112
Trenton, NJ 08625

Re: *In the Matter of the Suspension of the Certificates of Brett Holeman, State Board of Examiners,*
Agency Dkt. No. 8-11/21A

Dear Parties:

I have reviewed the pleadings filed in connection with appellant Brett Holeman's motion to settle the record on appeal in the above-captioned matter. Appellant maintains that the record on appeal provided by the State Board of Examiners (Board) does not adequately represent the record that should be before the Commissioner on appeal.

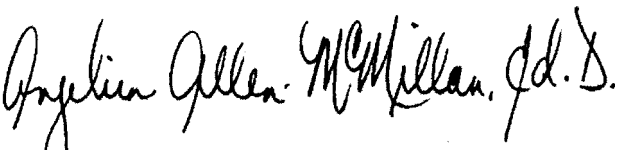
Pursuant to *N.J.A.C.* 6A:4-2.5(a), "[t]he record on appeal shall include all papers and exhibits ... on file with the State Board of Examiners...; all entries as to matters made on the record; any stenographic transcripts; and all papers filed with the Commissioner." Appellant's motion concerns two broad categories of documents. First, appellant seeks to exclude from the record a letter from the Freehold Regional High School District and documents related to appellant's employment in the West Morris Regional High School District. These documents were part of the evidence that was on file with the Board and are therefore appropriately included in the record. If appellant disagrees with the contents of those documents, he is free to respond to them in his brief in support of his appeal.

Second, appellant seeks to include the transcripts from his tenure hearing in the record. These documents were not part of the evidence that was on file with the Board and are therefore appropriately excluded from the record. While *N.J.A.C.* 6A:4-2.5(a) does indicate that transcripts are part of the record on appeal, that provision refers to transcripts from the proceedings before the Board that led to the decision being appealed, not to transcripts from a separate proceeding that were never

submitted to the Board. The Commissioner further notes that the doctrine of collateral estoppel applies to facts established in a prior tenure hearing, and although appellant may believe that the transcripts of that proceeding contradict the arbitrator's decision, neither the Board's suspension proceedings nor this appeal provide an avenue to challenge the arbitrator's decision or the findings therein.

Accordingly, appellant's motion to settle the record on appeal is denied.[1]

Sincerely,



Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: State Law Library

34-22L

[1] Appellant seeks clarification as to whether his letters on appeal, and the attachments, are considered part of the record. Pursuant to *N.J.A.C.* 6A:4-2.5(a), those documents are "papers filed with the Commissioner" and are part of the record.

36-22
Agency Dkt. No. 30-2/21

New Jersey Commissioner of Education

Decision

Board of Education of the Township of Washington, Gloucester County,

Petitioner,

v.

J.M. and R.H.,

Respondents.

On June 22, 2021, a final agency decision was rendered in this matter, wherein the Commissioner found respondents liable for tuition in the amount of $16,941 for the 2019-2020 school year, representing tuition for a period of ineligible attendance by their child in the Board's school district. The Board subsequently requested that the Commissioner seek entry of the assessments 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, Jennifer McFadden and Robert Houck are now subject to entry of a judgment by the court in the amount of $16,941, which represents the payment ordered by the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 23, 2022
Date of Mailing: February 23, 2022

35-22
OAL Dkt. No. EDU 01430-21
Agency Dkt. No. 15-1/21

New Jersey Commissioner of Education

Decision

N.S., on behalf of minor child, S.S.-B.

Petitioner,

v.

Board of Education of the Borough of Magnolia, Camden County,

Respondent.

On October 7, 2021, a final agency decision was rendered in this matter, wherein the Commissioner found N.S. liable for tuition in the amount of $18,599.40, representing tuition for a period of ineligible attendance by his minor child, S.S.-B., in the Board's school district during the 2020-2021 school year. The Board subsequently 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. N.S. offered no reasons why the judgment against him 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, Nathan Squires is now subject to entry of a judgment by the court in the amount of $18,599.40, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 23, 2022
Date of Mailing: February 23, 2022

37-22
Agency Dkt. No. 196-10/21

New Jersey Commissioner of Education

Decision

In the Matter of the Suspension of the Teaching Certificates of Emma Allen, Board of Education of the West Windsor-Plainsboro Regional School District, Mercer County.

For petitioner, Mark G. Toscano, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on October 19, 2021, by way of an Order to Show Cause served by petitioner (West Windsor-Plainsboro Regional School District Board of Education) upon respondent (Emma Allen), requiring respondent to show cause why an order should not be entered suspending her teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by her teaching contract. By notice dated October 27, 2021, the Office of Controversies and Disputes (Office) acknowledged 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, on December 9, 2021, the Office sent respondent a second and final notice – via certified and regular mail – directing that she 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 certified mail tracking indicates that the notice sent by certified mail was

delivered on December 13, 2021 and left with an individual. No answer to the Order to Show Cause had been filed as of this date.

The certification and supporting exhibits submitted by petitioner in this matter indicate that: the respondent was hired by petitioner as a full-time teaching staff member on September 1, 2020; the respondent entered into a contract for the 2021-22 school year that required 60-days' notice prior to termination; on or about August 23, 2021, the respondent sent an email to the Director of Human Resources indicating her decision to resign effective immediately. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be 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. [1]

Angelina Allen McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 23, 2022
Date of Mailing: February 23, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

38-22
Agency Dkt. No. 4-1/22

New Jersey Commissioner of Education

Decision

In the Matter of the Suspension of the Teaching Certificates of Courtney Lelli, Vineland Public Charter School, Cumberland County.

For petitioner, Geoffrey N. Stark, Esq.

For respondent, Courtney Lelli, *pro se*

This matter was opened before the Commissioner of Education on January 13, 2022, by way of an Order to Show Cause served by petitioner (Vineland Public Charter School) upon respondent (Courtney Lelli), requiring respondent to show cause why an order should not be entered suspending her teaching certificates pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by her teaching contract. By notice dated January 13, 2022, the Office of Controversies and Disputes (Office) acknowledged proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days.

On January 24, 2022, respondent sent email communication to the Office indicating that she would not be taking further action with respect to this matter. The Office sent a response on January 25, 2022 advising respondent that if she chooses not to contest the matter, then each allegation in petitioner's papers would be deemed admitted and that the Commissioner would decide this matter on a summary decision basis, pursuant to *N.J.A.C.* 6A:3-1.5(e). Alternatively, the Commissioner advised that respondent had the opportunity to submit opposition challenging the

petition. On January 29, 2022, respondent confirmed that she was not contesting this matter any further.

The petition, certification, and supporting exhibits submitted by petitioner in this matter indicate that: the respondent was hired by petitioner as a ten-month kindergarten teacher for the 2021-22 school year; respondent entered into an employment contract with petitioner that required 60-days' written notice prior to respondent's termination; after the close of business on November 24, 2021, respondent sent an email to the Principal indicating that she was resigning, effective immediately, and that she would not be reporting to work after the Thanksgiving holiday. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be 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. [1]

Angelina Allen McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 23, 2022
Date of Mailing: February 23, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

39-22

Agency Dkt. No. 19-2/22

New Jersey Commissioner of Education

Decision

In the Matter of the Suspension of the Teaching Certificates of Joya Anderson, Board of Trustees of the Achieve Community Charter School, Essex County.

For petitioner, Thomas O. Johnston, Esq.

For respondent, Joya Anderson, *pro se*

This matter was opened before the Commissioner of Education on February 1, 2022, by way of a petition and an Order to Show Cause served by the Board of Trustees of the Achieve Community Charter School (Board) upon respondent, Joya Anderson, requiring her to show cause why an order should not be entered suspending her teaching certificates pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by her teaching contract. On February 8, 2022, the respondent sent email communication to the Board indicating that she would not be contesting the petition or the suspension of her teaching certificate.

The petition submitted by the Board in this matter states that the respondent submitted her written resignation to the Board on December 22, 2021, with an effective date of January 2, 2022 – well short of the sixty day-notice required by the respondent's contract. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be 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 the 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. [1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 23, 2022
Date of Mailing: February 23, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

42-22

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Hearing of

RUTHERFORD BOARD OF EDUCATION

and

STAVROS SISKAS, RESPONDENT

Agency Docket Number 130-8/21

AWARD OF ARBITRATOR

The undersigned Arbitrator, having been duly designated by the Commissioner of Education from the Panel of Arbitrators in accordance with the TeachNJ statute, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, Rutherford Board of Education properly revoked the tenure and terminated the employment of Respondent Stavros Siskas. Respondent's grievance is hereby denied.

February 25, 2022



Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this day 25th day of February 2022 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

Kathryn Gallagher

KATHRYN GALLAGHER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 2/18/2026

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION

In the Matter of the Tenure Hearing of

RUTHERFORD BOARD OF EDUCATION

and

STAVROS SISKAS, RESPONDENT

Agency Docket Number 130-8/21

The undersigned was appointed by the Commissioner of Education as Arbitrator in the matter of the tenure proceedings brought by the Rutherford Board of Education against Stavros Siskas. Hearings in the above-entitled matter were held at Rutherford Borough Hall in Rutherford, NJ on November 29, 2021, December 3, 2021 and December 10, 2021 before Daniel F. Brent, duly designated as Arbitrator. Both parties attended these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross-examine witnesses, and to present evidence and arguments. A verbatim transcript was made of the proceeding. Both parties submitted post-hearing briefs, and the record was declared closed on January 31, 2022.

APPEARANCES

For the Board of Education

Rodney P. Hara, Esq. of Fogarty and Hara, Esqs.

Ashley L. Roessler, Esq., of Fogarty and Hara, Esqs. on the brief.

Jack Hurley, Superintendent of Schools

Joseph Kelly, Business Administrator and Board Secretary

Barbara O'Donnell, Supervisor of Computer Technology and Business Education

For the Respondent:

Ben Weathers, Esq., of Caruso, Smith and Picini, Esqs.

Stavros Siskas, Respondent

ISSUE SUBMITTED

What shall be the disposition of the tenure charges brought by the Rutherford Board of Education against Stavros Siskas?

NATURE OF THE CASE

Respondent Stavros Siskas was employed by the Rutherford Board of Education (hereafter, the Board or the District) since 2007, and acquired tenure in 2010. After serving as a Special Education Teacher at Union School from 2007 to 2014 and a Guidance Counselor at Union School from 2014 to 2016, the Grievant served as a Guidance Counselor at Pierrepont Upper Elementary School, from 2016 to the present. His transfer from the Union School to the Pierrepont School was part of a District-wide reorganization effectuated at the beginning of the 2016-17 school year.

On April 9, 2021, the Respondent was arrested for possession of crystal methamphetamine following a traffic stop by the Lyndhurst Police Department. The police officers stopped Respondent because he failed to signal before making a turn and thereafter failed to stop for a pedestrian walking in a crosswalk. This traffic stop occurred after the officers observed the Respondent approach a house in Lyndhurst that they had under surveillance as part of an ongoing police investigation regarding the sale of illegal drugs from the house. During a search of his vehicle, the Grievant responded to police inquiries by stating that he had come from the Stellito Funeral Home, where his mother's recent funeral service had been held.

Having observed the Grievant coming directly from the house they had under surveillance, the officers inquired further. When asked if there was anything illegal in his car, the Grievant had first stated "Why would

there be anything illegal inside of my vehicle, I don't want to go to jail." Shortly thereafter he admitted to having crystal methamphetamine in his car. Following this admission, the police officers searched his car and found a small plastic bag containing what was reported as a "white rock/crystal-like substance believed to be methamphetamine".

Respondent was arrested and transported to Lyndhurst Police headquarters where he was served a complaint summons and officially charged with possession of a controlled dangerous substance ("CDS") in violation of NJSA 20:35-10 (a)(1), a third-degree crime. The substance seized from Respondent's personal vehicle was sent to the New Jersey State Police North Regional Laboratory for testing. The test confirmed the substance as 2.3 grams of methamphetamine, a Schedule II drug.

Respondent acknowledged to the Lyndhurst Police and again to the Arbitrator during his testimony that he believed the substance he purchased from the house under surveillance to be crystal methamphetamine. He did not immediately report his arrest to the District. Rather, based on his professed reliance on statements by the arresting officers that the matter would be resolved expeditiously without criminal charges, Respondent waited to report his arrest, but did so within the fourteen-day interval required by applicable New Jersey statute.

On April 12, 2021, the Board suspended Respondent with pay and commenced its investigation of circumstances leading to his arrest. On August 3, 2021, Superintendent of Schools Jack Hurley filed tenure charges with Board Secretary Joseph Kelly. These charges were served on Respondent on August 4, 2021. Respondent filed a written response to the tenure charges on August 19, 2021. On August 23, 2021, the Rutherford Board of Education voted to certify the tenure charges to the Commissioner of Education and to suspend Respondent without pay pending a hearing on the merits. On August 25, 2021, the District served the Board's decision together with the tenure charges on Respondent and his attorney. On August 31, 2021, the Board certified the following Tenure Charges:

CHARGE NO. 1

Stavros Siskas, a tenured teaching staff member employed by the Rutherford Board of Education, exhibited unbecoming conduct when he was arrested on April 9, 2021, for possession of crystal methamphetamine, and subsequently fabricated the circumstances of his arrest to the administration, and, as a result, should be dismissed from his position.

CHARGE NO. 2

Stavros Siskas, a tenured teaching staff member employed by the Rutherford Board of Education, exhibited unbecoming conduct when, through his actions of possessing crystal methamphetamine leading to

his arrest for a third degree crime and fabricating the circumstances of his arrest to the administration, he violated Board policies, State regulations and national standards applicable to his position, and, as a result, should be dismissed from his position.

CHARGE NO. 3

Stavros Siskas, a tenured teaching staff member employed by the Rutherford Board of Education, exhibited unbecoming conduct when he set a firmware password on a district-issued laptop without the consent of the administration, thereby restricting the administration from being able to access the laptop and resulting in the elimination of the hard drive, in violation of the Board's acceptable use policy, and when he outright denied setting the firmware password despite conclusive evidence to the contrary, and, as a result, should be dismissed from his position.

CHARGE NO. 4

Stavros Siskas, a tenured teaching staff member employed by the Rutherford Board of Education, exhibited unbecoming conduct when, through his actions of setting a firmware password on a district-issued laptop, thereby restricting the administration's access and resulting in the elimination of the hard drive, and outright denying his doing so despite conclusive evidence to the contrary, he violated board policies, state regulations and national standards applicable to his position, and, as a result, should be dismissed from his position.

CHARGE NO. 5

Stavros Siskas, a tenured teaching staff member employed by the Rutherford Board of Education, exhibited unbecoming conduct when, throughout the 2014-15, 2015-16, 2018-19 and 2019-20 school years, he repeatedly violated board policies and regulations, procedures and chain of command, resulting in his being placed on two performance improvement plans and having his salary increments withheld, and when he continued violating Board policies and regulations during the 2020-21 school year despite such remedial measures, and, as a result of his pattern of misconduct, should be dismissed from his position. The charges were referred to the Commissioner of Education.

By letter dated September 16, 2021, counsel for the Board of Education and for Respondent were advised that the tenure charges "had been reviewed and deemed sufficient, if true, to warrant dismissal or reduction of salary, subject to determination by the arbitrator of the Respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review the charges which are not dismissed as the result of a motion under the preponderance of the evidence standard. Accordingly, the charges are now referred to Arbitrator Daniel Brent, pursuant to N.J. S. A. 18A: 6-16."

At the arbitration hearings, the District offered testimony by Detective Christopher Cuneo of the Lyndhurst Police Department, Detective William Kapp of the Lyndhurst Police Department; Detective

Lieutenant Vincent Auteri of the Lyndhurst Police Department; Joseph Kelly, Rutherford Board Secretary; Barbara O'Donnell, Supervisor of Computer Technology and Business Education; Christopher Richmond, Network System Administrator for the Rutherford Board of Education; Michael Kivowitz, Network Systems Administrator; Curt Schweitzer, Principal of Union School; Joan Carrion, Principal of Pierrepont School; and Jack Hurley, Superintendent of Schools. Respondent testified in support of his position and called as a witness Nicole Ealey, a teacher of math and architecture at the Union School.

The Board offered into evidence Exhibits P1 through P16, P20 through P25 and P27 through P72. Respondent offered Exhibits R-6A, R-8A, R-11A and R-13A. Counsel for Respondent Siskas requested, and the Board consented to, an extension of the deadline for the filing of post-hearing briefs from January 19, 2022 to January 31, 2022.

DISCUSSION AND ANALYSIS

Respondent is employed by the Rutherford Board of Education in a position of trust as an educator and a guidance counselor. Regardless of the underlying circumstances that may have preceded his admitted repeated purchase and use of methamphetamine to self-medicate his psychological or emotional challenges, such conduct not only violates

applicable criminal law, but also unequivocally constitutes conduct unbecoming for a professional educator or guidance counselor. No school district can reasonably be expected to maintain in its employ a teaching or guidance professional with direct contact with children who has engaged in such egregious and illegal conduct.

Respondent has not demonstrated that he suffers from a remediable chronic addiction, particularly to a legal substance such as alcohol, that should be treated as a medical condition. Neither has he demonstrated that his use of crystal methamphetamines did not have a substantial adverse impact on his relationship with his employer. The District has proven beyond the applicable standard of preponderance of the evidence that the Respondent engaged in activity that violated New Jersey law, applicable professional ethical standards, and the essential bond of trust with his employer.

For a series of reasons that neither the Respondent, the arresting officers who testified, nor District leadership could adequately explain, the serious drug charges imposed following the Respondent's arrest on April 9, 2021 were subsequently transferred from the Bergen County Court to the Lyndhurst Municipal Court, where the charges were reduced to a fictitious charge that he had violated a municipal noise ordinance. Respondent accepted the reduced charge and payment of a

fine as his penalty. The record of the court case does not set forth any basis for this reduction of the charge.

Respondent's testimony that he was to be treated leniently as a confidential informant in exchange for his testimony against the sellers of the drugs has not been substantiated by any official document in evidence or testimony by any of the police officers who appeared at the arbitration hearings. These officers testified that they made no such arrangement and that they had discovered no agreement by any prosecutor that would explain why Respondent was permitted to plead to a municipal noise ordinance violation in response to a third-degree criminal charge.

Respondent admitted in his testimony during the arbitration that he purchased and possessed methamphetamines on multiple occasions in order to self-medicate his emotional pain. These drugs are an illegal Schedule II controlled dangerous substance. Although one may be sympathetic to the circumstances that Respondent confronted following his mother's death from COVID-19 and other stressors in his life, his admitted misconduct in violation of Board policy by purchasing, possessing, and consuming crystal methamphetamine forfeited his right to continued employment by the Rutherford Board of Education. For this reason, the District has demonstrated by more than a preponderance of

the evidence that Respondent Stavros Siskas is culpable for Charge 1 and Charge 2, for having violated applicable national professional standards and Rutherford Board of Education policies regarding his position as a Guidance Counselor. That Respondent may have had an inaccurate understanding or a misconception regarding the import of his not having been convicted of a third degree crime is immaterial. He compounded his poor judgment by repeatedly lying to District officials about the circumstances of his arrest, the substances he possessed and used, and about his role in installing computer software that more probably than not disabled a Board laptop in his possession.

The District alleged in Charges 3 and 4 that the Respondent intentionally disabled the District issued laptop computer by setting a "firmware" password shortly after he was notified of his suspension pursuant to the tenure charges. As a result of this action, the District contended that Respondent restricted District administration from "from being able to access the laptop and resulting in the elimination of the hard drive -- in violation of the Board's acceptable use policy." The Board further contended that the Respondent lied to the Board about his actions notwithstanding "conclusive evidence to the contrary" and thus should be dismissed from his position for conduct unbecoming that includes repeated manifest dishonesty that rendered Respondent unfit to resume his duties.

Credible testimony during the arbitration hearings by a District Administrator and other computer technology personnel established persuasively by more than a preponderance of the evidence that a firmware password had disabled the laptop computer provided to Respondent for his professional use and that Respondent had opportunity and motive to install such a password after he was advised of the tenure charges and before he returned the laptop to appropriate Board officials. Notwithstanding the Respondent's testimony denying this accusation, no other logical or reasonable conclusion regarding the installation of software known as "Firmware" other than through the Respondent's actions has been demonstrated by credible evidence. The Board has met its burden in this regard.

Credible testimony also established that the immobilization, destruction, or inaccessibility of data stored on the hard drive of the Board issued laptop was caused, at least in part, by the Board IT experts while attempting to secure access to the hard drive. However, the record did not establish unequivocally that either the manufacturer or the vendor misled the Board's computer technicians in the sequence of programming they employed to try to overcome the restrictions imposed by the software password. Moreover, the evidentiary record is speculative regarding what Respondent may have placed on the hard drive, if anything, beyond the installation of the firmware that would have been

inconsistent with his obligation to the Board and a violation of Board policy.

If the laptop related charges were the sole basis for tenure charges brought against Respondent, a penalty short of dismissal might reasonably be contemplated. However, given the Respondent's uncontroverted culpability for serious conduct unbecoming a teacher or guidance counselor by his admitted purchase, possession and use of crystal methamphetamines while actively employed as a guidance counselor by the Board, the penalty of dismissal is justified for these elements of Respondent's misconduct as specified in Charges 1 and 2.

Charge 5 alleges a series of violations of "Board policies and regulations, procedures in chain of command, resulting in his being placed on two performance improvement plans and having his salary increments withheld." According to the Board, Respondent's continued violation of Board policies and regulations during the 2020-21 school year, despite multiple remedial measures, constituted a pattern of misconduct justifying dismissal from his position. Testimony from various District officials, including school principals and administrators, chronicled multiple instances in which the Respondent's sense of entitlement and his lack of appreciation for the boundaries of his authorities as a Guidance Counselor resulted in multiple violations of Board policy.

These actions included ripping out cabinetry in his office and ordering replacement furnishings without authorization, opening an Amazon account using his school's name without permission of the District, setting up a limited liability corporation in the name of a District school purportedly to handle the finances of a holiday party, violating a written admonition not to reveal prematurely the admissions decisions affecting his students by a Bergen County technical school, installing unauthorized monitoring systems in his guidance office, and purchasing and using a private email blast system to circumvent the District's technology for communicating with groups of students and parents. In addition, he permitted his students to spend a school day outdoors in response to being assigned to cover for an absent teacher when he had been previously scheduled to accompany students on a field day to the beach.

Respondent was twice placed on Personal Improvement Plans, had annual increments withheld, and was otherwise unequivocally placed on notice by the Board that his conduct and persistent flouting of the Board's policies, procedures, and reasonable expectations regarding his professional demeanor would jeopardize his employment. Having spent down his account of accumulated good will by irresponsible conduct over a period of years, Respondent depleted any equitable argument for

leniency regarding the revocation of his tenure and termination of his employment.

At best, the Respondent was a troubled, troubling, and difficult employee for District administrators. His inflated sense of what he should be able to do without seeking authorization from his supervisors repeatedly created conflict with District officials. The evidentiary record accurately and persuasively portrayed ongoing efforts by administrators on multiple occasions to communicate clearly and unambiguously to Respondent that his mode of conduct and his actions were inconsistent with the Board's reasonable expectations as his employer. Respondent failed properly to respond to the imposition of progressively severe discipline through these warnings, PIPs, and increment withholdings. Consequently, the District has demonstrated Respondent's culpability for the conduct described above as encompassed by Charge 5 by at least a preponderance of the evidence.

The Board's persuasive proofs, in combination with Respondent's testimony admitting most if not all of the substance of these complaints without any rationale or justification for his actions, constituted an aggravating factor that precludes any finding that the Board acted arbitrarily or capriciously in determining that the Respondent's conduct for the time frame encompassed by the instant tenure charges created just cause to terminate his employment.

The Board demonstrated persuasively that the penalty of dismissal is neither arbitrary nor capricious given Respondent's admitted and proven misconduct. Although Respondent may now regret the poor choices he made, the Respondent has unable to offer any credible or persuasive defense to his egregious misconduct. The Arbitrator has thoroughly considered all of the allegations, proofs, and testimony offered by the parties, including those that have not been discussed at length herein. After carefully considering the evidence and arguments contained in the evidentiary record, I find that the Board satisfied the standards governing the rights of tenured teachers established by the applicable New Jersey statutes, and further find that Respondent's gross misconduct fully justified revocation of his tenure and his dismissal from employment for conduct unbecoming a teacher and for other good cause shown.

Based on the evidence submitted, I find that the Rutherford Board of Education properly revoked the tenure and terminated the employment of Respondent Stavros Siskas. Respondent's grievance is hereby denied.

February 25, 2022 Daniel F. Brent, Arbitrator

43-22

New Jersey Commissioner of Education

Final Decision

M.M., on behalf of minor child,

Petitioner,

v.

Board of Education of the Township of Lafayette, Sussex County,

Respondent.

Synopsis

Petitioner appealed the finding of the respondent Board's Anti-Bullying Coordinator (ABC) that petitioner's minor son was not the victim of harassment, intimidation and bullying (HIB). Petitioner also sought video evidence regarding the alleged HIB incident. Following a prior decision by the Commissioner, the Appellate Division remanded the matter for consideration of additional evidence regarding whether the Board's HIB decision was ripe for review.

On remand, the ALJ identified the narrow issue for consideration here to be whether petitioner M.M. availed herself of the right to appeal the ABC's findings via a hearing before the respondent Lafayette Board of Education (Board), and if so, whether the Board rendered a decision based on that appeal. The ALJ found, *inter alia*, that: no proofs were presented to show that petitioner ever sought or received a hearing at the Board level; an HIB hearing was never conducted before the Board and thus no corresponding decision was ever issued by the Board based on such a hearing; although petitioner alleged on appeal that she possessed proof that a decision was rendered, no proof was ever presented despite repeated requests from the ALJ that petitioner provide same. Accordingly, the ALJ concluded that petitioner had not exhausted her administrative remedies, and therefore her case remains unripe for determination. Accordingly, the ALJ dismissed the petition.

Upon comprehensive review, the Commissioner found that: no further proceedings related to the video evidence are properly before the Commissioner at this time as two previous decisions have already ordered the Board to release the video in question to the petitioner; there is no remaining dispute as to whether the Board's HIB determination is ripe for review, as two previous Commissioner's decisions have determined that it is; while this matter was proceeding before various forums, petitioner filed a second petition stemming from the same incident alleging that the Board violated the Act; since a determination on the merits of petitioner's HIB claim in connection with the same incident is currently pending before the OAL under Agency Docket No. 216-11/21, there are no outstanding disputes herein. Accordingly, the Commissioner determined that no further proceedings are required in this case.

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

43-22

OAL Dkt. Nos. EDU 07169-21 (EDU 05225-20 on remand)
Agency Dkt. No. 94-5/20

New Jersey Commissioner of Education

Final Decision

M.M., on behalf of minor child,

Petitioner,

v.

Board of Education of the Township of Lafayette, Sussex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the parties pursuant to *N.J.A.C.* 1:1-18.4, and the replies thereto, have been reviewed and considered.

The primary relief sought in the petition of appeal filed in this matter was the production of video evidence maintained by the Lafayette Board of Education (Board) related to a harassment, intimidation, and bullying (HIB) complaint made by petitioner on behalf of her minor child. In two prior decisions, the Commissioner has ordered the Board to provide a copy of the requested video to the petitioner. *See, M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County*, Commissioner Decision No. 333-21L+, decided December 20, 2021; and *M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County*, Commissioner Decision No. 10-22L, decided

January 19, 2022. Accordingly, no further proceedings related to the video evidence are properly before the Commissioner at this juncture.[1]

The proceedings in this matter have also addressed the merits of the Board's HIB decision and whether that decision was ripe for review when the petition was originally filed. Again, in two prior decisions, the Commissioner has determined that the HIB decision is ripe for review and that any argument by the Board that petitioner had failed to exhaust administrative remedies is without merit. *See, M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County*, Commissioner Decisions No. 333-21L+, decided December 20, 2021; and *M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County*, Commissioner Decision No. 10-22L, decided January 19, 2022. Accordingly, there is no remaining dispute as to whether the Board's HIB determination is ripe for review.

While this matter was proceeding before various judicial forums, the petitioner filed a second petition of appeal alleging that the Board violated the Anti-Bullying Bill of Rights Act stemming from the same incident. That matter, with Agency Docket No. 216-11/21, has been transmitted to the OAL for a hearing regarding the merits of the Board's HIB decision and whether the Board violated the Act as alleged by petitioner. Accordingly, since a determination on the merits of petitioner's HIB claim in connection with the same incident is currently

[1] It is important to recognize that the Commissioner does not have the authority to enforce the order requiring the Board to provide the petitioner with the video evidence of the alleged incident. As provided in the New Jersey Court Rules, R. 4:67-6, parties seeking enforcement of agency orders are required to bring an action in New Jersey Superior Court.

pending before the OAL under Agency Docket No. 216-11/21, and there are no outstanding disputes remaining in this case, no further proceedings on this matter are required.[2]

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 4, 2022
Date of Mailing: March 4, 2022

[2] All motions pending under Agency Docket No. 94-5/20, including the motions to vacate, motion for partial summary decision, motion to reopen, motions to consolidate with Agency Docket No. 216-11/21, all motions related to adjournments, all motions related to stays of hearing dates or decisions, and all motions related to discovery and sanctions, are denied.

[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 07169-21
Agency Ref. No.: 94-5/20

(ON REMAND)

OAL DKT. NO. EDU 05225-20

M.M. ON BEHALF OF MINOR CHILD,

Petitioner,

v.

TOWNSHIP OF LAFAYETTE BOARD OF EDUCATION, SUSSEX COUNTY,

Respondent.

M.M. o/b/o Minor Child, pro se

Marc H. Zitomer, Esq., for respondent (Schenck Price Smith & King, LLP, attorneys)

Record Closed: December 8, 2021 Decided: December 9, 2021

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

The forgoing matter involves a petition of appeal on remand from the Appellate

Division of the Superior Court of the State of New Jersey to the Commissioner of the New Jersey Department of Education. The factual findings and legal conclusions in the first petition, EDU 05225-20, are incorporated herein by reference.

ISSUE

The remand decision raised a narrow issue on appeal: Did petitioner, M.M., avail herself of the right to appeal the Anti-Bullying Coordinator's findings via a hearing before the Lafayette Board of Education, and if so, did the Board of Education render a decision based on that appeal?

PROCEDURAL HISTORY

The underlying matter, docketed as EDU 05225-20, was dismissed by the undersigned via an Initial Decision on Motion for Summary Decision dated August 7, 2021. In that case, M.M. appealed the Respondent School District's (the District) Anti-Bullying Coordinator's (ABC) finding that her son was not the victim of harassment, intimidation and/or bulling (HIB). In that Initial Decision, the undersigned found that M.M. failed to exhaust her administrative remedies when she refused to appear in front of the local board of education for a hearing to dispute the ABC's findings as required by statute, and thus, the local board had not issued a corresponding decision regarding M.M.'s appeal. Instead, M.M. filed an action directly with the NJ Department of Education's Office of Controversies and Disputes, which was subsequently transferred to the Office of Administrative Law.

The original Petition of Appeal was assigned to the Honorable Danielle Pasquale, ALJ, who soon withdrew due to a conflict, and the matter was then assigned to the undersigned. In the Initial Decision, the undersigned reasoned, and the Commissioner subsequently affirmed, that M.M.'s claim was not ripe and must be dismissed.

Upon appeal to the Appellate Division of the New Jersey Superior Court, M.M. sought to supplement the record with documents allegedly showing that the Board had, in fact, rendered a decision regarding her appeal. As a result, the NJ Department of Education filed a Motion for Remand to allow these documents to be considered by the undersigned, with instructions that, if it is found that the local board had, in fact, rendered such a decision, then the underlying matter would, then, be ripe for a hearing before the Commissioner of Education and Office of Administrative law, and should proceed on the merits.

The remanded petition of appeal was transmitted to the OAL August 24, 2021. The transmittal sheet provided the following specific instructions regarding the alleged documents and the focus of the hearing:

> "…the DOE filed a motion for remand to allow those documents to be considered. The Commissioner is transmitting this matter for further fact-finding and a determination regarding whether the Board issued a decision. Should the ALJ determine that the Board did issue a decision, the matter may proceed for a merits determination regarding whether that decision was arbitrary, capricious, or unreasonable.

Subsequent to the matter being remanded to the OAL, M.M. immediately filed a Motion dated September 3, 2021, seeking to "disqualify Judge Tiscornia and provide an unbiased judge." The Motion was dismissed by the undersigned by Order dated September 14, 2021. M.M. then filed a motion to appeal this denial on September 20, 2021, with the Honorable Judge Ellen Bass, Acting Director and Chief Administrative Law Judge, who ultimately denied said appeal by order dated September 23, 2021.

On October 20, 2021, a hearing in the forgoing matter was set down for November 16, 2021. Upon receipt of the hearing date via electronic mail on October 20, 2021, M.M. immediately filed a document entitled "Motion to Stay the Proceedings Pending Decision on Petition for Certification to Supreme Court". Before the undersigned could act on the aforementioned Motion to Stay, M.M. filed an interlocutory Application for Permission to

File Emergent Motion with the Appellate Division, challenging my anticipated denial of her Motion to Stay. This application was promptly denied by the Appellate division on October 22, 2021.

On October 27, 2021, the undersigned issued an Order denying the October 20, 2021, Motion to Stay. M.M, promptly filed another interlocutory Application for Permission to File Emergent Motion, which was granted by the Appellate Division on October 28, 2021, giving leave for M.M. to make a Motion to the Appellate Division to have the matter before me scheduled for November 16, 2021, adjourned. On November 3, 2021, M.M. filed with the undersigned a Motion to Adjourn the November 16, 2021, hearing date, to which the undersigned issued an Order dated November 8, 2021, denying the aforementioned motion. On November 9, 2021, the Appellate Division issued an Order adjourning the matter until after December 7, 2021. On November 10, 2021, the undersigned set the matter down for a hearing date on December 8, 2021. The hearing was set as a preemptory date, as indicated on the face of the notice.

Aside from the above referenced Motions, M.M. has drafted and sent hundreds of correspondences via email and regular mail since this matter was transmitted to the OAL on remand. These correspondences include motions, responses to motions, discovery requests, petitions to the Appellate Division, petitions to the Supreme Court, letters to the Commissioner to the Dept of Education, letters to opposing counsel, letters to opposing counsel's client (the district), letters to the Director of the Office of Administrative Law, and letters to the undersigned, too numerous to mention here, but all of which are included in the physical case file. These correspondences continued right up to the moments before the hearing, when, approximately fifteen minutes prior to the commencement of the hearing, the undersigned received from M.M. a correspondence entitled "Petitioner's Motion to Sanction Respondent for Failure to Provide Discovery". The hearing was conducted on December 8, 2021, and the record was closed.

FINDINGS OF FACT
Petitioner's Refusal to Proceed and Failure to Present Proofs

At the hearing conducted via Zoom on December 8, 2021, petitioner, immediately indicated, before the docket number could even be read into the record, that she refused to proceed with the hearing. She appeared agitated, and at one point she stated she was "shaking" and was going to have a "break down". M.M. complained that I had "allowed unfair evidence into the record". She was referencing a revised exhibit list that respondent's counsel had circulated the morning of the hearing. I explained to M.M. that this was only an exhibits list, and that none of the exhibits had yet been entered into the record. I then noted the sole purpose of the hearing was for her to introduce the documents which she had indicated to the Commissioner and the Appellate Division that she possessed, and which tended to show a decision had been rendered at the local board level. I explained multiple times that this was the sole focus of the hearing on remand as indicated on the face of the transmittal sheet. My explanation seemed to make M.M. irate, as she would continuously begin to shout and talk over me whenever I drew her attention to the focus of the hearing.

When asked, M.M. indicated that she would not present any documents or testimony at the hearing. I asked her multiple times to reconsider and please present the documents that she had advised the Appellate Court she was precluded from presenting below, or any evidence other that she may have. My request was continually met with shouting. Mr. Zitomer expressed concern for M.M.'s behavior, noting that he was concerned that she has begun showing up to the homes of the Board Members. He also expressed great concern for the minor child, and noted that M.M. has kept her child from attending school for the entirety of the school year. Counsel then made a motion to dismiss M.M.'s appeal, which I ultimately granted at the end of the hearing after multiple unsuccessful attempts to have M.M. present her evidence.

Having received no proofs that M.M. sought or received a hearing at the Board level, I **FIND** that an HIB hearing was never conducted in front of the Board of Education, and thus, no corresponding decision was rendered by the Board based on any such hearing.

Legal Discussion and Conclusions

As noted above, the issue at the heart of the foregoing matter on remand is a narrow one: did the local board of education conduct a hearing and render a decision based M.M.'s appeal of the ABC's finding that no HIB violation occurred. Despite the fact that M.M. alleged on appeal to possess documents that purported to show such a decision was rendered, M.M. refused to provide any proofs whatsoever in support of her position. Instead, M.M. continued to be combative and argumentative on the record, both with myself and opposing counsel. The undersigned asked her repeatedly to enter any evidence at all into the record; a plea which continuously went unanswered and ignored.

Thus, based on the foregoing, and for the reasons expressed in my earlier decision, I, therefore, **CONCLUDE** that M.M. has not exhausted her administrative remedies and her case before the Office of Administrative Law remains unripe for adjudication.

ORDER

Based upon the foregoing, it is **ORDERED** M.M.'s petition of appeal be, and hereby 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.

December 9, 2021
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 12/9/21

Date Mailed to Parties: 12/9/21

id

44-22

New Jersey Commissioner of Education

Decision

Askiaa Nash,

Petitioner,

v.

Board of Education of the City of Newark,
Essex County, and Roger Leon, Superintendent,

Respondent.

Synopsis

Petitioner filed an application for emergent relief seeking reinstatement to his former position as Educational Media Specialist with the Newark Board of Education (Board), a position from which petitioner was terminated in 2001. Petitioner filed two previous petitions appealing the Board's denial of his application for reinstatement, in 2013 and 2016; both cases were dismissed, the first as untimely and due to his lack of tenure, and the second based on the doctrines of *res judicata* and *collateral estoppel*. The 2013 decision was also upheld by the Appellate Division.

In the instant case, the ALJ found, *inter alia,* that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner appeared at a hearing via Zoom on January 10, 2022 and agreed to an adjournment until January 14, 2022, at which time petitioner failed to appear; petitioner's current argument is again based on the Board's failure to reinstate him to the Educational Media Specialist position he held from 1993 to 2001, when he was terminated after charges of sexual assault against two students were brought against him; in the instant case, petitioner argued that he has a property claim to his former position and now argues that he was improperly terminated from his position without a hearing. The ALJ determined that petitioner's claims in the instant matter – even if based on new arguments not made previously – are still barred by the principles of res judicata and collateral estoppel. Accordingly, the ALJ granted summary decision in favor of the Board and dismissed the petition with prejudice.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this case. In so determining, the Commissioner noted that the issue of whether petitioner is entitled to reinstatement has been fully litigated and petitioner cannot attempt to re-litigate that issue by making arguments that he failed to make previously. The Commissioner also found that the petition was untimely. Accordingly, the matter was dismissed with prejudice.

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

44-22

OAL Dkt. No. EDU 00115-22
Agency Dkt. No. 238-12/21

New Jersey Commissioner of Education

Final Decision

Askiaa Nash,

Petitioner,

v.

Board of Education of the City of Newark, Essex County, and Roger Leon, Superintendent,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, along with petitioner's exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and the Board's reply thereto.

This matter was opened as a petition and motion for emergent relief filed by petitioner, who is seeking reinstatement as an Educational Media Specialist by the Newark Board of Education (Board). Petitioner worked for the Board from 1993 to 2001, when his employment was terminated following an investigation by the Division of Youth and Family Services into allegations that petitioner sexually assaulted two students. Criminal charges regarding the same incident were also filed in 2001, and petitioner was convicted in 2002 and sentenced to 22 years of incarceration. In 2013, petitioner's criminal conviction was reversed by the New Jersey Supreme Court and the indictment was dismissed. Petitioner filed a petition against the Board in 2013, seeking reinstatement to his former position. The 2013 petition was

dismissed as untimely, but the Administrative Law Judge in that case also found that petitioner was not entitled to reinstatement, as he had not earned tenure. *Askiaa Nash v. State-Operated School District of the City of Newark, Essex County*, Commissioner's Decision No. 424-13, decided November 25, 2013. That decision was affirmed by the Appellate Division in 2015. Petitioner filed another petition against the Board in 2016, again seeking reinstatement. The petition was dismissed based on the doctrines of *res judicata* and *collateral estoppel*. *Askiaa Nash v. State-Operated School District of the City of Newark, Essex County*, Commissioner's Decision No. 207-17, decided July 27, 2017 (Nash 2017). Petitioner filed the instant petition and motion for emergent relief in 2021, again seeking reinstatement. Petitioner now argues that as a non-tenured employee, he was improperly terminated in violation of his due process rights as he was not given a statement of reasons for his termination; was not provided with notice of nonrenewal; and was not given the opportunity to challenge allegations at a *Donaldson* hearing; further, petitioner alleged that the Board breached the collective bargaining agreement.

In an Initial Decision, the Administrative Law Judge (ALJ) noted that petitioner had not appeared for the emergent relief argument[1], but also granted the Board's motion for summary decision and dismissed the petition. The ALJ found that, even if petitioner's claim is based on arguments not made in his previous petitions, they are barred by the same principles of *res judicata* and *collateral estoppel* as in *Nash 2017*, and he cannot continue to bring the same claim by advancing new arguments he failed to make in prior years.

[1] Petitioner appeared via Zoom for an emergent hearing on January 10, 2022, but the parties adjourned the matter to January 14, 2022, at which time petitioner did not appear, despite efforts by the ALJ to contact him that morning by phone and email.

In his exceptions, petitioner argues that the ALJ erred because he is not challenging the tenure determination that was previously decided by the Appellate Division but was instead arguing that he was entitled to a fair termination process as a non-tenured employee. He alleges that the termination process was arbitrary, capricious and unreasonable because the procedures for non-renewing his employment contract, set forth in *N.J.S.A.* 18A:27-4.1(b) and *N.J.S.A.* 18A:27-10, were not followed and he was not given the opportunity to present his position to the Board. As such, petitioner contends that his statutory and constitutional rights were violated.[2] Accordingly, petitioner urges the Commissioner to reject the Initial Decision.

In reply, the Board argues that the ALJ properly dismissed the emergent application and granted summary decision in favor of the Board. The Board contends that the petition was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3 because it was filed 20 years after his termination. Additionally, the Board maintains that this is the third petition filed by petitioner seeking reinstatement, so it is also barred by the doctrines of *res judicata* and *collateral estoppel,* as the issues have already been decided. As such, the Board submits that the Initial Decision should be adopted.

Upon review, the Commissioner finds at the outset that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Petitioner did not appear for the emergent argument and fails to demonstrate any of the prongs of the *Crowe* test to warrant emergent relief. Further, the Commissioner agrees with the ALJ that summary decision should

[2] Petitioner appears to argue that the ALJ's statement that he attempted to call petitioner for the Zoom hearing is untrue, and that petitioner actually called chambers in an attempt to be a part of the Zoom meeting.

be granted in favor of the Board. The Commissioner concurs with the ALJ that this matter is barred by the doctrines of *res judicata* and *collateral estoppel* as it is the third petition filed against the Board seeking reinstatement. The Commissioner does not find petitioner's exceptions to be persuasive. Although petitioner contends that he is advancing new arguments based on improper termination as a non-tenured employee, the Commissioner notes that the issue of whether petitioner is entitled to reinstatement to his position with the Board has been fully litigated and petitioner cannot attempt to re-litigate that issue by making arguments that he failed to make previously. Finally, the Commissioner finds that this matter is also barred by the 90-day statute of limitations set forth in *N.J.A.C.* 6A:3-1.3. It has been 20 years since petitioner's termination, 9 years since his conviction was vacated, 6 years since the Appellate Division decision in this matter, and 4 years since a decision was issued on petitioner's second petition. As such, the Commissioner agrees with the ALJ that the petition should be dismissed with prejudice.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed with prejudice.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 4, 2022

Date of Mailing: March 4, 2022

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00115-22
AGENCY DKT. NO. 238-12/21

ASKIAA NASH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY AND LEON ROGER, SUPERINTENDENT,

Respondent.

Askiaa Nash, pro se petitioner

Adam S. Herman, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC)

Record Closed: January 14, 2022 Decided: January 18, 2022

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

Petitioner (Nash) makes this emergent application seeking reinstatement to the position of Educational Media Specialist with the Board of Education of the City of Newark, Essex County (Board/respondent). For the following reasons, I dismiss the emergent application and grant summary decision in favor of the Board.

On January 5, 2022, this matter was transmitted to the Office of Administrative Law (OAL) for emergent relief. On January 10, 2022, a hearing on this application via Zoom, began. Petitioner who had only been served with opposition papers filed by respondent earlier that day, agreed that he could use additional time to supplement his filing, and accordingly the hearing was adjourned to 9:30 a.m., January 14, 2022, again via Zoom. Petitioner failed to appear for the hearing, and despite efforts that morning to reach him by phone (a voicemail rather than Nash answered the phone) and email (his email had an automated reply saying it was full and could not receive any additional emails), Nash could not be contacted. Further, Nash, had not filed any supplemental material for consideration between January 10 and 14, and Nash has made no effort to contact the OAL since. Accordingly, respondent asked for a dismissal of the application for Nash's failure to appear. Respondent also filed a responsive pleading which seeks summary decision of the action based on numerous grounds.

The essence of Nash's current application is based on the Board's failure to reinstate him, upon his request, to a position he held as a, Educational Media Specialist from 1993 to 2000, when his employment was terminated after charges were brought of sexual assault of two students. While petitioner was convicted of those charges and sentenced to twenty-two years imprisonment, that conviction was overturned by the New Jersey Supreme Court and in 2013, the Essex County Prosecutor's Office dropped all charges. Soon thereafter, Nash sought reinstatement to his position as Media Specialist, the same application and remedy he seeks today. This application was the subject matter of a Summary Decision granted to respondent by Order of the Honorable Ellen S. Bass. ALJ. Aslkaa Nash v. State-Operated School District of the City of Newark,, Docket Number, EDU 08449-13. (Initial Decision (November 25, 2013) adopted Comm'r (February 2014) http://www.camlawrutgers.edu/library/oal. (hereinafter referred to as "Nash, 2013")

In that matter, Judge Bass found that Nash's application was time barred. Judge Bass found that the time for filing appeals before the Commissioner of Education is 90 (ninety) days "from the date of receipt of the notice of a final order ruling or other action by the district Board of Education". N.J.A.C. 6A:3-1.3 (i). The Board had terminated Nash effective June 22, 2001, and Nash had filed his appeal 13 years later, and thus his

application was time barred. Judge Bass also determined Nash was not a tenured employee. Judge Bass' decision was affirmed by the Appellate Division on October 16, 2015 (DKT #A-2473-13T4).

In 2017, Nash made the same application for reinstatement, in a petition transmitted to the OAL and heard on motion for summary decision by the Honorable Jude Tiscornia, ALJ. Judge Tiscornia dismissed the petition by Summary Decision. Askiaa Nash v. State-Operated School District of the City of Newark, OAL Docket Number EDU 01563-17 (June 14, 2017) (hereinafter "Nash 2017"). Judge Tiscornia found that Nash's claim was barred both by the common law res judicata doctrine that provides that "a cause of action between parties that has been finally determined on the merit by a tribunal cannot be litigated by those parties or their privies in a new proceeding." Nash 2017, page 4, citing Velasquez v Franz, 123 N.J. 498, 505 (1991.) Judge Tiscornia also found that Nash cannot bring the same claim again based on the doctrine of collateral estoppel. Nash, 2017, pp 4-5, citing Winters v. N. Hudson Reg'l Fire and Rescue, 212 N.J. 67, 85 (2012), which defined collateral estoppel as applying when:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

As stated by Judge Tiscornia in Nash, 2017, (page 5), in this case, I find that, once again, in this case, the "facts and arguments presented are the same as those contemplated by Judge Bass in her decision."

Here, Nash argues that he has a property claim to the position of Media Specialist from which he was terminated in 2001. He claims it was a violation of his due process guarantees of "property rights" and "free speech rights" to terminate him from his position without first holding a hearing. As noted by respondent, it has already been determined by Judge Bass, the Commissioner of Education, and the New Jersey Appellate Division that there was no denial of tenure rights. Even had Nash been wrongfully denied a so-

called Donaldson hearing, that claim needed to be raised in 2001. Furthermore, his current claim, even if based on new arguments not made in 2001, 2013 or 2017, are barred by the same principles noted in Nash 2017, namely res judicata and collateral estoppel. Petitioner is not entitled to bring the same claim year in and year out simply by advancing new arguments he failed to make years ago. The paucity of such arguments may be part of the reason why Nash failed to appear on the Emergent application which he sought. It should be noted that this instant claim borders on abuse of process, not only because it is the same action made years too late in 2013 and 2017 but also because he seeks "emergent" review of a termination that took place more than 21 years ago.

The record discloses that there is no way relief sought by Nash could or should be granted by the OAL, and that, given the clear record already established, no further hearing can possibly be warranted. Nash's 2022 claim is the same as those made in 2013 and again in 2017, and must be dismissed, as a matter of law. R:4-6.2.

ORDER

Based upon all of the foregoing, I **FIND** that Summary Decision in favor of the Board is **GRANTED** and that this matter should be and is hereby Ordered to 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 (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.

January 18, 2022
DATE

Ernest M. Bongiovanni

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: January 18, 2022

Date Mailed to Parties: January 18, 2022
id

45-22

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION
PEMBERTON, BURLINGTON COUNTY

IN THE MATTER OF TENURE HEARING	)	
	)	
between	)	
	)	
PEMBERTON TOWNSHIP SCHOOLS	)	
	)	
	)	
Petitioner	)	**CONSENT**
and	)	**AWARD**
	)	
JOAN MASCOLA	)	
Respondent	)	
	)	
DOCKET NO. 95-6/21	)	

Before: Lisa C. Charles
Arbitrator

APPEARANCES

FOR THE PETITIONER

Frank Cavallo,Esq., Michael Reilly, Esq., and Alicia D'Anella, Esq.,
Parker McCay P.A.

FOR THE RESPONDENT

Amy Gillette, Esq.,
Zeller & Wieliczko, LLP

BACKGROUND

On June 14, 2021, the Pemberton Township Schools, (Petitioner or School District) filed certified tenure charges against Joan Mascola (Respondent), a tenured teacher, sufficient to warrant her dismissal. The Respondent was charged with two consecutive annual partially effective evaluations. The Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal.

In a brief dated June 23, 2021, Amy Gillette, Counsel for the Respondent, filed a Motion for Summary Decision to dismiss the charges disputing that Ms. Mascola had received two consecutive annual partially effective evaluations.

On June 28, 2021, the charges were referred to the undersigned pursuant to N.J.S.A. 18A:6-17.3 to review the charges, which are not dismissed as the result of a Motion under the preponderance of the evidence standard, as well as Respondent's defenses and any Motion which may be filed with the Arbitrator in order to render a decision on the merits.

In a brief dated August 20, 2021, Michael Reilly, Counsel for the Petitioner, submitted a Response in Opposition to the Motion for Summary Decision asserting that there were genuine issues of material facts that precluded a summary judgment and necessitated a hearing.

Prehearing conferences were held on August 23, and September 20, 2021. In a Motion Decision dated October 25, 2021, I denied the Motion to Dismiss and ordered an evidentiary hearing. In a third prehearing conference on

November 9, 2021, the Counselors and I scheduled February 22-24, March 1, and March 3, 2022, to hear the case. On February 17, 2022, the Counselors notified the Arbitrator that a tentative settlement agreement had been reached and the hearing scheduled to begin on February 22, 2022, was cancelled.

On February 25, 2022, the Counselors submitted final documents to the Arbitrator entitled Separation Agreement and General Release, and Irrevocable Letter of Resignation indicating that the School District and the Respondent had voluntarily resolved all disputed matters and fully disposed of all issues in controversy between them.

The undersigned Arbitrator, pursuant to N.J.S.A. 18A:6-9 "to hear and make a final determination on a controversy and dispute arising under sub article B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes (C.18A:6-10 et seq.)," reviewed the terms of the Settlement submitted by Pemberton Township Schools and Respondent, Joan Mascola. The Counselors also informed me that the School District passed a Resolution approving the Settlement, with respect to the tenure charges filed against the Respondent. Thus, I find that the terms and conditions of the Settlement set forth herein (attached) meet the standards established by the Commission of Education for settlement of tenure matters *In re Cardonick,* State Board decision of April 6, 1983 (1990 *School Law Decisions* (S.L.D.) (842, 846).

CONSENT AWARD

Accordingly, I approve the terms of the Settlement and memorialize its terms and conditions in a Consent Award.

Lisa C. Charles — 3/2/22

Lisa C. Charles — Date

State of New Jersey}
County of Mercer}

Sworn to and affirmed before me on March 2, 2022

Notary Public

DAVID M KAPLAN
Notary Public - State of New Jersey
My Commission Expires May 31, 2026

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

March 7, 2022

VIA EMAIL ONLY

Charles V. Reilly, Esq.
448 North Maple Avenue
Ridgewood, NJ 07450

Laurie Weber
235 South Irving Street
Ridgewood, NJ 07450

Matthew Giacobbe, Esq.
Cleary, Giacobbe, Alfieri & Jacobs, LLC
169 Ramapo Valley Road
Upper Level 105
Oakland, NJ 07436

Re: Laurie Weber v. Board of Education of the Village of Ridgewood, Bergen County
Agency Dkt. No. 114-7/21

Dear Parties,

This matter involves a claim by petitioner Laurie Weber that the Ridgewood Board of Education (Board) is unlawfully operating a daycare business known as the Ridgewood Infant Toddler Development Center (IDTC). The Ridgewood Infant Toddler Development Center Parent Group (Parent Group), an organization of parents whose children attend the IDTC, filed a motion to intervene, which was denied by the Administrative Law Judge (ALJ). The Commissioner subsequently granted the Parent Group's request for interlocutory review.

The standard for intervention requires the Commissioner to consider whether the movant's interest is sufficiently different from that of any other party so as to add measurably and constructively to the scope of the case. *N.J.A.C.* 1:1-16. Upon review, I concur with the ALJ that the Parent Group has not demonstrated a sufficient and distinct interest in the outcome of this matter to meet the standard for intervention. The Board's pleadings to date clearly demonstrate its interest in the IDTC remaining

open, an interest that aligns with the interests of the Parent Group. Moreover, the Commissioner is not persuaded by the Parent Group's argument that the Board failed to characterize the IDTC as an educational program when opposing the petition. Initially, as the ALJ noted, neither the petitioner nor the Board dispute this feature of the program. Furthermore, this argument does not demonstrate that the Board's *interests* are distinct from the Parent Group's interests, but rather merely that the Board has chosen to pursue a litigation strategy with which the Parent Group does not agree. For these reasons, the Parent Group's motion to intervene is denied.

However, *N.J.A.C.* 1:1-16.5 provides that all motions for leave to intervene shall be treated, in the alternative, as a motion for permission to participate. In deciding whether to permit participation, the Commissioner must determine whether the participant's interest is likely to add constructively to the case without causing undue delay or confusion. *N.J.A.C.* 1:1-16.6(b). The Commissioner concludes that the Parent Group has met this standard. The Parent Group's interest in the impact of any potential closure of the IDTC may be deemed a significant interest, as contemplated by *N.J.A.C.* 1:1-16.6(a), and its information regarding the children enrolled in the IDTC may add constructively to this proceeding without resulting in undue delay or confusion.

Accordingly, the Parent Group is hereby granted participant status and the ALJ shall determine the nature and extent of the participation, which is limited to the right to argue orally, file statements or briefs, and file exceptions to the Initial Decision. *N.J.A.C.* 1:1-16.5 does not afford participants the ability to participate in settlement negotiations, so to the extent that such negotiations are occurring, they shall remain solely between the petitioner and the Board.

Sincerely,



Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

AAM/JKH
c: State Law Library
Honorable Nanci G. Stokes, A.L.J.

46-22L

47-22
OAL Dkt. No. EDU 14374-19
Agency Dkt. No. 193-8/19

New Jersey Commissioner of Education

Final Decision

Dawn Gizis,

Petitioner,

v.

Board of Education of the Town of Bethlehem, Hunterdon 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. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that Paragraph 21 of the Agreement references an action that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, 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: March 9, 2022
Date of Mailing: March 9, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 14374-19
AGENCY DKT. NO. 193-8/19

DAWN GIZIS,

Petitioner,

v.

TOWN OF BETHLEHEM BOARD OF EDUCATION,

HUNTERDON COUNTY,

Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

Michelle M. Schott., Esq . for respondent (Purcell Mulcahy Flanagan, attorneys)

Record Closed: January 24, 2022 Decided: January 25, 2022

BEFORE **JOSEPH A. ASCIONE,** ALJ:

These matters were transmitted to the Office of Administrative Law for determination as a contested case on October 11, 2019 (, pursuant to N.J.S.A. 52:14B 1 to -15 and N.J.S.A. 52:14F 1 to -13.

The parties have settled these matters and have filed a Settlement Agreement and Release indicating the terms thereof, which is attached and fully incorporated herein.

Having reviewed the record Settlement Agreement and Release, which reference both matters, **I FIND** these matters concern the same law, and otherwise meet the standards for

consolidation under N.J.A.C. 1:1-17.3. Accordingly, I **CONCLUDE** that these matters should be consolidated. Additionally, I **FIND**:

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

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

I **CONCLUDE** that the Settlement Agreement and Release meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved.

In view of the foregoing, I approve the settlement and **ORDER** that these matters be consolidated and further **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

January 25, 2022
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency 1-27-22

Date Mailed to Parties: 1-27-22

Attachment
mm

Montaner, Maria [OAL]

From: Michelle Schott <MSchott@fbolawfirm.com>
Sent: Monday, January 24, 2022 12:19 PM
To: Montaner, Maria [OAL]
Cc: kwaldman@selikoffcohen.com; Michelle Schott
Subject: [EXTERNAL] RE: EDU 14374-19 Gizis, Dawn v. Twp. of Bethlehem BOE, Hunterdon Co.
Attachments: Gizis.fully executed Settlement Agreement and Release.pdf; Gizis - Stipulation of Dismissal.pdf

Importance: High

Ms. Montaner – I am responding on behalf of Michelle Schott. Per you request see attached (1) fully executed Settlement Agreement and (2) Stipulation of Dismissal.
Thank you.

Rosemary Purcell, Legal Assistant
FLANAGAN BARONE & O'BRIEN LLC
4 Essex Avenue, Suite 200
P.O. Box 259
Bernardsville, NJ 07924
DIRECT DIAL: 908-306-6725
FAX: 908-658-4659
rpurcell@fbolawfirm.com

FLANAGAN BARONE O'BRIEN

PLEASE NOTE: We are pleased to announce that the name of our firm has been changed to FLANAGAN, BARONE & O'BRIEN. Our new website address is fbolawfirm.com. We ask that you kindly update your records to reflect our new name and email addresses. Emails sent to our old email address will be forwarded. Thank you.

NOTICE: This message, and any attached file, is intended only for the individual or entity to whom it was addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. Nothing in this email should be construed as a legal opinion. If you have received this communication in error, please notify me immediately by reply email and delete the email and all copies of it. Thank you.

From: Montaner, Maria [OAL] [mailto:Maria.Montaner@oal.nj.gov]
Sent: Monday, January 24, 2022 11:04 AM
To: Michelle Schott; kwaldman@selikoffcohen.com
Subject: EDU 14374-19 Gizis, Dawn v. Twp. of Bethlehem BOE, Hunterdon Co.

Dear counsel,

The above matter remains open and it is my understanding that the matter settled awaiting board approval. Kindly provide the fully executed settlement with board approval for Judge Ascione' s review and the file can be process accordingly. Thank you.

Best,
Maria

Maria M. Montaner
Judicial Assistant to:
Andrew M. Baron, ALJ (973-648-6022)
Matthew Miller, ALJ (973-648-6289)
Irene Jones, ALJ (Ret. on recall) (973-648-6077)
Joseph A. Ascione, ALJ (973-240-8579)
Office of Administrative Law
33 Washington Street, 7th Floor
Newark, NJ 07102
(F) 973-648-6124

MICHELL M. SCHOTT, ESQ.
Attorney ID#024141985
Purcell, Mulcahy & Flanagan, LLC
4 Essex Avenue, Suite 200
P.O. Box 259
Bernardsville, NJ 07924
(908) 658-3800
Attorneys for Respondent, Bethlehem Township Board of Education
Our File: 304-26511 (RFB)

DAWN GIZIS, Petitioner, vs. BETHLEHEM TOWNSHIP BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY NO: 193-8/19 **STIPULATION OF DISMISSAL**

The matter in difference in the above-entitled action having been amicably settled by and between the parties, it is hereby stipulated and agreed that the same be and hereby is dismissed with prejudice and without costs or attorney fees.

SELIKOFF & COHEN, P.A.
Attorneys for Petitioner

Keith Waldman, Esq.
Dated: March __, 2021

FLANAGAN BARONE & O'BRIEN (formerly PURCELL MULCAHY & FLANAGAN)
Attorneys for Defendant
Bethlehem Township Board of Education

Michelle M. Schott, Esq.
Dated: ~~March~~ August 31, 2021

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE IN FULL ("Agreement") is made this 25th day of May, 2021, by and between Dawn Gizis (hereinafter "Petitioner") and the Bethlehem Township Board of Education ("Respondent" or "District" or "Board"), its members, heirs, executors, administrators, officers, employees, successors, and assigns. Petitioner and Respondent are hereinafter collectively referred to as the "Parties" and each may be referred to severally as a "Party."

WHEREAS, on May 16, 2019 Respondent eliminated several personnel positions, including Petitioner's position as a Technology Integration Teacher; and

WHEREAS, Respondent acknowledges Petitioner's position was eliminated solely due to budgetary constraints and

WHEREAS, Petitioner brought a Petition of Appeal (hereinafter "Petition") before the Commissioner of Education of the State of New Jersey, entitled Dawn Gizis v. Bethlehem Township Board of Education, bearing Agency No.: 193-8/19 alleging termination of employment in violation of her tenure and seniority rights; and

WHEREAS, Respondent denies the allegations in the Petition, continues to deny any and all liability for all claims in the Petition, continues to deny any and all allegations of wrong doing of any kind, denies any and all allegations that the Respondent violated any laws or regulations, or engaged in any unlawful or wrongful conduct and has filed an Answer to the Petition denying any and all liability; and

WHEREAS, by entering into this Agreement Respondent does not admit any liability whatsoever and specifically denies any and all allegations of wrong doing; and

5/25/2021

WHEREAS, due to the uncertainty of the outcome of the Petition of Appeal, as well as the potential expenditure of resources on discovery and possible hearing of this matter, with numerous witnesses, and the concern that the school personnel may be removed from educational and administrative duties and responsibilities during that time, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with the Petition; and

WHEREAS, it is understood and agreed by Dawn Gizis that the Board, its members, heirs, executors, administrators, officers, employees, successors, and assigns, by reason of the payment, consideration, and any other terms made on behalf of the Board, does not admit any liability nor has the Board made any agreements to make any payments or to take any actions that are not reflected in this Agreement. Further, it is understood and agreed by Petitioner that the allegations set forth in the Petition remain disputed, inconclusive, and expressly denied by the Board; and

WHEREAS, it is understood and agreed that in releasing any and all claims that Dawn Gizis has asserted or could have asserted against Respondent, Dawn Gizis also intends to release any and all claims which she could have asserted against any and all its members, heirs, executors, administrators, officers, employees, successors, and assigns of the Bethlehem Township Board of Education, except any such claims outside the scope of their employment and as to Board of Education Members their volunteer services; and

WHEREAS, the Parties have by way of compromise and accord settled without adjudication of any issues of fact or law and without any admission of liability, all claims which Petitioner either raised or which could have been raised in the Petition or in a lawsuit up to the date of this Agreement, and which claims are more fully-described below;

NOW THEREFORE, in consideration of the foregoing and of the mutual covenants contained herein, and intending to be legally bound, the Parties agree as follows:

5/25/2024

1. **RECITALS**

The above recitals are hereby referred to and incorporated herein by reference.

2. **SCOPE OF AGREEMENT**

It is the Parties' mutual intention to settle (through this Agreement) all claims in the Petition, as well as any and all claims that Petitioner could have asserted, either through filing of a Petition or lawsuit or by any other means, whether now known or unknown, up to and through the effective date of this Agreement, which are hereinafter referred to and defined as the "Settled Claims", except as expressly provided herein. The Parties specifically agree that as of the effective date of this Agreement, there are no claims, which have been raised or could have been raised in the Petition, or in a law suit or by other means, other than the claims that have been asserted in the Petition that are now released by Petitioner herein, except as expressly provided herein. The Parties further recognize that the only claims that this Agreement does not resolve are claims under New Jersey Workers Compensation Act, for which Ms. Gizis certifies she is unaware of any factual basis, and for future claims, if any, arising from any breach of this Settlement Agreement.

Nothing in this Agreement shall be construed to prohibit Petitioner or Respondent from communicating with or participating in any administrative proceedings before the National Labor Relations Board or the Equal Employment Opportunity Commission related to Petitioner's employment, to the extent that they are compelled by law to engage in such communication and/or participation. However, Petitioner acknowledges and agrees that she is specifically waiving any and all of her rights to any personal recovery in any such proceedings including, without limitation, lost wages and benefits, front pay, damages for emotional distress, personal injury, punitive damages, reinstatement and other personal equitable relief, and attorneys' fees and costs, except as expressly provided herein.

5/25/2021

Dawn Gizis understands that the Petition will be dismissed and she agrees not to appeal from the dismissal of, re-file, revive, or reopen the Petition.

3. **PAYMENT**

In full and final satisfaction and accord of Petitioner's claims in the Petition against the Board, and in consideration for the Release as more fully set forth at paragraph 6 below, the Board, through its insurance carrier, agrees to pay Petitioner the total sum of Twenty-Seven Thousand Five-Hundred Dollars ($27,500.00), inclusive of attorneys' fees and costs in a check payable to Petitioner. That agreed-to amount shall constitute full and complete compensation for the execution of the Agreement and other required documents necessary to resolve and compromise the Settled Claims with finality and with prejudice. As a condition of the aforementioned payment, Petitioner agrees she will not seek anything further from the Respondent including any other action, payment or employment, except as expressly provided herein. Petitioner understands and agrees the payment of these settlement proceeds is the only consideration for this Agreement that she shall receive from the Board.

KG/MK 5/25/2021

This Settlement Agreement and payment of these settlement proceeds is subject to the approval of the Board and is without prejudice to any of the Parties if the terms are not approved by the Board, as more particularly set forth in paragraph 17.

The payment of these settlement proceeds is further conditioned upon Petitioner completing, executing, and returning to the law firm, Purcell Mulcahy & Flanagan, LLC the following documents: (1) this Agreement, signed; (2) a Child Support Judgment Lien and Patriot Act search results attached to the Agreement as **Exhibit A**; (3) a Medicaid and SCHIP Extension Act of 2007 form attached to the Agreement as **Exhibit B**; (4) a Stipulation of Dismissal with Prejudice in favor of the Respondent in the form attached to the Agreement as **Exhibit C** to be

held in escrow until such time as the settlement checks have been received by Petitioner's attorney and (5) **Exhibit D** completed W9 form from Petitioner.

The settlement proceeds of Twenty-Seven Thousand Five-Hundred Dollars ($27,500.00) shall be paid in one check in the amount of Twenty-Seven Thousand Five-Hundred Dollars ($27,500.00) payable to Dawn Gizis within sixty (60) days of the Board's receipt of all of the documents required from the Petitioner and executed, unless Petitioner exercises her right to revoke this Agreement pursuant to the provisions in paragraph 20 of this Agreement. The District will issue an IRS Form 1099 MISC with Box 3 checked.

4. **NO REPRESENTATIONS/INDEMNIFICATION**

The Respondent makes no representations as to the tax consequences of the aforementioned payment being provided to Petitioner herein, and shall assume no responsibility for any tax liability attributed to Petitioner except as provided herein. Petitioner explicitly agrees to be solely responsible for and to pay any and all taxes found to be owed from the payment that is made pursuant to this Agreement except as provided herein. While the Parties agree the funds paid under this Settlement are in no way, shape or form compensation for wages or benefits, in the event the IRS (Internal Revenue Service) or the New Jersey Division of Taxation determines otherwise, the Parties shall each be responsible for their own tax liability as determined by the Internal Revenue Service and/or New Jersey Division of Taxation.

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 solely by Petitioner including, but not limited to, any Medicare or Medicaid claims and/or liens, Workers' Compensation claims and/or liens, Social Security claims (except as provided in Paragraph 4) and/or liens, Veterans' Administration 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 claims based on subrogation or any other legal or equitable theory. Petitioner, therefore, agrees upon prompt presentation of any such claims and/or liens, to defend the Board, and herself, against any such claims and/or liens, and to indemnify and hold Respondent harmless against any judgment entered against Petitioner based on such claims and/or liens, including the payment of any fines, charges, litigation expenses, and attorney's fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of this Agreement and Petitioner agrees to pay all costs, interest and attorney's fees relative to any such lien.

5. **NO ADMISSION OF LIABILITY**

This Agreement is a result of a compromise and accord to conclude the Petition and to avoid the further expenditure of attorneys' fees and costs that would result from continued protracted litigation of this matter. It is expressly understood and agreed that nothing contained in this Agreement is intended to be, nor shall be construed as, nor shall be represented by any Party, their attorneys or their agents to be an admission by or determination of liability by the Parties, or the Board, its members, heirs, executors, administrators, officers, employees, successors, and assigns. As to the validity of any claims asserted or which could have been asserted in the Petition, or being precedential as to any other matter, Respondent continues to wholly deny any and all liability and disclaim any responsibility for said claims. Accordingly, this Agreement shall not be used as an admission by any Party in any proceedings; however, this Agreement may be introduced in any proceedings to enforce the terms and conditions or an action concerning any Party's tax status.

5/15/2024

6. RELEASE AND EXTINCTION OF CLAIMS

Petitioner agrees to and hereby releases and gives up any and all claims and rights, direct or indirect, which she may have against the Board, including officers, employees, members, agents, departments, attorneys, successors, heirs, and assigns, except for those arising outside the scope of their employment and as to Board of Education Members their volunteer services.

This releases all claims, including those of which Petitioner is not aware and those not expressly mentioned in this Release, including but not limited to the Settled Claims and all claims for attorney's fees and costs, as well as any potential tax liability resulting from this settlement, except as expressly excluded herein, including paragraphs 2 and 20 of this Agreement. Merely by way of example, Settled Claims includes:

(a) All claims and rights which Petitioner may have against Respondent as set forth in the Petition, or which were raised or which could have been asserted in the Petition or a lawsuit or by any other means, including claims for attorneys' fees and/or costs, by way of, Petition of Appeal, Cross-Petition, complaint, amendment, cross-claim, counterclaim, third-party claim, or subsequent action up to and through the date of execution by Petitioner of this Agreement; and

(b) Any and all claims for lost benefits and/or rights including, but not limited to, all claims for "bumping" rights, for injunctive relief and/or equitable relief, all claims for compensatory damages, including but not limited to economic damages, salary, overtime pay, pension benefits, service credit, back pay, future pay, health benefits, any other fringe benefits, all claims for emotional distress damages, psychological and bodily injury, personal injury, any other types of unliquidated damages, punitive damages, and specifically including claims for prejudgment and post-judgment interest as well as

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attorneys' fees and litigation costs, which were raised or could have been raised, whether in the Petition, a lawsuit or by other means, pursuant to, or cognizable by amendment, or by subsequent action up to and through the date of this Agreement, including those claims about which Petitioner is presently aware and those about which Petitioner is unaware, and any claims not specifically mentioned in this Agreement.

This Release applies to claims resulting from anything that has happened from the beginning of time up until and through the date of execution of this Agreement by Petitioner, and arising out of any relationship between and among Petitioner and the Board, or either of them, including Petitioner's past employment relationship with the Board.

Petitioner releases the following claims predating the date of this Agreement: all claims, direct and indirect, and any rights for injury and/or damages Petitioner may have against the Board, specifically including, but not limited to, all claims asserted or that could have been asserted in this Petition; all claims arising under the common law, whether in tort or contract; all claims and grievances of discrimination, harassment, hostile work environment, retaliation, violation of public policy, civil rights violations, contract violations, collective agreement violations, wrongful discharge, emotional distress, attorneys' fees, expenses of litigation and/or costs of suit, and all claims under any federal, state, or local laws including, but not limited to, the Convention Leave Statute, N.J.S.A. 18A:31-2 and administrative code regulations pertaining to same, 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, et seq., the New Jersey Civil Rights Act, N.J.S.A. 10:6-2, et seq., the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -39, the New Jersey Family Leave Act, Title VII of the Federal Civil Rights Act of 1964, as amended, 42 U.S.C. §2000 (e), et seq., the Age Discrimination in Employment Act, as amended, 29 U.S.C. §621 et.

5/25/2004

seq., the Older Worker Benefit Protection Act ("OWBPA") except as provided herein, the Civil Rights Acts of 1964 and 1991, 42 U.S.C. §1981, 1983, 1985, and 1986, Americans with Disabilities Act, 42 U.S.C. §12101, et seq., the Rehabilitation Act, USERRA, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retraining Notification Act, and any other state or federal civil rights laws, antidiscrimination laws, or other employment-related tort law.

The Parties further recognize that the only claims that this Agreement does not resolve are claims under New Jersey Workers Compensation Act, for which Ms. Gizis certifies she is unaware of any factual basis, and for future claims, if any, arising from any breach of this Settlement Agreement.

5/25/2021

Petitioner further understands, agrees to and acknowledges that she is bound by this Release to the end of time. Anyone who succeeds to her rights and responsibilities, such as her heirs or the executors of her estate, are also bound in the same manner. This Release is made for the benefit of the Board. In consideration for this Release, Petitioner has received promises from the Board, as set forth more fully in paragraphs 3 and 8 in this Agreement. Dawn Gizis further declares and represents that there may be unknown or unanticipated economic damages, mental anguish and emotional distress, including physical manifestations thereof, that result from her employment by the Board, and, in making this Agreement, Dawn Gizis understands and agrees that this Agreement is intended to settle her claims for any and all such issues.

7. **REEMPLOYMENT**

Petitioner was not terminated for cause, has obtained employment elsewhere at a substantial salary increase and has advised Respondent that she does not intend to ever seek

employment with the Board again.. Given that Petitioner has no intention of ever seeking employment with the Board again, Petitioner agrees to the following: Petitioner agrees she will not seek reemployment with the Board in any capacity, either directly or indirectly. If Petitioner applies for any position or vacancy with the Board, either directly or indirectly, the terms of this Agreement shall control and Petitioner shall be deemed to have breached this Agreement. Petitioner agrees that the Board reserves the right to reject any such application for employment, withdraw any offer of employment, or terminate her from any subsequent employment with the Board, in its sole discretion, for any reason, including but not limited to Petitioner's breach of this Agreement.

8. **REFERENCES**

Respondent shall provide a positive reference to any verbal or written inquiry regarding Petitioner's employment with the Bethlehem Township Board of Education, including verification of employment, position held and that termination was due to budgetary constraints only. If Petitioner makes a request for a positive letter of reference regarding her employment by the Bethlehem Township Board of Education, the Chief School Administrator will provide same referencing Petitioner's employment as a Technology Integration Teacher in the Bethlehem Township Public Schools

9. **CONFIDENTIALITY AND NON-DISPARAGEMENT**

The Parties mutually understand and agree that the terms of this Agreement, will be kept confidential to the extent permitted by law. The Parties, including their representatives or agents, further agree that they shall not reveal to anyone, other than as may be mutually agreed upon in writing, the terms and conditions concerning this Agreement. This non-disclosure provision does not bar the following disclosures: (1) disclosures by Petitioner to members of her immediate

family; or (2) disclosures by a Party for the purpose of obtaining legal, tax, accounting, or financial advice; or (3) disclosures by a Party which may be required by law; or (4) disclosures by a Party for the purpose of obtaining or maintaining publicly or privately funded benefits or insurance. The Parties agree to inform those persons with whom they are permitted to share such information as to the confidentiality of this Agreement. Upon all other inquiries, the Parties shall only respond that the matter has been resolved to the satisfaction of all those concerned.

The Parties acknowledge that this Agreement may be subject to disclosure pursuant to the Open Public Records Act (OPRA) or common law right to access records request. If this Agreement is disclosed by Respondent pursuant to such a request, Respondent shall notify Petitioner of same and provide her with a copy of the OPRA request. Following the release of this Agreement, or any part thereof pursuant to an OPRA request, Petitioner shall have the right to respond to any inquiry resulting from the disclosure pursuant to the OPRA request or to the content of any public comment made by any member of Respondent's management team regarding the Petitioner and/or the released Agreement or part thereof. Such comments by Petitioner in response to any public comment made by any member of Respondent's management team shall only be made in the platform in which the public statement by Respondent's management appeared. Respondent shall then have the right to respond to the content of any responsive public comment made by Petitioner. Such comment by Respondent shall only be made in the platform in which the Petitioner's public statement appeared. Either party may then comment upon the other party's comments in the same platform. The parties acknowledge that their mutual goal is to avoid public discussion of this matter whenever possible.

This confidentiality provision shall not apply to any statements made by Petitioner and/or Respondent in testimony or in papers filed in this Petition or in other matters in which she/it/they

5/27/2021

is/are a Party, or before the Equal Employment Opportunity Commission, the National Labor Relations Board, or other government agencies, only to the extent that Petitioner and/or Respondent is compelled by law to provide such statements, testimony and/or papers to the aforementioned entities. Nothing herein shall limit or prohibit the parties from sharing this Agreement with any tribunal(s) and/or court(s) of competent jurisdiction for the sole purpose of enforcing the terms of this Agreement. The failure of either party to enforce this clause shall not be considered a waiver of the right to confidentiality.

The Parties, including members of Respondent's litigation control group as defined by New Jersey law, mutually agree not to make, publicly or privately, through any media or medium (including, without limitation, comments on social networking sites), any defamatory, disparaging, or derogatory remarks or otherwise make statements that could injure the business or reputation of any of the Parties to this agreement. Upon all other inquiries, the Parties shall only respond that the matter has been resolved to the satisfaction of all those concerned.

10. **MATERIALITY**

The Parties agree that each paragraph of this Agreement, including the recitals, is material. In the event that any portion of this Agreement is determined to be illegal, the Parties agree, in advance, to reform the Agreement in good faith to provide each Party with the full benefit of the settlement memorialized by this Agreement, to the extent permitted by law.

11. **SEVERABILITY**

Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the parties will make reasonable efforts to revise such provision so that each party receives the full benefit of the bargain negotiated in this agreement. Should such revision not be possible, the validity of the remaining parts, terms or provisions shall not be affected thereby and

said illegal or invalid part, term or provision shall be deemed not to be part of this Agreement or may be modified as necessary.

12. **NO RIGHTS CONFERRED UPON NON-PARTIES**

This Agreement is intended to confer rights and benefits only upon the Parties and is not intended to confer any right or benefit upon any other person or entity. No person or entity other than the Parties shall have any legally enforceable rights under this Agreement. All rights of action for any breach of this Agreement are hereby expressly reserved to the Parties.

5/21/2024

13. **FULL UNDERSTANDING**

This Agreement, including the recitals, sets forth the complete understanding and entire agreement between the Parties and supersedes any and all prior agreements or understandings between the Parties. This Agreement may not be modified, altered, changed, discharged, terminated or waived except upon express written consent of the Parties wherein specific reference is made to this Agreement. It is agreed that there are no other understandings or agreements (either written or oral) which would have any impact upon this Agreement. By executing this Agreement, Petitioner represents and acknowledges that she does not rely, and has not relied upon, any representation or statement not set forth in this Agreement made by Respondent or its counsel with regard to the subject matter, basis, or effect of this Agreement, or otherwise.

14. **SERVICES OF COUNSEL**

The Parties certify that they have had the opportunity to discuss this Agreement with counsel. They are fully satisfied with the services of their counsel with respect to this Agreement,

and they enter into this Agreement knowingly, willingly and without any coercion or improper inducements.

15. **AUTHORITY OF SIGNATORIES**

Each signatory represents that she or he is a Party or has been duly authorized by a Party to sign on that Party's behalf and that in the case of the Board, all procedural formalities attendant to the execution of this Agreement have been satisfied.

16. **LAW GOVERNING**

This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey, except where federal law controls.

17. **APPROVAL BY BOARD**

This Agreement shall be subject to approval by the Bethlehem Township Board of Education and is without prejudice to any party if the terms are not approved. The Parties are not bound by this Agreement until it has been approved and executed by the Board.

18. **DRAFTING AND NEGOTIATION OF AGREEMENT**

The Parties understand and agree that the drafting and negotiation of this Agreement have been participated in by the Parties and their respective counsel and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the Parties. No ambiguity shall be resolved against any party based upon authorship.

19. **EXECUTION IN COUNTERPARTS**

The Parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

20. **REVOCATION PERIOD**

Petitioner acknowledges that pursuant to the Older Workers Benefit Protection Act of 1990 ("OWBPA"), she was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and has seven (7) days from the execution of this Agreement to revoke it by delivering written notification to the Bethlehem Township Chief School Administrator. It is understood that this Agreement is not effective until the seven-day revocation period has expired and, if revoked by Petitioner prior to the expiration of such period, this Agreement will not be effective or enforceable, and Petitioner will not be entitled to the consideration described herein. Petitioner, however, may voluntarily waive the twenty-one (21) day review period provided for under the OWBPA, and her signature on the certification that follows this paragraph signifies her agreement to waive the review period.

DGiz 5/25/2024

21. **EFFECTIVE DATE**

The effective date of this Agreement shall be the next day following the date upon which the Bethlehem Township Board of Education formally ratifies and executes this Agreement. DAWN GIZIS FURTHER CERTIFIES, ACKNOWLEDGES, AND REPRESENTS THAT SHE IS ABLE TO READ AND UNDERSTAND ENGLISH, THAT SHE UNDERSTANDS ALL OF THE PROVISIONS HEREIN, AND THAT SHE ENTERS INTO THIS AGREEMENT KNOWINGLY AND VOLUNTARILY, WITH THE ADVICE AND ASSISTANCE OF HER ATTORNEY. DAWN GIZIS ACKNOWLEDGES THAT SHE HAS NO PHYSICAL OR MENTAL PROBLEM, CONDITION, OR IMPAIRMENT OF ANY KIND, WHICH HAS INTERFERED WITH HER ABILITY TO READ AND UNDERSTAND THE MEANING OF THIS AGREEMENT AND ITS TERMS.

DAWN GIZIS FURTHER REPRESENTS THAT IN SIGNING THIS AGREEMENT, SHE DOES NOT RELY UPON ANY PROMISES OR REPRESENTATIONS MADE BY ANYONE OTHER THAN THOSE PROMISES AND REPRESENTATIONS SPECIFICALLY STATED HEREIN.

DAWN GIZIS FURTHER WARRANTS, REPRESENTS, AND AGREES THAT IN SIGNING THIS AGREEMENT, SHE DOES SO WITH FULL KNOWLEDGE OF ANY AND ALL RIGHTS WHICH SHE MAY HAVE WITH RESPECT TO THE RESPONDENT AND THE PETITION.

DG 5/25/2024

IN **WITNESS WHEREOF**, and intending to be legally bound, the Parties have executed this Settlement Agreement and General Release as of the dates set forth below.

WITNESS:

Beverly Vlietstra
BOARD SECRETARY

DATED: 6/30/21

BETHLEHEM TOWNSHIP BOARD OF EDUCATION

BOARD PRESIDENT

DATED: 6/28/21

WITNESS:

DANA GIZIS

DATED: 5-25-2021

DAWN GIZIS

DATED: 5/25/2021

48-22

OAL Dkt. No. EDU 10909-20
Agency Dkt. No. 220-10/20

New Jersey Commissioner of Education

Final Decision

Christine Lopez,

Petitioner,

v.

New Jersey Department of Education, State Board of Examiners,

Respondent.

The record of this matter and the Consent Order transmitted by the Office of Administrative Law have been reviewed. The agency is a party to this matter; therefore, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the Consent Order is deemed to be the final decision in this matter.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 9, 2022
Date of Mailing: March 9, 2022

ANDREW J. BRUCK
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for Department of Education,
State Board of Examiners
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

By: Amna T. Toor
Deputy Attorney General
(609) 376-3100
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	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
CHRISTINE LOPEZ V. NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS	OAL DOCKET NO. EDE 10909-2020 S AGENCY DOCKET NO. 220-10/20
	CONSENT ORDER

WHEREAS, Petitioner, Christine Lopez ("Petitioner") and Respondent, New Jersey Department of Education, State Board of Examiners ("Examiners"), have mutually agreed to settle the above-captioned matter, with Andrew J. Bruck, Attorney General of New Jersey, by Amna T. Toor, Deputy Attorney General, appearing on behalf of the Examiners, and James V. Durgana, Esq., appearing on behalf of Petitioner; and

WHEREAS, this matter arose from Petitioner's appeal, challenging the Examiners' decision denying her application for Learning Disabilities-Teacher Consultant certification; and

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. The Petition of appeal, pending at the Office of Administrative Law, DOCKET NO. EDE 10909-2020 S will be withdrawn by Petitioner with prejudice, and Petitioner consents to the withdrawal.

2. Respondent agrees that Petitioner has met the three years of successful teaching experience required for a Learning Disabilities-Teacher Consultant ("LDT-C") certification pursuant to N.J.A.C. 6A:9B-14.10, but Petitioner must still meet all other applicable requirements.

3. Petitioner acknowledges that should she seek a LDT-C certification, she must meet all requirements for this certification pursuant to N.J.A.C. 6A:9B-14.10 and must submit an application for this certification, as reflected in her Affidavit, the terms of which are incorporated herein by reference.

4. Petitioner acknowledges the certification requirements may change in the interim and that she will be required to meet all applicable requirements at the time of application, as reflected in her Affidavit, the terms of which are incorporated herein by reference.

5. By consenting to the withdrawal with prejudice of this matter, Petitioner agrees to waive any and all hearings to which she is entitled, and Petitioner agrees that she will not oppose the denial of her application for a LDT-C certification in any forum.

6. The Petitioner does not concede that the allegations in the petition in this matter were not justified, nor does Respondent admit or concede the truth of the allegations in the petition filed in this matter, and both parties have entered into this agreement for the purposes of settlement only.

7. The parties agree that this Consent Order fully resolves all issues between them arising from Petitioner's October 19, 2020 Petition of Appeal.

8. The parties acknowledge that this Consent Order is subject to the approval of the State Board of Examiners and will not be effective until the State Board of Examiners approves the settlement. Signed Before me Christine Lopez Middlesex County, NJ. 08640 Sept. 7, 2021

Christine Lopez
Petitioner

Date: 8/7/21

Anna T. Toor, D.A.G.
Attorney for State Board of Examiners

Date: 9/23/2021

Deborah Kerr
Notary Public of New Jersey
My Commission Expires Aug. 31, 2023

ANDREW J. BRUCK
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CHRISTINE LOPEZ V. NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDE 10909-2020 S AGENCY DOCKET NO. 220-10/20 **AFFIDAVIT**

I, Christine Lopez, of full age, being duly sworn upon her oath, depose and say:

1. I agree to the withdrawal with prejudice of my Petition of Appeal, pending at the Office of Administrative Law, Docket No. EDE 10909-2020 S.
2. I acknowledge that should I seek a Learning Disabilities Teacher-Consultant ("LDT-C") certification, I must meet all requirements for this certification pursuant to N.J.A.C. 6A:9B-14.10 and agree that I must submit an application for LDT-C certification.

3. I agree that the certification requirements may change in the interim and that I will be required to meet all applicable requirements at the time of application.

4. By consenting to withdraw this matter, I agree to waive any and all hearings to which I am entitled and I agree that I will not oppose the denial of my application for a LDT-C certification in any forum.

5. I acknowledge that in signing this affidavit I understand the terms of this agreement.

6. I understand that the aforementioned shall not take effect until the State Board of Examiners has voted to accept it.

Christine Lopez (Petitioner) 8/7/21

Sworn and Subscribed
before me this 7th day
of September, 2021

Deborah Kerr
Notary Public of New Jersey
Commission Expires Aug. 31, 2023

48-22

OAL Dkt. No. EDU 10909-20
Agency Dkt. No. 220-10/20

New Jersey Commissioner of Education

Final Decision

Christine Lopez,

Petitioner,

v.

New Jersey Department of Education, State Board of Examiners,

Respondent.

The record of this matter and the Consent Order transmitted by the Office of Administrative Law have been reviewed. The agency is a party to this matter; therefore, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the Consent Order is deemed to be the final decision in this matter.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 9, 2022
Date of Mailing: March 9, 2022

52-22

New Jersey Commissioner of Education

Final Decision

Brian Jasey,

Petitioner,

v.

Board of Education of the City of Newark,
Essex County,

Respondent.

Synopsis

Pro se petitioner filed a petition of appeal against the respondent Board concerning the "Newark Enrolls" admission and enrollment policy for Newark's Science Park High School (Science Park). Petitioner alleged that the admissions process discriminates against male student applicants, in violation of the New Jersey Law Against Discrimination (NJLAD), *N.J.S.A.* 10:5-1 et seq. and *N.J.A.C.* 6A:7. Petitioner argued that the process unfairly denies male applicants admission to the school and sought, *inter alia,* to permit students previously denied admission the opportunity to transfer into Science Park. The Board filed a motion for summary decision, which was opposed by the petitioner.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner has twice previously challenged the "Newark Enrolls" centralized enrollment process, under which students are permitted to apply for admission to up to eight public schools in the district, after his son was not accepted to Science Park for seventh grade in the 2016-17 school year; a 2016 challenge by petitioner was dismissed on the merits, and a 2018 challenge – this time alleging that an unauthorized algorithm violated the transition plan for the return of local control to the Newark Public School District – was dismissed for failure to state a cause of action upon which relief could be granted; the instant petition is barred by the doctrine of *res judicata*; petitioner lacks standing to bring this action; and petitioner's claims should be dismissed as a matter of law because he has failed to demonstrate that the admissions policy is discriminatory or that the Board acted arbitrarily, capriciously or unreasonably in determining who to admit to Science Park. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner, *inter alia*, agrees with the ALJ that this matter is barred by the doctrine of *res judicata*; petitioner's 2016 case had the same parties, cause of action, and issues as this matter, and *res judicata* therefore prevents re-litigation here. Accordingly, the Initial Decision of the OAL was adopted 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.

52-22

OAL Dkt. No. EDU 10181-20
Agency Dkt. No. 201-9/20

New Jersey Commissioner of Education

Final Decision

Brian Jasey,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Board's reply thereto.

In this matter, petitioner challenges the Board's admissions and enrollment process for the Science Park High School (Science Park), alleging that the process discriminates against male applicants who are unfairly being denied admission, and seeks to permit them the opportunity to transfer into the school. Petitioner also requests that the Newark Enrolls admissions and enrollment policy be changed to guarantee that all available seats at Science Park are filled and awarded in accordance with an equity plan. Under Newark Enrolls, all students may apply for admission to up to eight public schools in the district, including charter schools. Criteria for admissions in the six magnet schools includes student grades, test scores, and attendance.

Students are provided with a "match letter," which indicates which school they will be enrolled in for a given school year.

In 2016, petitioner filed a petition on behalf of his son, alleging that his son was unfairly denied admission in the school due to racial and gender discrimination in the admissions process, as well as the failure of the school to apply sibling preference. Following a hearing on the merits, the Administrative Law Judge (ALJ) dismissed the petition, finding that petitioner failed to prove discrimination on the basis of race or gender. *B.J., on behalf of minor child, T.J. v. State-Operated School District of the City of Newark, Essex County, and Gabrielle Ramos-Solomon, Executive Director, Office of Student Enrollment*, Initial Decision, EDU 08133-16, dated April 23, 2018, *adopted by* Commissioner's Decision No. 166-18, dated June 1, 2018 (*Jasey I*). The ALJ found that while there was a higher percentage of girls than boys at Science Park, the admissions process is gender neutral and is reasonably based on grades, standardized test scores, and attendance. *Ibid.* The ALJ emphasized that petitioner did not present any reason beyond enrollment numbers and relative percentages of girls and boys in the student population to demonstrate the allegation of discrimination, which was not sufficient to support his claim. *Ibid.*

In 2018, petitioner filed another petition challenging the admissions process for Science Park, alleging that an unauthorized algorithm violated the transition plan for the return of local control to the Newark Public School District. The Commissioner dismissed this petition prior to transmittal to the OAL on the basis that it failed to state a cause of action upon which relief could be granted. *B.J. v. State-Operated School District of the City of Newark,*

Essex County, A. Robert Gregory, Angelica Allen McMillan, Kathleen Tierney, Commissioner's Decision No. 223-18LM, dated July 27, 2018 (*Jasey II*).

In the instant matter, the ALJ granted the Board's motion for summary decision and dismissed the petition. The ALJ found that: (1) the petition was barred by the doctrine of *res judicata*; (2) petitioner lacked standing to bring this action; and (3) petitioner's claims should be dismissed as a matter of law because he has failed to demonstrate that the admissions policy is discriminatory or that the Board acted arbitrarily, capriciously or unreasonably in determining who to admit to Science Park.[1]

In his exceptions, petitioner argues that the ALJ failed to address why 23 seats were left vacant at Science Park in both the 2019-20 and 2020-21 school years. Petitioner contends that since there was no "cutoff disqualifying admission criteria" that precludes students – such as student attendance, student GPA or student standardized test scores – the Board has committed acts of misfeasance or malfeasance by systematically victimizing students who were denied admission when seats were still available, without providing justification as to why seats were left vacant. Petitioner argues that the Superintendent and Board President have recognized that the failure to admit the allotted number of students in previous years was wrong and have since ensured that all seats were filled for the 2021-22 school year; additionally, the administration has instituted a waitlist policy for the magnet schools. In order to remedy past wrongdoing, petitioner urges the Commissioner to order that the Board identify and offer admission to 23 ninth grade applicants from both the 2019-20 and 2020-21 application pools so that those eligible students may transfer into Science Park.

[1] The ALJ relaxed the 90-day limitations period set forth in *N.J.A.C.* 6A:3-1.3(i) due to the nature of petitioner's claims.

In reply, the Board argues that petitioner's exceptions fail to address the reasons why the petition was dismissed by the ALJ: the doctrine of *res judicata*, petitioner's lack of standing, and his failure to provide any evidence of gender discrimination. Instead, the Board maintains that petitioner simply rehashes the points made in his petition and filings at the OAL and expresses disagreement with the Initial Decision. The Board also contends that petitioner's arguments regarding the Superintendent and Board President fail to demonstrate that the ALJ's grounds for dismissal of this matter were incorrect. Accordingly, the Board asks the Commissioner to adopt the Initial Decision.[2]

Upon review, the Commissioner[3] agrees with the ALJ that this matter is barred by the doctrine of *res judicata*. The doctrine prevents re-litigation of a case when there is "(1) a final judgment by a court of competent jurisdiction, (2) identity of issues, (3) identity of parties and (4) identity of the cause of action." *Selective Insurance Company v. McAllister*, 327 *N.J. Super.* 168, 172-73 (App. Div. 2000). The Commissioner is in accord with the ALJ that *Jasey I*, decided by the Commissioner in 2018, had the same parties, cause of action, and issues as this matter. In both cases, petitioner challenged the Newark Enrolls admissions and enrollment process as discriminatory. *Jasey I* determined that petitioner failed to present evidence of actual discrimination. In the instant matter, the ALJ addressed the merits and again found that the petition and moving papers fail to set forth evidence that the Board has discriminated against male Science Park applicants, and that petitioner instead bases this allegation solely on the

[2] The Board argues that the ALJ erred in relaxing the 90-day statute of limitations. The Commissioner notes, however, that the Board did not file exceptions to the Initial Decision, so such argument will not be further addressed.

[3] This matter has been delegated to the undersigned Assistant Commissioner pursuant to *N.J.S.A.* 18A:4-34.

number of female students enrolled at Science Park as opposed to male students. *Jasey I* found that such evidence is not sufficient to support a claim of discrimination because the admissions criteria – standardized test scores, grades, and attendance – are gender neutral, and such reasoning applies equally here.

The Commissioner does not find petitioner's exceptions to be persuasive. The ALJ addressed petitioner's argument regarding vacant seats in the Initial Decision, finding that the determination of the number of students to be enrolled is a discretionary one, and the Board is entitled to a presumption of validity. The Commissioner agrees with the ALJ that petitioner has failed to demonstrate that the Board's decisions concerning who to admit to Science Park, which are based on consideration of grades, standardized test scores, and attendance, are arbitrary, capricious, or unreasonable.[4]

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[5]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: March 14, 2022
Date of Mailing: March 15, 2022

[4] The Commissioner will not address the issue of standing.

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISON
OAL DKT. NO. EDU 10181-20
AGENCY DKT. NO. 201-9/20

BRIAN JASEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Brian Jasey, petitioner, pro se

Brenda C. Liss, Esq., (General Counsel, Newark Board of Education), for respondent.

Record Closed: November 4, 2021 Decided: January 27, 2022

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Petitioner, Brian Jasey, (Jasey) a taxpaying resident of Newark, New Jersey, files a Petition of Appeal (petition), against Respondent, the Board of Education of the City of Newark, (Board) challenging the admission and enrollment policy of the Board concerning the Science Park High School (SPHS) and alleging that the same discriminates against

male students in violation of the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 et seq. and N.J.A.C. 6A:7.

PROCEDURAL HISTORY

On September 20, 2020, Jasey filed petition with the Commissioner of the Department of Education ("Commissioner"). The Board filed its answer on October 26, 2020. The matter was transferred to the Office of Administrative Law (OAL) and filed at the OAL on October 27, 2020, as a contested matter.

After transmittal to the OAL, with the Board's consent, Jasey filed an amended petition on January 21, 2021 and filed another amended petition on July 7, 2021.[1] The factual allegations and legal claims in the amended petitions are the same as those in the petition; only the requested relief is changed.

An initial telephone conference was held on December 10, 2020. A Prehearing Order was issued on December10, 2020. Telephone conferences were held on January 8, 2021. An Amended Prehearing Order was issued on January 15, 2021.

Telephone conferences were held again on March 2, 2021 and August 11, 2021, while the parties continued with pre-trial discovery and an attempt to settle the matter.

On August 11, 2021, the Board then asked for leave to file a motion for summary decision, which they filed on September 24, 2021. Jasey filed his opposition on October 15, 2021, and the Board filed its reply on October 22, 2021. Oral argument was held on November 4, 2021. A hearing is scheduled for February 10, 2022.

The underlying Initial Decision is submitted within the time allowed by Executive Order No. 127, as extended by N.J.S.A.26:13-32.

FACTUAL SUMMARY AND FINDINGS

[1] The initial petition and the two amended petitions will be referred to herein as "petition".

Jasey's alleges in the petition that the local, state, and federal tax dollar school funding received by the Board is being managed with misfeasance or malfeasance by Board administrators. Specifically, Jasey asserts that as a taxpayer, for the 2019-2020 and 2020-2021 academic years, the Board has committed acts of discrimination in admission and enrollment decisions against male students through its Newark Enrolls process and through the prejudicial admissions policy of the SPHS Principal Angela Mincy, in violation of the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 et seq. and N.J.A.C. 6A:7. Accordingly, Jasey alleges that qualified Newark male applicants that meet the criteria for admission to SPHS for 9th grade are being unfairly denied admission.

The Board filed its answer on October 26, 2020, in which it admitted that the Board's budget for the 2019-2020 and 2020-2021 school years assumed 200 and 240 seats for SPHS 9th graders, respectively. It denied most other allegations in the petition, including the allegation of discrimination.

The Board is a pre-K to 12 District. For the past several years, the Board has allowed all students to apply for admission to any public school in the district, including participating charter schools. Through its "Newark Enrolls" centralized enrollment process, students are permitted to apply for admission to up to eight public schools in the district. Jasey and his son, T.J., participated in this enrollment process in the 2015-2016 school year. At the time, T.J. was a sixth grader at Philips Academy Charter School. They applied for admission to only one school, SPHS, for his seventh-grade year, 2016-2017. T.J. was not accepted to SPHS.

Jasey filed a petition, caption, T.J. v. State-operated School District of Newark et al., OAL Dkt. EDU 08133-16 ("Jasey I") with the Commissioner seeking an order to compel the Board to enroll his minor son, T.J., in SPHS. Jasey contended that T.J. should be admitted to Science Park based on the sibling preference, because his brother, K.J., attended the school. Further, Jasey maintained that T.J. was denied admission to SPHS as the result of racial and gender discrimination in violation of N.J.S.A. 18A:36-20.

On April 23, 2018, following a hearing, an Administrative Law Judge (ALJ), dismissed the petition of Jasey I on the merits. Specifically, the ALJ concluded that Jasey failed prove by a preponderance of the evidence that the Board discriminated against T.J. on the basis of race or gender. With respect to gender, while the ALJ agreed that there was a higher percentage of girls than boys at SPHS, he held that the Board "demonstrated that [SPHS]'s admission criteria [were] gender neutral and reasonable in considering grades, standardized test scores and attendance." In contrast, the ALJ found that Jasey had failed to advance "any reason beyond the percentage of girls and boys to believe that there is actual discrimination." The Commissioner issued a final decision adopting the initial decision in full on June 1, 2018.

Jasey then filed a new petition, captioned B.J. v. State-Operated School District of the City of Newark et al., Agency Ref. No. 126-5/18 ("Jasey II") again challenging the SPHS admissions process. In this matter, Jasey alleged that the algorithm used in the Board's admissions process for the 2018-2019 violated the Transition Plan for the Return of Local Control to the Newark Public Schools ("Transition Plan"). The Board filed a motion to dismiss the action with the Commissioner prior to transmittal to the OAL, and the Commissioner granted the Board's motion and dismissed the petition with prejudice on July 27, 2018 for failure to state a cause of action upon which relief could be granted. Ibid.

Jasey now alleges that for the 2019-2020 and 2020-2021 school years, the Board has committed acts of discrimination in admission and enrollment decisions against male students through its Newark Enrolls process and through the prejudicial admissions policy of the SPHS Principal Angela Mincy, in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. and N.J.A.C. 6A:7. Accordingly, Jasey alleges that qualified Newark male applicants that meet the criteria for admission to SPHS for 9th grade are being unfairly denied admission.

The Board has now filed a motion for summary decision. At issue in the Board's motion for summary decision is whether (1) Jasey's petition is barred by the doctrine of *res judicata*; (2) Jasey lacks standing to present his claim; (3) the petition should be

dismissed as untimely; and (4) the petition should be dismissed because, as a matter of law, his claim must fail.

I FIND that the Board is a pre-K to 12 District. For the past several years, the Board has allowed all students to apply for admission to any public school in the district, including participating charter schools. Through its "Newark Enrolls" centralized enrollment process, students are permitted to apply for admission to up to eight public schools in the district.

I FIND that Jasey does not assert any claim on behalf of his son T.J., and that Jasey files this petition as a "tax paying resident of Newark, New Jersey, that is a member of Newark citizens that vote the BOE [Board of Education] members into their elected positions to carry out the will of the community in the public-school education of our children." (Brenda Liss Certification, Exhibit G).

I FIND the Board does not dispute that that there is a higher percentage of girls than boys admitted to SPHS. **I FIND** that Jasey's claim of gender discrimination is based on enrollment numbers and percentages. (Liss Certification, Exhibit H). **I FIND** that SPHS admitted 177 students for the 200 available spaces 9th grade seats in academic year 2019-2020; and 217 students for the 240 available 9th grade seats in academic year 2020-2021. (Id.)

I FIND that the Newark Enrolls universal enrollment system is governed by a Memorandum of Understanding ("MOU") between the Board and all charter schools participating in the system (known as "local education agencies" or "LEAs"). (Rochanda Jackson Certification, Exhibit A). The MOU in effect for the 2019-2020 and 2020-2021 school years (and, upon information and belief, all prior years in which the Newark Enrolls system has been in effect) describes the shared policies underlying the system. (Id.)

I FIND that students were informed of their school assignments for the 2019-2020 school year, by way of "match letters" issued in the Newark Enrolls enrollment process, on April 15, 2019. (Jackson Certification, ¶9); and they were informed of their school

assignments for the 2020-2021 school year, by way of "match letters," on May 20, 2020. (Id., ¶10).

DISCUSSION

A Motion for Summary Decision shall be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(a). If "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." Ibid. A Motion for Summary Decision before the OAL must be analyzed, "in accordance with the principles set forth by the New Jersey Supreme Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995)." Nat'l Transfer v. New Jersey Dep't of Envtl. Prot., 347 N.J. Super. 401, 408 (App. Div. 2002). A determination that there is a genuine issue of material fact 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. Brill, 142 N.J. at 540-41.

In order to defeat the motion, the opposing party must establish the existence of genuine disputes of material fact relevant to the case. 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.'" Brill, at 529 (citations omitted).

For the reasons discussed below, this matter is ripe for Summary Decision because the facts 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(a). Specifically, Jasey's Petition is barred by *res judicata*; he lacks standing as a taxpayer, and his claims fail as a matter of law. Jasey's Petition will not be dismissed for

untimeliness under N.J.A.C. 6A:3-1.3(i) because he has demonstrated that his claims implicate a compelling public interest which justifies relaxation of the 90-day rule.

The Board's motion alleges the following points as reasons for dismissal of the petition:

I. Jasey's Petition is Barred by the Doctrine of Res Judicata.

In support of its motion for summary decision, the Board first asserts that the petition must be dismissed on the basis of res judicata because Jasey is attempting to re-litigate the same claims alleging gender discrimination in enrollment decisions at SPHS, which were fully litigated and decided in Jasey I. In opposition, Jasey asserts that the current petition is not an attempt to re-litigate this claim, as he argues that he filed Jasey I as a parent, alleging that his son was entitled to enrollment based on an existing policy of sibling preference and that there was gender and race discrimination used in the SPHS admissions process that resulted in the low enrollment of Black males at SPHS. In contrast, Jasey now argues that the current petition, which he filed as a "taxpaying resident" of Newark, alleges wrongdoing by the Board administrators in the mismanagement of taxpayer funds as it relates to the enrollment of students at SPHS.

Res judicata "refers broadly to the common-law doctrine barring re-litigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991).; see also Selective Insurance Co. v. McAllister, 327 N.J. Super. 168, 172 (App.Div.), certif. denied, 164 N.J. 188 (internal quotations and citations omitted). At its core, the doctrine provides "that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." Velasquez, 123 N.J. at 505 (citing Roberts v. Goldner, 79 N.J. 82, 85 (1979)).

New Jersey courts have recognized that the judicial principles underlying collateral estoppel and other doctrines of issue preclusion, such as res judicata, serve important policy goals in both administrative law and judicial settings. See Hackensack v. Winner, 82 N.J. 1, 31-33 (1980); Ensslin v. Tp. of N. Bergen, 275 N.J. Super. 352, 369

(App.Div.1994) (noting that preclusion applies if agency decision was "rendered in proceedings which merit such deference"), certif. denied, 142 N.J. 446, (1995). The many benefits that flow from preclusion doctrines, such as "finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness" also "have an important place in the administrative field." Hackensack, 82 N.J. at 32-33.

Accordingly, **I CONCLUDE** that the doctrine of res judicata is clearly applicable to the within matter as to the decisions made by the Commissioner in Jasey I. For res judicata to apply, however, there must be "(1) a final judgment by a court of competent jurisdiction, (2) identity of issues, (3) identity of parties, and (4) identity of the cause of action." McAllister, 327 N.J. Super. at 172-173 (citing T.W. v. A.W., 224 N.J. Super. 675, 682 (App.Div.1988)).

As a threshold matter, **I CONCLUDE** here, a final judgement was rendered in Jasey I. After a three-day hearing and presentation of a full evidential record, the ALJ dismissed Jasey I, finding that Jasey failed to prove by a preponderance of the evidence that the Board discriminated against T.J. on the basis of race or gender in violation of N.J.S.A. 18A:36-20. With respect to gender discrimination, the ALJ in Jasey I specifically found, while it was clear that there was a higher percentage of girls than boys at SPHS, the Board "demonstrated that [SPHS]'s admission criteria [were] gender neutral and reasonable in considering grades, standardized test scores and attendance. In contrast, [Jasey did] not advance any reason beyond the percentage of girls and boys to believe that there is actual discrimination." Initial Decision. The Commissioner adopted the decision in its entirety.

I CONLUDE that there is also an identity of issues between Jasey I and the present action. Jasey I alleged the following two issues:

> (1) that Jasey's son, T.J., was denied rightful admission to SPHS despite a sibling preference entitlement that was afforded to all Newark families with a child already enrolled in the district. TJ's sibling was enrolled at SPHS at the time of TJ's application; and

(2) that T.J. was denied admission to SPHS as the result of racial and gender discrimination in violation of N.J.S.A. 18A:36-20.

Jasey, now asserts that the within petition "uniquely and independently revealed malfeasance or misfeasance by administrators in their dereliction of duty in denying qualified highly ranked Newark students their rightful admission entitlement to 23 budgeted SPHS 2019-2020 9th grader seats and 23 budgeted SPHS 2020-2021 9th grade seats, seats that were paid for by federal, state, and local taxpayer dollars." He now asserts these claims not on behalf of his son T.J., who has spent the last four years at a private high school and is preparing for college, but rather as a tax-paying resident of Newark.

I **CONCLUDE** that despite Jasey's characterization of the present claims, the crux of the issues in the two cases remain substantially the same: that SPHS's admissions and enrollment policies and practices discriminate against students based on gender. Jasey himself notes that the Board's wrongful acts in denying 46 qualified highly ranked Newark students to SPHS, with no legitimate explanation ever being offered, "is an identifiable means by which males were allowed to be systematically victimized and not considered for SPHS enrollment." (Jasey Opposition to the Board's Motion for Summary Decision ("Jasey Opp.") at 2.

I **CONCLUDE** that the parties here remain the same, and the causes of action remain substantially similar to the Jasey I matter. In Jasey I, Jasey sought an order, on behalf of his son to compel the Board to enroll his son, T.J., in SPHS, as well as other male students in the Newark school district who he alleged had been wrongfully denied admission based on the Newark Enrolls process. The current petition again seeks an order that requires the Board to enroll eligible male students at SPHS, now for the 2019-2020 and 2020-2021 school years, which does not include Jasey's son T.J.

In sum, I **CONCLUDE** that all the factors that must be present to apply res judicata are present here -- there was (1) a final judgment made by the Commissioner, (2) identity

of issues, (3) identity of parties, and (4) identity of the cause of action. As such, **I CONCLUDE** Jasey should be barred from bringing this petition by res judicata.

II. Jasey Lacks Standing to Bring The Withing Petition.

The Board argues that Jasey lacks standing because Jasey has brought this action solely based on his status as a taxpayer, rather than on behalf of his son, to challenge the SPHS admissions process, which is not enough to confer standing. In response, Jasey argues that he has standing to present this action because Newark taxpayers have a vested interest in the public education of the children of Newark.

New Jersey has "a venerable tradition of liberal application of standing criteria." Crescent Park Tenants Ass'n v. Realty Equity Corp. of N.Y., 58 N.J. 98, 101, 107-11 (1971). N.J.S.A. 52:14B-8, the provision of New Jersey's Administrative Procedure Act that permits any interested person to challenge the applicability of any statute or rule enforced or administered by an agency, is grounded in this long tradition. Further, unlike the Federal Constitution, there is no express language in New Jersey's Constitution which confines the exercise of the state's judicial power to "actual cases and controversies." See U.S. Const. art. III, § 2; N.J. Const. art. VI, § 1. As such, New Jersey "remains free to fashion its own law of standing consistent with notions of substantial justice and sound judicial administration." Salorio v. Glaser, 82 N.J. 482, 491 (1980). Individual justice must be weighed against the public interest, "always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of just and expeditious determinations on the ultimate merits." Crescent Park, 58 N.J. at 107-08 (internal quotations and citations omitted)

The "essential purpose" of the standing doctrine in New Jersey is to:

> ...assure that the invocation and exercise of judicial power in a given case are appropriate. Further, the relationship of plaintiffs to the subject matter of the litigation and to other parties must be such to generate confidence in the ability of the judicial process to get to the truth of the matter and in the integrity and soundness of the final adjudication. Also, the standing doctrine serves to fulfill the paramount judicial

> responsibility of a court to seek just and expeditious determinations on the ultimate merits of deserving controversies.

[N.J. State Chamber of Commerce v. N.J. Election Law Enforcement Comm'n, 82 N.J. 57, 69, 411 A.2d 168 (1980).]

Despite New Jersey's liberal approach, courts nonetheless "[confine] litigation to those situations where the litigant's concern with the subject matter evidenced a sufficient stake and real adverseness." Crescent Park., 58 N.J. 98 at 107-108. The Supreme Court has made clear that it will not render advisory opinions or function in the abstract, nor will it entertain petitions by plaintiffs "who are 'mere intermeddlers,' or are merely interlopers or strangers to the dispute." Id. at 107. Courts are "required to balance conflicting considerations and weigh questions of remoteness and degree." Al Walker, Inc. v. Stanhope, 23 N.J. 657, 661 (1957). Litigants must have "a clear, identifiable, substantial, and real interest in the outcome of [a legal] challenge." Jen Elec., Inc. v. Cty. of Essex, 197 N.J. 627, 647 (2009). Furthermore, there must be a measurable, detrimental impact on the complaining party's personal rights (see Salorio, 82 N.J. at 491) and a substantial likelihood that the plaintiff will experience some harm if the court returns an unfavorable decision (N.J. State Chamber of Commerce, 82 N.J. at 67).

In this calculus, a "plaintiff's particular interest in the litigation in certain circumstances need not be the sole determinant. That interest may be accorded proportionately less significance where it coincides with a strong public interest." N.J. State Chamber of Commerce, 82 N.J. at 68 (citing Elizabeth Fed. Sav. & Loan Assn. v. Howell, 24 N.J. 488, 499 (1957)). As a result, New Jersey courts have held consistently that "slight private interest, added to and harmonizing with the public interest," sufficient to give standing to seek judicial review of official action. Elizabeth Federal S & L Ass'n v. Howell, 24 N.J. 488, 499 (1957) (internal quotations and citations omitted).

New Jersey's liberal application of standing is particularly salient in taxpayer suits. See Bell v. Stafford Tp., 110 N.J. 384, 390-91 (1988); Walker v. Stanhope, 23 N.J. 657, 130 A.2d 372 (1957). This is especially true with regards to exercises of legislative or quasi-legislative authority. New Jersey Turnpike Auth. v. Parsons, 3 N.J. 235, 239-41

(1949). This is based, in part, on the rationale that "taxpayers' suits [are] an effective means for restraining official misconduct." Haines v. Burlington Cty Bridge Comm., 1 N.J. Super. 163, 172 (App. Div. 1949. The New Jersey Supreme Court has long 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, 24 N.J. 154, 177 (1957)

New Jersey courts have found taxpayer intervention appropriate for certain government acts or alleged wrongdoing. See Driscoll v. Burlington Bridge Co., 8 N.J. 433, 474-476, cert. denied, 344 U.S. 838 (1952) (standing appropriate in cases "fraught with fraud and corruption"); Matlack v. Bd. of Chosen Freeholders, 191 N.J. Super. 236 (Super. Ct. 1982) (standing to challenge bond ordinance that improperly gave county discretion to purchase land development credits and illegally authorized the proceeds to be used for land purchases outside county); Koons v. Bd. of Comm'rs of Atlantic City, 134 N.J.L. 329 (Sup.Ct.1946),aff'd, 135 N.J.L. 204, 50 A.2d 869 (E. & A.1947)(standing appropriate ultra vires acts); Kozesnik, 24 N.J. at 177 (for zoning matters, landowners permitted to seek review of local legislative or quasi-judicial action without proof of unique financial detriment); L. Pucillo & Sons, Inc. v. Tp. of Belleville, 249 N.J. Super. 536, 592 A.2d 1218 (App.Div), certif. denied, 127 N.J. 551, 606 A.2d 364 (1991)(standing to challenge illegal billing procedures).

Courts have distinguished situations in which a taxpayer seeks to challenge government expenditures, for which standing has been conferred, versus cases in which the taxpayer seeks additional government expenditures, for which standing is not appropriate. See Nolan v. Fitzpatrick, 9 N.J. 477, 484, 89 A.2d 13 (1952) (standing to challenge wrongful expenditures by governing body). In Loigman v. Township Committee of the Tp. of Middletown, 297 N.J. Super. 287, 296 (App. Div. 1997), the Appellate Division examined whether a plaintiff taxpayer had standing to bring an action to enforce a collective negotiation agreement between a public employer and a public employee union. The court held that, "[w]hile permissible taxpayer suits generally seek to prevent municipalities from disbursing funds," the plaintiff taxpayer had no standing to sue because they were not a party to the labor contract and because they sought to enforce a contractual provision and require governmental expenditures. Id. at 296. In so holding,

the court contrasted the plaintiff's position to a case in which a taxpayer was deemed to have standing to challenge the legitimacy of the referendum which authorized salary increases of government employees. Ibid. (citing Theurer v. Borrone, 81 N.J. Super. 188, 193 (Law Div.1963)). The Court also expressed its concern that "[i]f individual taxpayers with multiple competing interests were able to bring suit in such situations, they could cripple the government's ability to function properly." Ibid.

In contrast, in Ridgewood Educ. Ass'n v. Ridgewood Bd., 284 N.J. Super. 427, 665 A.2d 776 (N.J. Super. 1995) the Appellate Division addressed whether two tenured part-time supplemental teachers employed by the local board of education, who were also residents and taxpayers of the city, had standing to challenge a newly adopted board policy. The board's policy limited employment of supplemental teachers to two consecutive years, and the two teachers sought a declaration from the Commissioner that the policy was arbitrary, capricious, and unreasonable. The ALJ found that the two teachers lacked standing as persons directly affected by the policy because they had acquired tenure and would be unaffected. These findings were adopted by the Commissioner and affirmed by state board.

The Appellate Division reversed, holding that the teachers had standing to challenge the new policy. The court found that, even to the extent their status as residents and taxpayers of the district was alone not sufficient to afford standing, which the court found to be "of questionable validity," they had standing by reason of their professional status and involvement. Ridgewood Educ. Ass'n, 284 N.J. Super. at 432. The court found that the teachers "must be seen as having satisfied any additional requirement that may exist for a 'slight private interest, added to and harmonizing with the general public interest.'" Id. at 433 (quoting Hudson Bergen County Retail Liquor Stores Ass'n v. Hoboken Board of Comm'rs, 135 N.J.L. 502, 510 (E. & A.1947)). The court found no reason "why this State's historic liberal approaches to the issue of standing in general should not apply to taxpayer suits challenging the quasi-legislative actions of local boards of education." Ibid. (internal citations omitted).

Finally, in People For Open Gov't v. Roberts, 397 N.J. Super. 502 (App. Div. 2008), the Appellate Division addressed whether plaintiff taxpayers, as individuals and as

members of an organization, had standing to challenge what they claimed to be a lack of enforcement of a city ordinance designed to curtail the nefarious practice of "pay to play," where individuals and companies are awarded municipal contracts as a reward for having made political contributions to municipal officials.

The court held that each of the individual plaintiffs had standing because they had clearly established "an abiding interest in the effective enforcement ordinance." Id. at 510. The court noted that the individual plaintiffs had been "personally involved" with the unsuccessful effort to have the city council enact meaningful pay-for-play legislation as well as the initiative which resulted in forcing the matter onto the ballot where it was overwhelmingly approved by the voters. Id. at 510-511. Under these circumstances, the court found that the individual plaintiffs had that "slight additional private interest coupled with the great public interest, in enforcement of the "pay to play" ordinance to provide the required standing to bring this action." Id. at 511 (internal quotations and citations omitted). The court noted that, under these circumstances, it did not need to decide whether "mere taxpayer" status alone would suffice.

Here, as the Board argues, Jasey seeks to implement a "better" and "less impactful" SPHS admission process. Jasey also seeks to compel the Board to fill all the "budgeted seats" at SPHS, which I **CONCLUDE** amount to Jasey inserting himself in the Board's right to administer its admissions policy through its Newark Enrolls process. As discussed in Loigman, I **CONCLUDE** Jasey is not merely challenging a district-wide policy and seeking to prevent the Board from disbursing funds, which would be sufficient to confer standing as a taxpayer, but rather, Jasey urges the undersigned to enter an order compelling SPHS to admit "qualified Newark male applicants that meet the criteria for admission to SPHS for 9th grade", which I **CONCLUDE** is not appropriate.

I CONCLUDE that if Jasey were deemed to have standing, the concerns expressed in Loigman would be present here, namely that this claim and similar ones could "cripple the government's ability to function properly." Loigman, 297 N.J. Super. at 296.

I CONCLUDE further, that Jasey lacks standing by nature of his taxpayer status alone. While Jasey I was filed on behalf of his son, a Newark public school student, his son has now spent the last four years at a private high school in preparation for college. Jasey now files this case as a taxpaying resident of Newark, with a "vested interest in the education of the children of [his] Newark community[.]" Jasey's petition seeks to vindicate the rights of all male student applicants to SPHS.

I CONCLUDE, that while Jasey alleges that Board administrators have committed "fraudulent waste . . . by their dereliction of duty by not appropriately allocating taxpayer dollars for their intended purpose in academic years 2019-2020 and 2020-2021, by leaving 46 budgeted SPHS freshman seats vacant at a cost to Newark residents of approximately $1,000,000 (46 x $22,000 cost per pupil), with no legitimate justification." Ibid; Jasey has failed to set forth any factual support for these allegations, as is required to challenge a motion for summary decision. Brill, 142 N.J. at 537.

Finally, despite New Jersey's liberal approach. Jasey's relationship to these allegations are too remote to confer standing. Al Walker, Inc. 23 N.J. 657 at 661, **I CONCLUDE** Jasey lacks the "clear, identifiable, substantial, and real interest in the outcome of [a legal] challenge." Jen Elec. 197 N.J. at 647. **I CONCLUDE** that while there is arguably a strong public interest in the admissions decisions of Newark's magnet schools, Jasey must still possess some "slight" private interest to afford him standing. See People For Open Gov't, 397 N.J. Super. at 511.

Jasey's motion opposition submitted herein, reveals that there is no measurable, detrimental impact on Jasey's personal rights (Salorio, 82 N.J. at 491), nor is there a substantial likelihood that Jasey will experience even some harm if an unfavorable decision is made (N.J. State Chamber of Commerce, 82 N.J. at 67), and I therefore **CONCLUDE**, as a result, that Jasey lacks standing, and the Board's motion maybe granted on that basis alone.

III. Jasey has demonstrated some compelling circumstances that justify relaxation of the ninety-day rule under N.J.A.C. 6A:3-1.3(i), despite the petition being untimely filed.

The Board asserts that Jasey's petition is untimely pursuant to N.J.A.C. 6A:3-1.3(i), which provides in pertinent part:

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

[N.J.A.C. 6A:3-1.3(i)]

The Board alleges that for enrollment for the 2019-2020 school year, Newark Enrolls match letters were sent out on April 15, 2019, and for enrollment in the 2020-2021 school year, they were sent out on May 20, 2020. Jasey filed the within petition in this matter on September 17, 2020, which the Board asserts is well over 90 days from the date of each match letter and "therefore well out of time." Accordingly, the Board asserts that the petition is barred. In opposition, Jasey responded that the petition was filed "as soon as it became apparent to the Petitioner that an identifiable pattern of NBOE administrator misconduct had occurred."

The ninety-day period "gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety-days." Nissman v. Bd. of Educ. of Twp. of Long Beach Island, Ocean Cty., 272 N.J. Super. 373, 380 (App. Div. 1994) (alteration in original) (quoting Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993)). The purpose of the ninety-day rule 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. Id. at 587.

The rule furthermore exists to "penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs." Id. (quoting Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111, 115 (1973) (internal quotation marks omitted)). The notice requirement should effectuate concerns for individual justice by not triggering the

limitations period until a petitioner has been alerted to the existence of facts that may equate with a legal cause of action. Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978). At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." Borough of Park Ridge v. Salimone, 21 N.J. 28, 48 (1956).

Under the rule, "[a]dequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow, 131 N.J. 572 at 588; Notice that is "unofficial and informal" is "sufficient to trigger the ninety-day limitations period." Burd, at 281. It has been firmly recognized that attempts to resolve a claim through negotiations with the local board do not negate the receipt of adequate notice, nor do they toll the running of the limitations period. Kaprow, at 588; see also Giannetta v. Bd. of Educ. of the Twp. of Egg Harbor, OAL Dkt. EDU 357-10-04 Initial Decision, adopted, Comm'r (April 25, 2005).

In order for the 90-day period to run, a petitioner must have knowledge of their firm position, and of the respondent's "equally firm disagreement" with it. Bd. of Twp. of Waterford v. Bd. of Educ. of Twp. of Hammonton, OAL Dkt. Nos. EDU 6798-07 & EDU 8091-07, Comm'r of Educ. (March 24, 2008). The parties must be "undeniably at impasse" in which the aggrieved party has "no entitlement to subsequent intervention by the County Superintendent or Department [of Education]..." Bd. of Educ. of Mountainside v. Bd. of Educ. of Twp. of Berkeley Heights, OAL Dkt. No. 9700-06, Comm'r (January 17, 2008), affirmed at Bd of Educ. of Mountainside v. Bd of Educ. of Berkeley Heights, 2010 N.J. Super. Unpub. LEXIS 545.

Finally, the limitations period begins to run once a petitioner receives notice of the firm rejection of its claims, whether communicated formally or informally. Gloucester Bd. of Educ. v. Lenape Bd. of Educ, OAL Dkt. EDU 10120-98, Initial Decision, adopted and modified, Comm'r (Dec. 16, 1999)(rejecting the ALJ's recommendation and dismissing the petitioner's appeal as untimely after determining that the limitations period began when the respondent directed clear communications that it had no intention of paying the tuition of its resident students attending the petitioner's academy, and rejecting the ALJ's

contentions that a board's final action must be made formally by a resolution, minutes or otherwise).

The ninety-day rule may only be relaxed under exceptional circumstances or if there is a "compelling" reason to do so. Kaprow, 131 N.J. at 590. Certain cases are excepted from the rule, which include "cases involving (1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975).

Further, rules may be relaxed where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice. See N.J.A.C. 6A:3-1.16. Although rare, relaxation of the 90-day rule has been deemed appropriate in situations for which there is a compelling public interest. Seitz v. Bd. of Educ. of Parsippany-Troy Hills, OAL Dkt. EDU 12821-11, Initial Decision (May 30, 2013), adopted, Comm'r (July 15, 2013), <http://njlaw.rutgers.edu/collections/oal/> (relaxing the ninety-day rule where a superintendent challenged whether his employment contract with the Board was lawfully approved and executed before a regulatory amendment capping superintendents' salaries came into effect); Bd. of Educ. of Mountainside v. Bd. of Educ. of Berkeley Heights, OAL Dkt. EDU 9700-06, Initial Decision (July 20, 2007), modified, Comm'r (January 17, 2008), <http://njlaw.rutgers.edu/collections/oal/> (relaxing the ninety-day rule where one school district which sent its students to another district pursuant to a sending-receiving relationship contended that it was overcharged for tuition over the years); Bey v. Bd. of Educ. of Newark, 93 N.J.A.R.2d (EDU) 288, 294 (finding that the ninety-day rule should be relaxed in an action certifying tenure charges against a teaching staff member who had been accused of mismanaging and misappropriating school funds entrusted to him in his capacity as school treasurer). However, the expenditure of public funds alone is not a sufficient public interest to justify a waiver or relaxation of the ninety-day rule. Elmwood Park Bd. of Educ. v. Farrell, 95 N.J.A.R.2d (EDU) 375, 378.

In the within matter, students and parents were notified of admissions decisions on April 15, 2019 for the 2019-2020 school year, and on May 20, 2020 for the 2020-2021

school year. Jasey initiated this matter on September 20, 2020, when his petition was filed with the Commissioner, which is beyond the ninety-day time frame that is required by law.

Jasey asserts that "[s]everal attempts were made . . . through normal channels of communication to alert [Board] officials of the miscarriage of justice that was jeopardizing the enrollment of qualified high ranking entitled Newark students admission to SPHS." Jasey Opp. at 5. He asserts further that when he did not receive a response or acknowledgement by Board officials, he "immediately filed this Petition as a whistleblower's last resort." Ibid. However, the Board has not adjusted its admission policies or practices since a decision was handed down in Jasey I , and I **CONCLUDE** that Jasey was thus on notice after admissions decisions were made for the 2019-2020 and 2020-2021 school years.

I **CONCLUDE** that Jasey's attempts to resolve his allegations with the Board do not negate the fact that he received adequate notice on both April 15, 2019 and May 20, 2020, at which time the tolling of the limitations period began. Kaprow at 587 (1993); Riely v. Hunterdon Central Bd. of Educ., 173 N.J. Super. 109 (App.Div.1980). I **CONCLUDE** that Jasey does not allege any facts that would have triggered the ninety-day period, other than the April 15, 2019 or May 20, 2020 dates, and I **CONCLUDE** that on that day, or at least soon thereafter, Jasey learned from the Board the existence of facts (i.e., the enrollment statistics) that would enable him to file a timely claim.

I **CONCLUDE** that despite Jasey's failure to comply with the requirements of the 90-day rule, under N.J.A.C. 6A:3-1.3(i), some conditions are present here that may warrant relaxation of the same. Namely, as discussed above, the expenditure of public funds alone is not a sufficient public interest to justify a waiver or relaxation of the ninety-day rule. Elmwood Park Bd., 95 N.J.A.R.2d (EDU) at 378, and the admissions policies and decisions of the Board's public schools are unquestionably an issue of compelling public interest that go beyond the interests of the two parties. Bogart v. Bd. of Educ. of East Orange, OAL Dkt. No. EDU 6248-02 (Jan. 26, 1983) adopted, Comm'r (March 14, 1983) (The ninety-day rule will be relaxed "only where there is come compelling reason

for the same, such as the presence of a substantial constitutional or other issue of fundamental public interest beyond that of concern only to the parties themselves.").

For these reasons, I **CONCLUDE** that since allegations of gender discrimination in admissions decisions and malfeasance of Board administrators are situations which arguably warrant the relaxation of the ninety-day rule, I will deny the Board's motion for summary decision on this claim.

IV. Jasey's Petition Should be Dismissed because as a Matter of Law, His Claims Fail.

Jasey first asserts that SPHS has committed acts of discrimination in the admission and enrollment process against qualified male applicants through the Newark Enrolls admission process and policy. In response, the Board argues that Jasey's claims are insufficient to sustain his claims of discrimination and must fail as a matter of law.

In addressing a claim of racial discrimination in public schools in Booker v. Bd. of Educ., 45 N.J. 161, 180 (1965), the New Jersey Supreme Court emphasized that:

> [T]he goal here is a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures. This brings into play numerous factors to be conscientiously weighed by the school authorities. Considerations of safety, convenience, time economy and the other acknowledged virtues of the neighborhood policy must be borne in mind. Costs and other practicalities must be considered and satisfied. And trends towards withdrawal from the school community by members of the majority must be viewed and combatted, for if they are not, the results may be as frustrating as the inaction complained about by the minority.

The same principles apply to allegations of discrimination under NJLAD, which has been interpreted to allow reasonable restrictions which promote important governmental objectives. In re Katherine Frey Dickerson, 193 N.J. Super. 353 (Ch.Div.1983). Similarly, the New Jersey Supreme Court has construed the law to "simply extend the New Jersey constitutional bases of proscribed discrimination in respect to student opportunities to

include gender in the education system." Hinfey v. Matawan Bd. of Educ., 147 N.J. Super. 201 (App.Div.1977), rev'd on other grounds 77 N.J. 514 (1978).

I **CONCLUDE** that Jasey's petition and his moving papers fail to set forth any evidence that the Board has and continues to discriminate against male SPHS applicants. Jasey bases this allegation purely on the number of female students enrolled at SPHS, as opposed to the number of male students. When presented with this issue in Jasey I, the ALJ found that the Board had demonstrated that its admission criteria are gender neutral, and that Jasey failed to advance any reason beyond stating the percentage of girls versus boys to prove that there was actual discrimination at play in SPHS' admission process. Initial Decision.

Further, Jasey I held that the Board had demonstrated that it utilized sound educational values and procedures in it admission criteria for magnet schools, including SPHS. Ibid. The Commissioner adopted the ALJ's findings in their entirety.

The material facts of the admissions process, Newark Enrolls, as outlined in detail in the ALJ's Initial Decision, remained true for the 2019-2020 and 2020-2021 school years. (Jackson Certification).

Jasey himself admits that admission to SPHS is a "merit-based system where all student applicants were ranked by a formula weighing each student's admission criteria of grades, standardized test scores, attendance record and high school entrance examination score." (Jasey Opp. at 2). I **CONCLUDE** that given the extensive findings in Jasey I together with the fact that the SPHS admissions process has not changed since Jasey I, I **CONCLUDE** that Jasey's claims must fail as a matter of law.

Jasey continues to rely solely on the number of female students enrolled at SPHS, as opposed to the number of male students, which I **CONCLUDE**, Jasey I made clear is simply not enough to sustain a claim of reverse gender discrimination. In his opposition, Jasey now denies that he is making a case for quotas or reverse discrimination – rather, he is "demanding fair and equal access to SPHS enrollment for all Newark students, regardless of gender, that applied to SPHS based on student merit, the NBOE Board

Member budgets, Superintendent approvals and documented SPHS ranking admission policies that were in place during the mentioned academic years." Jasey argues that by leaving 46 vacant seats the Board "unfairly created an arbitrary SPHS admissions "cutoff enrollment" that unjustifiably denied highly ranked qualified SPHS male applicants to their entitled admission in academic years 2019-2020 and 2020-2021. Ibid.

Jasey's argument fails to recognize that with respect to discretionary actions by any board of education, the scope of the Commissioner's review is not to substitute her judgment but rather to determine whether there was a reasonable basis for such action. Kopera v. Bd. of Educ., 60 N.J. Super. 288, 295-96 (App. Div. 1960), and therefore, I **CONCLUDE** that as permitted by N.J.S.A. 18A:38-4, the Board established its own rules and regulations relative to admission. Policy determinations made by local boards of education enjoy a presumption of validity that will not be disturbed absent a showing of arbitrary, capricious, or unreasonable action on the part of the board. Bd. of Educ. of Colts Neck v. Bd. of Educ. of Freehold Reg'l High Sch. Dist., 270 N.J. Super. 497, 505 (App. Div. 1994). An "'action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives.'" Parsippany-Troy Hills Educ. Ass'n v. Bd. of Educ. of Parsippany-Troy Hills, 188 N.J. Super. 161, 167 (App. Div. 1983) (quoting Kopera, 60 N.J. Super.at 294)).

For these reasons, I **CONCLUDE** that the Board may utilize its discretion when dealing with matters involving magnet school admission, curriculum, attendance, and other related areas so long as it is rationally based and free from any arbitrary action. The record reveals that the process here is governed by a MOU between the Board and the local educational agencies. (Jackson Cert. at 2).

I **CONCLUDE** that the proofs presented herein reveal that the Board followed its Newark Enrolls process in determining who to admit to SPHS for the 2019-2020 and 2020-2021 school years by considering grades, standardized test scores and attendance, and that Jasey has failed to set forth any new evidence that the Board's decisions were arbitrary or capricious, as is his burden. As such, I **CONCLUDE** that Jasey's claims fail as a matter of law.

ORDER

IT IS hereby **ORDERED** that for the reasons set forth herein, the Board's motion for summary decision is **GRANTED** and Jasey's petition filed herein are **DISMISSED**, as to the following issues: 1) Jasey's petition is barred by the doctrine of res judicata; (2) Jasey lacks standing to present his claim; and (3) the petition should be dismissed as a matter of law, as Jasey will fail in his claim.

IT IS hereby **ORDERED** that for the reasons set forth herein, the Board's motion for summary decision is **DENIED** as to the issue that Jasey did not file the petition in a timely manner.

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

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 27, 2022 _____

DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: January 27, 2022

Date E-Mailed to Parties: January 27, 2022

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APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS

For Petitioner:

P-1 Opposition Brief to Summary Decision Motion and exhibits

For Respondent:

R-1 Notice of Motion and Certification of Service
R-2 Brief in support of motion for summary decision
R-3 Certification of Brenda C. Liss, Esq., with exhibits
R-4 Certification of Rochanda Jackson with exhibits
R-5 Sur-reply

55-22

OAL Dkt. No. EDU 05610-21
Agency Dkt. No. 176-8/20

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Linden,
Union County,

Petitioner,

v.

M.T., on behalf of minor children, C.T., C.T.,
and C.T.,

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. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that Paragraph 1 of the Agreement references an action that has preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 22, 0222
Date of Mailing: March 22, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05610-21
AGENCY DKT. NO. 176-8/20

BOARD OF EDUCATION OF THE CITY OF LINDEN, UNION COUNTY,

Petitioner,

v.

M.T., ON BEHALF OF MINOR CHILDREN, C.T., C.T. and C.T.,

Respondent.

Nathanya G. Simon, Esq., for Petitioner (Scarinci Hollenbeck, attorneys)

M.T., Respondent, pro se

Record Closed: February 11, 2022 Decided: February 17, 2022

BEFORE **MATTHEW G. MILLER,** ALJ:

On July 6, 2021, the Department transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, 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.

On February 9, 2022, the parties settled this matter. A copy of their settlement agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision 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 17, 2022
DATE



MATTHEW G. MILLER, ALJ

Date Received at Agency: 2/23/2022

Date Mailed to Parties:
mm

Montaner, Maria [OAL]

From:	Allyson De Virgil o <adevirg'lio@sh-law com>
Sent:	Friday, February 11, 2022 9.37 AM
To:	Montaner, Maria [OAL]
Cc:	Nathanya Simon; Mon'que Rob'nson, Marnie Hazelton; Kathleen A. Gaylord
Subject:	[EXTERNAL] Linden Board of Education v. M.T. o/b/o C.T., C.T., and C.T. (EDS 05610-2021)(176 8/20)
Attachments:	02.11.2022 Ltr to ALJ with ful y executed Agreement and Note (C.T. C.T. and C.T.).pdf; Settlement Agreement and Release Ful y Executed 02.10.2022.pdf; Promissory Note Fully Executed 02.10.2022.pdf

On behalf of Nathanya Simon, please see attached.

Thank you.

Allyson DeVirgilio | Legal Secretary for Nathanya G. Simon, Keith T. Campbell & Dianna Santiago Esqs.
adevirgilio@sh-law.com
Direct Phone: 201 896-7244

SCARINCI | HOLLENBECK
1100 Valley Brook Avenue | P.O. Box 790 | Lyndhurst, NJ 07071 | map
P 201.896.4100 F 201.896 8660

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Disclaimer: The [illegible] and [illegible] are [illegible] [illegible] [illegible]

NATHANYA G. SIMON |Partner
nsimon@sh-law.com
Phone: 201-896-7223 Fax: 201-896-7224

February 11, 2022

VIA EMAIL ONLY
Honorable Matthew Miller, A.L.J.
Office of Administrative Law
33 Washington Street, 7th Floor
Newark, New Jersey 07102

Re: Linden Board of Education v. M.T. o/b/o C.T., C.T., and C.T.
OAL Docket No. EDS 05610-2021 N
Agency Ref. No. 176-8/20
Our File No. 14694.1003

Dear Judge Miller,

I am pleased to enclose a copy of the fully signed and approved Settlement Agreement and Release ("Agreement") and Promissory Note ("Note") for this matter indicating the Agreement and Note were approved by the Linden Board of Education ("Board"). Accordingly, it would be greatly appreciated if Your Honor would adjourn any future dates associated with this matter. Additionally, please review and approve the Agreement and Note and issue a Final Decision Approving same after which its terms will be fully implemented.

If you require any additional information or have any questions with regard to this matter, please do not hesitate to contact me. Thank you very much for the courtesies extended to the parties in this matter.

Respectfully Submitted,

/s/ Nathanya Simon
Nathanya G. Simon
For the Firm

NGS/ad
Enclosure
cc: Monique Tate (via mail and e-mail)
Marnie Hazelton, Superintendent of Schools (via e-mail)
Kathleen Gaylord, SBA/Board Secretary (via email)

SCARINCI & HOLLENBECK, LLC
ATTORNEYS AT LAW
1100 Valley Brook Avenue
P.O. Box 790
Lyndhurst, New Jersey 07071-0790
T: (201) 896 4100
F: (201) 896-8660
Attorneys for Petitioner, Linden Board of Education
Our File No.:14694.1003

Board of Education of the City of Linden, Petitioner, v. M.T. o/b/o C.T., C.T., and C.T., Respondent,	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL DOCKET NO: EDU 05610-2021N AGENCY REF. NO: 176-8/20 SETTLEMENT AGREEMENT **AND RELEASE**

THIS AGREEMENT is made this __ day of December, 2021 between M.T. on behalf of C.T., C.T. and C.T. and the Linden Board of Education, having its principal place of business at 2 E. Gibbons Street, Linden, New Jersey 07036 (the "Board").

WHEREAS, C.T., C.T. and C.T. attended the Linden Public School District during the 2018-2019 and 2019-2020 school year; and

WHEREAS, a dispute arose regarding their entitlement to attend school in the District pursuant to N.J.S.A. 18A:38-1 et seq., and

WHEREAS, there was a hearing before the Board and a withdrawn appeal before the Commissioner of Education during which it was established that M.T. did not maintain a legal domicile in Linden during part of the 2018-2019 school year and during the entire 2019-2020

school year and therefore M.T.'s three children were not entitled to receive a free education from the Linden School District; and

WHEREAS, Linden filed a Petition for tuition reimbursement which calculated that the amount of tuition that was owed was $96,578. 24 ($68,160.80 for the period prior to the appeal filing, plus $28,417.44 for the period during which the hearing and decision on appeal were pending); and

WHEREAS, the parties have discussed this matter and have agreed to amicably resolve any and all issues raised in this matter:

NOW, THEREFORE, the parties hereby agree to the following terms of this Settlement Agreement and Release ("Agreement"):

1 M.T. shall remit payment by cash or certified check, payable to the Linden Board of Education the total amount of eighteen thousand dollars ($18,000.00), which is being accepted by Linden as full satisfaction for the tuition owed for the period of time when M.T.'s three children were accessing educational services from Linden and she was not legally residing in Linden.

a. Payments shall be remitted in the amount of nine hundred dollars ($900.00) per quarter (four payments per year) starting January 1, 2022 for a period of five (5) years.

b. Quarterly payments include the cumulative total of monthly payments occurring at the end of every quarter of the year (three months ending on the last day of each March, June, September, and December).

c. Quarterly payments shall be remitted within ten (10) days of the first day of each quarter.

d. Payments shall be submitted to the Office of the Business Administrator, Linden Board of Education, 2 E. Gibbons Street, Linden, New Jersey 07036.

2. Except with respect to the payments referenced herein, the Board waives any right to additional outstanding tuition payments for the period of C.T., C.T. and C.T.'s attendance in the District while not residing within the City of Linden. Nothing in this Agreement shall prevent the District from seeking additional tuition payments for attendance subsequent to the date of execution of this Agreement or from exercising other rights that may be available to the District.

3. In the event of any default by Respondent or breach by Respondent of Respondent's obligations to make timely Settlement Payments (which is not cured within twenty (20) days of default after written notice from the Board), the Board is entitled to move for entry of the judgment against the Respondent in the amount of eighteen thousand dollars ($18,000.00) minus any payments made prior to the default.

5. This Agreement may be executed in several counterparts each of which when so executed and delivered, shall constitute an original, fully enforceable counterpart for all purposes.

6. This Agreement shall be subject to the approval by the Linden Board of Education by Resolution at a duly constituted meeting of the Board, and shall be submitted to the Administrative Law Judge assigned to this case and to the Commissioner of Education for approval.

7. In the event any provision of this Agreement is held to be void or unenforceable by any court or regulatory authority having jurisdiction thereof, such ruling will not affect the validity of the remainder of this contract which shall continue to be in full force and effect.

8. This Agreement represents the entire agreement between the parties and will not be modified in whole or in part. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity to consult with counsel of each parties' choosing and option. Both parties acknowledge that they have reviewed this Agreement in its entirety, that they fully understand its provisions, requirements, and limitations, and fully understand all of its contents. All parties are bound by this Agreement and each of its provisions and anyone who succeeds to the rights and responsibilities of the parties are also bound.

IN WITNESS WHEREOF, the parties have signed this Agreement or caused their representative to sign this Agreement on the dates set forth below.

Parent Petitioner

M.T., individually and on behalf of C.T., C.T., and C.T.

Dated: 1/10/22

Linden Board of Education

By: CARLOS RIVAS, Board President

Dated: 02/09/2022.

Witnessed:

KATHLEEN A. GAYLORD, BUS. ADMIN./BD. SEC'Y

By: _____, Board Secretary

Dated: 1/10/2022

STATE OF NEW JERSEY)

SS:

COUNTY OF)

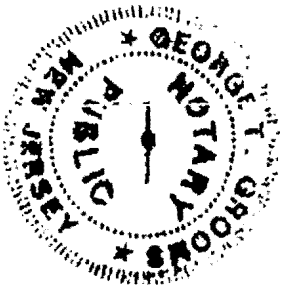
I CERTIFY that on December, 2021, M.T., individually and o/b/o C.T., C.T., and C.T., personally came before me and acknowledged under oath, to my satisfaction, that these persons:

(a) are named in and personally signed this document; and

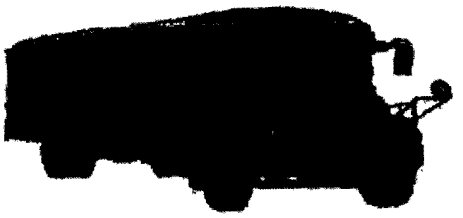
(b) signed, sealed, and delivered this document as his/her act and deed.

Attorney or Notary Public

George T Grooms
Notary Public
New Jersey
My Commission Expires 1/9/24



Sworn to and subscribed
before me this
10 day of January 2022.



J & J TRANSPORTATION

631 E. St. George Avenue
Linden, NJ 07036
908-486-0011

December 14, 2021

To whom it may concern,

As you know,this pandemic is still ongoing, and we are trying to navigate as best as we can. Please be advised that due to the increasing numbers of Covid in the schools, Ms. Monique Robinson has been laid off from J and J Transportation as of 12/14/21 until further notice. We work for the Board of Education, and we are being told to discontinue transportation due to students having Covid and other students who have been exposed, needing to quarantine. She is not paid for sick days, holidays, or vacation days.

If you have any further question, please feel free to contact me at the above number.

Thank you,

Melissa Yeldell

GM

PROMISSORY NOTE

AMOUNT: $18,000.00 (EIGHTEEN THOUSAND DOLLARS)

By: Monique R. Tate
1302 Clark Street
Rahway, NJ 07065

To: Linden Board of Education
2 East Gibbons Street
Linden, NJ 07036

Effective Date: January 1, 2022

FOR VALUE RECEIVED, the undersigned Monique R. Tate, of full age, sound mind, and under no constraint or under influence ("the Borrower") promises to pay to LINDEN BOARD OF EDUCATION (the "Board") at the Office of the Business Administrator, 2 East Gibbons Street, Linden, New Jersey 07036, or at such other place or places as the Board shall hereafter designate in writing, the amount of EIGHTEEN THOUSAND ($18,000.00) DOLLARS, with no interest, in lawful money of the United States. The principal amount of this Note shall be paid as follows:

1. Twenty (20) consecutive quarterly payments each in the amount of NINE HUNDRED ($900.00) DOLLARS due on or before the tenth (10^{th}) day of each first month on the quarter beginning with the month of January, 2022, and continuing through the month of October, 2026, when the unpaid principal balance of this Note shall be due and payable (the "Maturity Date").

2. Maturity or Default Interest Rate. In the event any principal balance of this Note shall remain unpaid after the Maturity Date or in the event of an acceleration of

the principal amount due hereunder as a result of an event of default pursuant to the terms of this Note, then and in such events, the interest rate on this Note shall be twelve (12%) percent per annum (the "Default Interest Rate"); provided, however, in the event that the Default Interest Rate shall exceed the interest rate then permitted by law, then and in that event, the Default Interest Rate shall be reduced to the maximum interest rate permitted by law.

3. Default. The occurrence of any of the following events shall be deemed an "event of default" without notice to the Borrower, except as shall be provided for herein:

(A) The failure of the Borrower to make payment of any installment of principal due under this Note within twenty (20) days after the due date of such required payment;

(B) The filing of a petition by the Borrower for relief under any Federal or State insolvency law, the making of an assignment for the benefit of creditors, the adjudication of insolvency in any Federal or State Court or the filing of an application to any Federal or State tribunal for the appointment of a receiver or trustee for any substantial part of the Borrower's assets;

(C) Commencement against the Borrower of any proceeding such as described in subparagraph (B) above which shall remain unstayed for a period of sixty (60) days; or

(D) The death of the Borrower.

4. Remedies. Upon the occurrence of an event of default hereunder, at the

option of the Board, the entire principal amount of this Note shall become immediately due and payable without further notice, demand or presentment for payment. Thereafter, the interest on the principal amount shall be computed at the Default Interest Rate. In addition, upon the occurrence of an event default hereunder, the Board, shall be entitled to recover all costs and expenses incurred, including a reasonable allowance for attorney's fees, to obtain or enforce payment of any amount due and owing hereunder.

5. No Waiver By Holder. A delay on the part of the Board in the exercise of any right or option hereunder, a delay in a notice or demand which may be given to the Borrower by the Board with respect to any right or option hereunder or a failure to declare a default with respect to any event of default hereunder shall not constitute a waiver thereof or limit or impair in any respect the right of the Board to take any action provided for herein.

6. Notices. A notice provided for herein shall be in writing and shall be given by certified or registered mail and deemed to have been given and received when a certified or registered letter containing such notice, return receipt requested, properly addressed with proper postage prepaid, shall be deposited in the United States mail. In the event such notice shall be given by means other than certified or registered mail, then and in that event, it shall be deemed to have been given when delivered to and received by the party to whom it shall be addressed.

7. Successors and Assigns. This Note shall be binding upon the Borrower and the Board and their respective heirs, personal representatives, successors and assigns.

8. Governing Law. This Note shall be governed by and construed in

accordance with the laws of the State of New Jersey.

9. Captions. The captions herein are asserted only for convenience of reference and shall in no way define, limit or describe the scope or intent of this Note.

10. Waiver of Presentment. The Borrower and all other parties who at any time may be liable in any capacity, jointly and/or severally, specifically waive presentment, demand for payment, protest and notice of dishonor of this Note and authorize the Board, without notice, to enforce her rights hereunder in this instrument.

11. Prepayment. This Note may be prepaid, in whole or in part, at any time, or from time to time, without penalty.

Borrower

Monique K. Tate

Linden Board of Education

By: CARLOS RIVAS, Board President

Dated: 2/9/22

Witnessed:

KATHLEEN A. GAYLORD, BUS. ADMIN./BD. SEC'Y

By: , Board Secretary

Dated: 2/10/2022

STATE OF NEW JERSEY)

SS:

COUNTY OF)

I CERTIFY that on December, 2021, M.T., individually and o/b/o C.T., C.T., and C.T., personally came before me and acknowledged under oath, to my satisfaction, that these persons:

(a) are named in and personally signed this document; and

(b) signed, sealed, and delivered this document as his/her act and deed.

Attorney or Notary Public

George T Grooms
Notary Public
New Jersey
My Commission Expires 5/19/24

Sworn to and subscribed before me this
10 day of January, 22.

56-22
OAL Dkt. No. EDU 05088-20 and EDU 05089-20 (Consolidated)
Agency Dkt. No. 49-2/20 and 44-2/20

New Jersey Commissioner of Education

Decision

Laura Langer, et al,

Petitioners,

v.

Willie Hembree and Board of Education of the City of Plainfield, Union County,

Respondents,

and

Stuart Balch, et al,

Petitioners,

v.

Willie Hembree and Board of Education of the City of Plainfield, Union County,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Upon review, the Commissioner agrees with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that petitioners in this matter agreed to withdraw their petitions, and that the petition of appeal should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 22, 2022
Date of Mailing: March 22, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 05088-20

LAURA LANGER, ET AL,
Petitioners,
v.
WILLIE HEMBREE & BOARD OF EDUCATION OF THE CITY OF PLAINFIELD,
Respondents.

STUART BALCH, ET AL
Petitioners,
v.
WILLIE HEMBREE & BOARD OF EDUCATION OF THE CITY OF PLAINFIELD,
Respondents.

OAL DKT. NO. EDU 05089-20

(CONSOLIDATED)

Laura Langer and **Stuart Balch**, appearing pro se on behalf of petitioners

Michelle M. Schott, Esq. on behalf of respondent Board of Education of the City of Plainfield

Record Closed: January 31, 2022 Decided: February 7, 2022

BEFORE **NANCI G. STOKES**, ALJ

STATEMENT OF THE CASE

On or about October 31, 2021, petitioners agreed to withdraw their petitions. Each matter consists of petitioners against the Board of Education of the City of Plainfield. All but two of the petitioners submitted letters withdrawing their request for a hearing. Several attempts have been made to obtain the last two withdrawals to no avail. Petitioners Peter Ringlee and Bogdan Langer, failed to withdraw her petition; despite my instructions to do so. Should this case be dismissed? Yes. Under N.J.A.C. 1:1-14(c)(1), dismissal may be granted for the unreasonable failure to comply with a judge's order.

PROCEDURAL HISTORY

In February 2020 a petition was filed with the Office of Controversies & Disputes. On May 5, 2020, respondent filed a motion to dismiss the petition in lieu of an answer. On May 11, 2020, the Office of Controversies and Disputes within the New Jersey State Department of Education transmitted these matters to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, 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.

On June 23, 2020, I held a telephone prehearing wherein the parties agreed that the cases should be consolidated. Petitioner Balch also designated petitioner Langer to act as his representative. Each petitioner was to advise the court, via email, that Langer would be their representative. All petitioners, including Peter Ringlee and Bogdan Langer, submitted emails authorizing Langer to act as their representative.

Several telephone conferences were conducted, the last one being November 30, 2021. The purpose of the November conference call was to secure the agreement regarding some of the petitioners to join the others in withdrawing their petition. It was

not clear which petitioners were or were not withdrawing. Under my direction, on October 29, 2021, my secretary sent an email to all petitioners requesting that they reply individually whether or not they are withdrawing their request for a hearing. All but two petitioners responded that they are withdrawing. On November 3, 2021, a telephone conference was conducted wherein Lagner advised that both petitioners were willing to withdraw but had not sent an email confirming the withdrawal.

CONCLUSIONS OF LAW

Under N.J.A.C. 1:1-14.14 (a)(1), a dismissal may be granted for the unreasonable failure to comply with judge's order. In this case, I instructed petitioners to submit individual emails of who no longer wished to have a hearing. Based upon emails received from both Peter Ringlee and Bogdan Langer authorizing Laura Langer to "make any and all decisions she deems necessary on resolving the combined case", coupled with Langer's email withdrawing her request for a hearing, I **CONCLUDE** that this matter is no longer a case before OAL and should be **DISMISSED**.

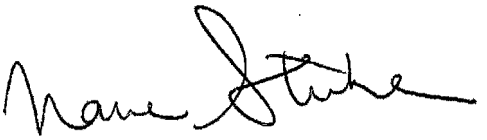
ORDER

Based on the foregoing, I **ORDER** 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 is authorized by law to make a final decision 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 under 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 7, 2022

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: February 7, 2022

Date Mailed to Parties: February 7, 2022

ljb

DOCUMENTS RELIED ON

- Letters of withdrawals
- Emails, dated July 7, 2020, authorizing Langer to act as a representative

57-22+

OAL Dkt. No. EDU 09572-21
Agency Dkt. No. 81-5/21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Jessica Clark, Board of Education of the Township of Gloucester, Camden County.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of respondent, Jessica Clark's failure to appear at a scheduled hearing at the OAL on February 2, 2022, has been reviewed. Respondent did not file an explanation for her failure to appear, notwithstanding the opportunity to do so. Moreover, the record indicates that the respondent did not abide by the 60-day notice requirement prior to resigning from her teaching position with the Gloucester Township School District.

Accordingly, pursuant to *N.J.S.A.* 18A:26-10, the respondent's teaching certificate 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.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 26, 2022
Date of Mailing: April 26, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

58-22

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Kinnelon, Morris County,

Petitioner,

v.

Karen D'Amico,

Respondent.

Synopsis

In this matter on remand, the petitioning Board contended that respondent – a member of the Kinnelon Board of Education – violated *N.J.S.A.* 18A:12-2, which mandates that no one may serve on a board of education if they have a direct or indirect interest in a claim against the board on which he/she sits. The Board argued that respondent is disqualified from serving as a member because of a special education due process petition that respondent's husband filed against the Board, asserting that their child was being denied educational services for the 2020-2021 school year and seeking reimbursement for the cost of the child's attendance at a private school. Also at issue is a letter sent by respondent to the Board on August 13, 2021, notifying the Board of her intent to unilaterally place her child in a private school and reserving the right to seek reimbursement for the costs of that placement if the dispute between the parties over the child's services was not resolved amicably within 10 days. The parties filed cross motions for summary decision. Following an Initial Decision in December 2021, the Commissioner found that the status of the dispute between the parties was unclear, and remanded the matter to the OAL for further fact-finding.

On remand, the ALJ found, *inter alia*, that: the parties stipulated to a single fact, that respondent had unilaterally placed her child in a private school, and the parties further agreed to forego any additional briefs or submissions to the OAL on remand of this matter. The ALJ concluded that the 10-day letter did not violate *N.J.S.A.* 18A:12-2; accordingly, the ALJ granted the respondent's motion for summary decision and denied the Board's cross motion.

Upon review, the Commissioner, *inter alia,* disagreed with the ALJ's finding that the 10-day letter cannot be considered a "claim" against the Board, as the letter indicated that respondent would unilaterally place her child in a private school if the dispute over the child's educational placement was not resolved; further, the letter reflected respondent's intent to seek reimbursement for the cost of her child's placement, *i.e.*, a specific request for monetary relief in violation of *N.J.S.A.* 18A:12-2; the record shows that respondent followed through with the unilateral private school placement; therefore, the respondent has a claim for monetary relief against the Board that precludes her continued service as a Board member. Accordingly, the Commissioner granted the Board's motion for summary decision and denied the respondent's cross motion. The respondent was removed from the Board.

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

58-22

OAL Dkt. No. EDU 04830-21, 10023-21 (on remand)
Agency Dkt. No. 43-3/21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Kinnelon, Morris County,

Petitioner,

v.

Karen D'Amico,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4, and respondent's reply thereto, have been reviewed and considered.

In this matter, the Board contends that respondent, who is a member of the Board, has a direct or indirect interest in a substantial financial claim against the Board in violation of *N.J.S.A.* 18A:12-2 and is therefore disqualified from serving as a Board member. At issue is a letter sent by respondent to the Board on August 13, 2021, in which respondent notified the Board of her intent to unilaterally place her child in a private school while reserving the right to seek reimbursement for the costs of that placement if the dispute between the parties over the child's special education services was not resolved amicably within 10 days (10-day letter). The Commissioner previously found that the status of the dispute between the parties was unclear and remanded the matter to the Office of Administrative Law for further fact-finding. Commissioner Decision No. 307-21 (Dec. 3, 2021). On remand, the parties stipulated to a single fact: that respondent had unilaterally placed

her child in a private school. The ALJ concluded that the 10-day letter did not violate *N.J.S.A.* 18A:12-2. Accordingly, the ALJ granted respondent's motion for summary decision and denied the Board's motion for summary decision.

In its exceptions, the Board argues that the ALJ's authority on remand was limited to fact-finding regarding the status of the dispute, and the ALJ exceeded that authority by making legal findings. Furthermore, the Board contends that the ALJ failed to follow the Commissioner's directive in Commissioner Decision No. 307-21, which clearly stated that if respondent followed through with the unilateral placement, respondent would have a claim for monetary relief that precludes her continued service as a board member. Finally, reiterating arguments made in prior stages of the proceedings, the Board argues that the 10-day letter created a claim resulting in a disqualifying conflict of interest.

In reply, respondent argues that the ALJ appropriately sought facts and applied those facts. Respondent contends that her 10-day letter did not make any specific monetary demands of the Board, nor has she filed a due process petition for reimbursement of her child's private school placement. Therefore, according to respondent, there is no disqualifying conflict.

Upon review, the Commissioner disagrees that the 10-day letter cannot be a "claim" against the Board. The Commissioner has previously held that a Notice of Tort Claim filed against a board of education constitutes a claim. *Bd. of Educ. of the Borough of Berlin, Camden Cty. v. Charlotte Lee*, Commissioner Decision No. 238-02 (June 14, 2002). In that matter, the Commissioner affirmed the Initial Decision, in which the ALJ noted that a "notice of tort claim is not merely an inchoate claim that may be pursued at some future date, but represents an actual claim against a public entity which may be subject to settlement and, failing that, may be the subject of a future court action against the public entity." *Bd. of Educ. of the Borough of Berlin, Camden Cty. v. Charlotte Lee*,

EDU 6050-01 (Apr. 29, 2002). Just as the law requires a Notice of Tort Claim to be filed prior to commencing legal action against a public entity, the law also requires parents seeking reimbursement from a board of education for a unilateral placement to send a 10-day letter. *N.J.A.C.* 6A:14-2.10. Such reimbursement is obtainable through litigation at the OAL. *Ibid.* While the requirements for a Notice of Tort Claim are more specific than those for a 10-day letter, the Commissioner does not find this distinction consequential. In both documents, one party is alerting another to the existence of a claim and fulfilling legal requirements necessary as a precondition to filing a formal action to pursue that claim. A 10-day letter, just like a Notice of Tort claim, is a claim that is subject to settlement and may be the subject of a future court action. *Bd. of Educ. of the Borough of Berlin, supra.*

The Commissioner is mindful of the findings of the New Jersey Supreme Court concerning disputes about special education services for the children of board of education members. In *Bd. of Educ. of City of Sea Isle City v. Kennedy*, 196 *N.J.* 1 (2008), the Court concluded that a board member should not be removed from office merely because she advanced a claim against the board involving her or her immediate family member's interest. *Id.* at 17-18. The Court recognized that disagreements between parents of special education students and the board of education may require effort to resolve, and multiple meetings or even mediation following the filing of a due process hearing request may not always be the type of conflict that requires removal. *Id.* at 21-22. The Court instructed the Commissioner to examine the nature of the dispute to determine "when a conflict over a child's educational program becomes so substantial that removal from office is required." *Id*. at 22. Finally, the Court concluded that when a due process claim includes a specific request for monetary relief, a substantial conflict has occurred, and removal is appropriate. *Ibid.*

Here, the 10-day letter indicated that respondent would unilaterally place her child in a private school if the matter was not resolved, and the record now reflects that respondent followed through with that placement. The letter also reflected respondent's intent to seek reimbursement for the cost of her child's placement – a specific request for monetary relief.[1] Accordingly, respondent has a claim for monetary relief against the Board that precludes her continued service as a board member.[2]

Accordingly, the Board's motion for summary decision granted, and respondent's motion for summary decision is denied. Respondent is hereby removed from the Board.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, J.d.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 1, 2022
Date of Mailing: April 1, 2022

[1] If respondent did not intend to pursue her claim for monetary relief, she could have executed a release of her claim. However, a status update provided by the parties following the Initial Decision demonstrates that respondent did not execute any release.

[2] The Commissioner disagrees with the ALJ that a disqualification in the absence of a pending due process petition would disqualify any parent of a child with disabilities from being a member of a board of education, as a parent always has the right to file a due process petition. First, case law holding that a Notice of Tort Claim is sufficient to disqualify a board member, as discussed herein, demonstrates that the filing of a formal action – a complaint or a due process petition – is not required for disqualification. Second, disqualifications are examined on a case by case basis, and here, respondent has asserted a specific request for monetary relief – conduct that the Supreme Court has found to be disqualifying.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 10023-21

AGENCY DKT. NO. 43-3/21

ON REMAND

OAL DKT. NO. EDU 04830-21

BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,

Petitioner,

v.

KAREN D'AMICO,

Respondent.

Jarrid H. Kantor, Esq., for petitioner (Antonelli Kantor, attorneys)

Hillary D. Freeman, Esq., for respondent (Freeman Law Offices, attorneys)

Record Closed: February 8, 2022 Decided: February 18, 2022

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

STATEMENT OF THE CASE

Petitioner, Kinnelon Board of Education (Board or KBOE) requests, inter alia, that the Commissioner of Education construe the provisions of N.J.S.A. 18A:12-2 and determine and declare that Board Member Karen D'Amico has "a direct or indirect interest in a substantial financial claim" against the Board and is disqualified from serving as a member of the Board as a result of said financial claims, pursuant to N.J.S.A. 18A:12-2.

PROCEDURAL HISTORY

On or about April 13, 2021, the Board filed with the New Jersey Department of Education an amended Verified Petition for a Declaratory Ruling Pursuant to N.J.A.C. 6A:3-2.1 (Verified Petition).[1] On or about May 4, 2021, respondent filed an answer to the Verified Petition, which includes an affirmative defense that the Verified Petition "fails to state a claim upon which relief may be granted against Respondent."

By letter dated June 1, 2021, the Acting Commissioner of Education notified the parties as follows:

> I have reviewed the petition for declaratory ruling in the above-captioned matter, together with the respondent's answer. Upon such review I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq*.
>
> Accordingly, petitioner's request for a declaratory ruling is declined and this matter shall be transmitted to the Office of Administrative Law.

The Department of Education (Department) transmitted the case to the Office of Administrative Law (OAL) where it was filed on June 11, 2021. The transmittal noted that

[1] Per Mr. Kantor's April 12, 2021, letter to the Department of Education, it was amended to incorporate additional redactions and to remove the Board's request for attorneys' fees.

"Petitioner filed motion for summary decision following filing of answer (hard copy to follow due to size)," but the hard copy of the motion was not transmitted. On June 30, 2021, petitioner submitted a copy of the motion directly to the OAL, consisting of a statement of material facts and brief. On July 29, 2021, respondent filed a response/cross-motion for summary decision, consisting of a brief. Petitioner filed a reply letter brief on August 20, 2021. On August 25, 2021, petitioner supplemented its filing with a letter and attachment. On August 26, 2021, respondent replied thereto by way of an email.

An Initial Decision–Summary Decision denying petitioner's cross-motion for summary decision, granting respondent's cross-motion for summary decision, and dismissing the petition was issued on October 19, 2021. The Commissioner's Final Decision, dated December 2, 2021, remanded the matter to the OAL "for further fact-finding regarding the current state of the dispute between the parties identified in the August 13, 2021 10-day letter sent by respondent to the Board."

On February 8, 2022, the parties submitted a joint stipulation of facts, dated February 7, 2022, and waived submission of briefs.

JOINT STIPULATION OF FACTS

The parties' joint stipulation of facts states as follows:

> That, in connection with Respondent's "10-Day" Letter to the Kinnelon Board of Education dated August 13, 2021, as referenced the Commissioner's Final Decision dated December 2, 2021, that respondent Karen D'Amico has unilaterally placed S.D. in a private school.
>
> The Parties further stipulate and agree to forego of any further briefs and/or submissions with the Office of Administrative Law on remand of this matter.
>
> [J-1.]

LEGAL ANALYSIS AND CONCLUSION

This matter was transmitted to the OAL by the Department of Education Office of Controversies and Disputes, not the School Ethics Commission, and the statute at issue is N.J.S.A. 18A:12-2, which states:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county.

Thus, the pivotal issue is whether D'Amico, indisputably a Board member, was in violation of N.J.S.A. 18A:12-2 by being interested directly or indirectly in any claim against the Board[2].

The Commissioner's Final Decision, dated December 2, 2021, remanded the matter to the OAL "for further fact-finding regarding the current state of the dispute between the parties identified in the August 13, 2021 10-day letter[3] sent by respondent to the Board." In this regard, the Final Decision stated, in pertinent part:

> The Commissioner is unable to conclude, based on the current record, whether there is currently a substantial conflict between the parties. The 10-day letter indicates that respondent will unilaterally place her child in a private school if the matter is not resolved, but there is no further information regarding whether a resolution occurred. If a resolution did occur, then the dispute may not be substantial enough to warrant respondent's removal from the board. If a resolution did not occur, and respondent followed through with the unilateral placement, respondent has a claim for monetary relief against the Board that precludes her continued service as a board member.

[2] Per Respondent's attorney, D'Amico has been removed from the Board.
[3] The Verified Petition was filed in April 2021, months before the 10-day letter was sent.

However, even though D'Amico unilaterally placed her child in a private school and despite the fact that the Final Decision states that the "Commissioner has previously held that a Notice of Tort Claim filed against a board of education constitutes a claim," for the reasons that follow, my decision on the merits remains unchanged.

It is the public policy of the State of New Jersey that public entities are only liable for their negligence within the limitations of N.J.S.A. 59:1-1 et seq., the "New Jersey Tort Claims Act." Regarding the time for presentation of a claim against a public entity, N.J.S.A. 59:8-8 (emphasis added) states, in pertinent part:

> A *claim* relating to a cause of action for death or for injury or damage to person or to property shall be presented as provided in this chapter not later than the 90th day after accrual of the cause of action. After the expiration of six months from the date *notice of claim* is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity or public employee if:
> a. The claimant failed to file the *claim* with the public entity within 90 days of accrual of the *claim* except as otherwise provided in N.J.S.A. 59:8-9; or
> b. Two years have elapsed since the accrual of the *claim*; or
> c. The claimant or the claimant's authorized representative entered into a settlement agreement with respect to the *claim*.

A claim against a public entity must be presented by the claimant or by a person acting on his behalf and must include: (a) the name and post office address of the claimant; (b) the post-office address to which the person presenting the claim desires notices to be sent; (c) the date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted; (d) a general description of the injury, damage or loss incurred so far as it may be known at the time of presentation of the claim; (e) the name or names of the public entity, employee or employees causing the injury, damage or loss, if known; and (f) the amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar

as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. N.J.S.A. 59:8-4.

Thus, a notice of tort claim against a public entity is not the equivalent of a 10-day letter. Pursuant to 20 U.S.C. § 1412(a)(10)(C)(i), and subject to 20 U.S.C. § 1412(a)(10)(A), a board of education is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school if the board of education made free, appropriate public education (FAPE) available to the child and the parents elected to place the child in such private school. See also N.J.A.C. 6A:14-2.10(a). However, if the parents enrolled the child in a private school without the consent of or referral by the board of education, an administrative law judge may require the agency to reimburse the parents for the cost of that enrollment if the administrative law judge finds that the board of education has not made FAPE available to the child in a timely manner prior to that enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii); see also N.J.A.C. 6A:14-2.10(b). The parents must provide notice to the board of education of their concerns and intent to enroll their child in a nonpublic school at public expense. N.J.A.C. 6A:2.10(c). Reimbursement may be reduced or denied for the reasons set forth at N.J.A.C. 6A:2.10(d), which include "If, at least 10 business days (including any holidays that occur on a business day) prior to the removal of the student from the public school, the parents did not give written notice to the district board of education of their concerns or intent to enroll their child in a nonpublic school." N.J.A.C. 6A:2.10(d).

Unlike a 10-day letter, which is a notice of concerns or intent to enroll in a private school to avoid reduction or denial of reimbursement for the private school in the event a due process petition alleging a denial of a FAPE is ever filed, a notice of tort claim is a "claim" against a public entity, the entirety of which–including the specifics of the transaction which gave rise to the claim, a general description of the injury, damage or loss incurred and a computation of the amount claimed–must be filed within ninety days, or the claimant is barred from filing suit in an appropriate court of law.

All children with disabilities have the right to a FAPE and parents of a child with disabilities may file a claim against the board of education if the child was denied a FAPE. Further, if the child was denied a FAPE there are various other bases for financial claims for which no 10-day letter is required. Thus, to disqualify a parent of a student with disabilities from the board of education based upon N.J.S.A. 18A:12-2 only[4], in the absence of a pending due process petition alleging a denial of FAPE and claim for reimbursement, would essentially disqualify any parent of a child with disabilities from being a board of education member, as the parent always has the right to file a due process petition.

For the reasons set forth hereinabove and in the Initial Decision, dated October 19, 2021, incorporated herein by reference, I **CONCLUDE** that the 10-day letter is not a violation of N.J.S.A. 18A:12-2, and further **CONCLUDE** that petitioner's motion should be denied, respondent's cross-motion should be granted, and the Verified Petition should be dismissed.

ORDER

It is hereby **ORDERED** that the petitioner's motion for summary decision is **DENIED**, the respondent's cross-motion for summary decision is **GRANTED**, and the Verified 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

[4] Although petitioner argued "a disqualifying conflict of interest under the School Ethics Act ("SEA"), N.J.S.A. 18A:12-2," this statute does not fall under the School Ethics Act, N.J.S.A. 18A:12-21 to -34, and the matter was transmitted to the OAL by the Department of Education Office of Controversies and Disputes, not the School Ethics Commission. Accordingly, this decision is limited to violation of N.J.S.A. 18A:12-2 and no determination is made as to conflict of interest or ethics.

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.

Kelly J Kirk

February 18, 2022

DATE

KELLY J. KIRK, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

APPENDIX

Exhibits in Evidence

J-1 Joint Stipulation of Facts

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

April 5, 2022

VIA EMAIL ONLY
Andrew L. Schwartz, Esq.
Schwartz Law Group, LLC
Monroe Office Center at Forsgate
12 Centre Drive
Monroe Township, NJ 08831

Joseph G. Antinori, Esq.
Andrew S. Brown, Esq.
Brown & Connery LLP
360 Haddon Avenue
P.O. Box 539
Westmont, NJ 08108

Re: Cynthia Adams-Buffaloe, et al. v. State-Operated School District of the City of Camden, Camden County, Agency Dkt. No. 180-6/16, Commissioner Decision No. 340-19.

Dear Counsel,

The Commissioner has reviewed the materials filed in connection with petitioners' motion for clarification of the December 17, 2019, decision in the above-captioned matter. That decision ordered that petitioners were entitled to appointment as lead educators, retroactive to July 1, 2016, with all salary, benefits, and emoluments of that position, subject to mitigation. Petitioners subsequently filed an action in Superior Court seeking to enforce the Commissioner's decision, arguing that they are entitled to vacation days dating back to 2016. The Superior Court determined that it needed clarification regarding the scope of the Commissioner's decision and directed petitioners to file the motion for clarification.

Upon review, the Commissioner is unable to issue a decision regarding petitioners' entitlement to vacation days based on the current record. There appear to be factual distinctions among the petitioners' claims that warrant fact-finding by testimony or certification that exceed the scope of a motion for clarification. Additionally, while the Commissioner ordered in the December 17, 2019 decision that petitioners were entitled to benefits, the precise legal question of whether petitioners were entitled to vacation days for the years when they worked in teaching positions but were entitled to administrative positions was not addressed.

Accordingly, petitioners' motion for clarification is denied. However, the Commissioner deems the question of whether petitioners are entitled to vacation days dating back to 2016 to be a controversy appropriate for transmittal to the Office of Administrative Law as a contested case. The Commissioner exercises her discretion to transmit the existing pleadings and will not require petitioners to file a new petition. Counsel for petitioners shall notify the Office of Controversies and Disputes within ten days whether each petitioner named in the prior petition wishes to be named as a petitioner in the matter to be transmitted.

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

AAM/JKH
c: State Law Library

60-22

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

April 5, 2022

VIA EMAIL ONLY

Ms. Maryann Moretti
12 Meadow Ridge Lane
Lafayette, NJ 07932

Marc H. Zitomer, Esq.
Schenck, Price, Smith & King, LLP
115 West Century Road, Suite 100
Paramus, NJ 07652

Re: ***M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County, Agency Dkt. No. 94-5/20, Commissioner Decision No. 43-22.***

Dear Parties:

I have reviewed the materials filed in connection with petitioner's Motion for Reconsideration of the Commissioner's March 4, 2022 decision.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)(2), a motion for reconsideration shall be determined 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.

Upon review and consideration of the submissions, I find that petitioner has failed to satisfy the factors set forth in *N.J.A.C.* 6A:3-1.15(b)(2). Petitioner's disagreement is with the outcome of the decision, which is not a sufficient basis for the decision to be reconsidered.

Accordingly, the Motion for Reconsideration is hereby DENIED.[1]

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JKH
c: State Law Library

61-22L

[1] 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.

62-22E

OAL Dkt. No. EDU 01629-22
Agency Dkt. No. 28-3/22

New Jersey Commissioner of Education

Order on Emergent Relief

Karen D'Amico,

Petitioner,

v.

Board of Education of the Borough of Kinnelon, Morris County,

Respondent.

The record of this emergent matter 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 the standards enunciated in *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 ALJ denying petitioner's application for emergent relief is adopted.

Additionally, in light of the decision issued in *Board of Education of the Borough of Kinnelon, Morris County v. Karen D'Amico,* Commissioner Decision No. 56-22 (March 25, 2022), removing petitioner as a member of the Board, no further proceedings are necessary to adjudicate this matter. Accordingly, the Commissioner requests that the filed be returned to the agency pursuant to *N.J.A.C.* 1:1-3.3(a).

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 5, 2022
Date of Mailing: April 5, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 01629-22
AGENCY DKT. NO. 28-3/22

KAREN D'AMICO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF KINNELON, MORRIS COUNTY,

Respondent.

Hillary D. Freeman, Esq., for petitioner (Freeman Law Offices, attorneys)

Jarrid H. Kantor, Esq., for respondent (Antonelli Kantor, attorneys)

BEFORE: **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE

Karen D'Amico (here listed as "Petitioner, but previously listed in both prior Docket Numbers as "Respondent") challenges the Kinnelon Board of Education's action regarding her membership on the BOE, including removing her and barring her from sitting as a BOE member. Throughout this Initial Decision / Order, for the sake of clarity, the parties will be referred to as "D'Amico" and either "Board" or "KBOE". The abbreviation "BOE" will be used generically, as appropriate.

Previously, the Kinnelon Board of Education (the "Board", "BOE" or "KBOE") requested that the Commissioner of Education construe the provisions of N.J.S.A. 18A:12-2 and determine and declare that Board Member Karen D'Amico has "a direct or indirect interest in a substantial financial claim" against the Board and is disqualified from serving as a member of the Board as a result of said financial claims.

The BOE has, in the interim, removed D'Amico from the BOE. The BOE has filed its Opposition to D'Amico's Petition / Motion.

PROCEDURAL HISTORY

On or about April 13, 2021, the Board filed with the New Jersey Department of Education an amended Verified Petition for a Declaratory Ruling Pursuant to N.J.A.C. 6A:3-2.1 (Verified Petition). On or about May 4, 2021, D'Amico filed an Answer to the Verified Petition, which includes an affirmative defense that the Verified Petition "fails to state a claim upon which relief may be granted against Respondent."

By letter dated June 1, 2021, the Acting Commissioner of Education notified the parties as follows:

> I have reviewed the petition for declaratory ruling in the above-captioned matter, together with the respondent's [D'Amico's] answer. Upon such review I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq*. Accordingly, petitioner's [Board's] request for a declaratory ruling is declined and this matter shall be transmitted to the Office of Administrative Law.

The Department of Education (Department) transmitted the case to the Office of Administrative Law (OAL) where it was filed on June 11, 2021. The Transmittal noted that "Petitioner [Board] filed motion for summary decision following filing of answer (hard copy to follow due to size)," but the hard copy of the motion was not transmitted. On June

30, 2021,the Board submitted a copy of the motion directly to the OAL, consisting of a statement of material facts and brief. On July 29, 2021, D'Amico filed a response/cross-motion for summary decision, consisting of a brief. The Board filed a reply letter brief on August 20, 2021. On August 25, 2021, the Board supplemented its filing with a letter and attachment. On August 26, 2021, D'Amico replied thereto by way of an email.

An Initial Decision–Summary Decision denying the Board's cross-motion for summary decision, granting D'Amico's cross-motion for summary decision, and dismissing the petition was issued on October 19, 2021.

The Commissioner's Final Decision, dated December 2, 2021, remanded the matter to the OAL "for further fact-finding regarding the current state of the dispute between the parties identified in the August 13, 2021 10-day letter sent by D'Amico to the Board." In this regard, the Final Decision stated, in pertinent part:

> The Commissioner is unable to conclude, based on the current record, whether there is currently a substantial conflict between the parties. The 10-day letter indicates that respondent will unilaterally place her child in a private school if the matter is not resolved, but there is no further information regarding whether a resolution occurred. If a resolution did occur, then the dispute may not be substantial enough to warrant respondent's removal from the board. ***If a resolution did not occur, and respondent followed through with the unilateral placement, respondent has a claim for monetary relief against the Board that precludes her continued service as a board member.***
>
> [Emphasis supplied.]

On February 8, 2022, the parties submitted a joint stipulation of facts, dated February 7, 2022, and waived submission of briefs. The parties' Joint Stipulation of Facts states as follows:

> That, in connection with Respondent's "10-Day" Letter to the Kinnelon Board of Education dated August 13, 2021, as referenced in the Commissioner's Final Decision dated December 2, 2021, that ***respondent Karen D'Amico has unilaterally placed S.D. in a private school.***

> The Parties further stipulate and agree to forego of any further briefs and/or submissions with the Office of Administrative Law on remand of this matter.
>
> [Emphasis supplied.]

The Initial Decision of February 18, 2022 was written taking cognizance of Bd. of Educ. Of the Borough of Berlin, Camden Cty. v. Charlotte Lee (Commissioner Decision No. 238-02, June 14, 2002), where the Commissioner of Education had concluded that the filing of a Notice of (Tort) Claim under N.J.S.A. 59:1-1, et seq. against a school board constituted a "claim". In the Initial Decision dated February 18, 2022, Judge Kirk found that a Notice of Tort Claim against a public entity is not the equivalent of a 10-day letter. Judge Kirk distinguished between how the filing of a Title 59 Tort Claim Notice creates a "claim", but that the sending of a 10-day letter is merely a notice of concerns or intent to enroll a child in a private school, which parents are required to give to a Board of Education in order to avoid reduction or denial of reimbursement in the event that a due process petition alleging a denial of FAPE is ever filed.

Judge Kirk interpreted D'Amico's sending of the August 13, 2021 10-day letter as a notice, not a claim. Therefore, Judge Kirk concluded that sending the 10-day letter was not a violation of N.J.S.A. 18A:12-2. Since Judge Kirk concluded that D'Amico had not violated N.J.S.A. 18A:12-2, she denied the Board's Motion for Summary Decision, which had sought D'Amico's removal from the Board for having "a direct or indirect in a substantial financial claim" and Judge Kirk also granted D'Amico's Motion for Summary Decision seeking to dismiss the Board's Verified Petition.

D'Amico has now filed a Petition of Appeal and an Application for Emergent (hereinafter "D'Amico's motion") Relief seeking an Order from this Tribunal directing that the Board must immediately reinstate her, and enjoining the Board, pending any exceptions/appeals, from removing her, and enjoining the Board from filling her seat with another person.

DISCUSSION AND FINDINGS OF FACT

The only facts sought by the Acting Commissioner in her December 2, 2021 Final Decision, when the matter was remanded, were: (1) whether or not the parties had reached a resolution of their dispute and, (2) if the parties had not reached an agreement, then she needed to know whether or not D'Amico had unilaterally placed her child in a private school. The parties' Joint Stipulation of Facts (submitted to Judge Kirk during the pendency of the Remand) settled the two questions of fact: There has been no resolution and D'Amico has indeed unilaterally placed her child in a private school.

APPLICABLE LAW

N.J.A.C. 6A:3-1.6(a) provides:

> Where the subject matter of the controversy is a particular course of action by a district board of education ... the petitioner may include with the petition of appeal, a separate motion for emergent relief ... pending the Commissioner's final decision in the contested case."

N.J.A.C. 6A:3-1.6(b) provides:

> A motion for 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.

Crowe v. DeGioia, 90 N.J. 126 (1982) arose out of a set of circumstances regarding support and palimony matters. Nonetheless, the case has been the polestar decision in New Jersey for cases wherein injunctive relief is sought. The case stands for the proposition that an injunction cannot be granted unless and until the party seeking relief presents clear and convincing evidence that: (1) the injunction is "necessary to prevent irreparable harm"; (2) that "the legal right underlying the claim is settled"; (3) that the party seeking relief has made "a preliminary showing of a reasonable probability of ultimate success on the merits"; and (4) that "the relative hardship to the parties in granting or denying [injunctive] relief", on a balancing of the equities, weighs in his favor. Crowe, 90 N.J. at 132-34. In order to prevail, the party seeking injunctive relief must demonstrate by clear and convincing evidence that he meets all four Crowe factors. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012).

"[A] party who seeks mandatory preliminary injunctive relief must satisfy a 'particularly heavy' burden." Guaman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011), Rinaldo v. RLB Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006).

Also, "[w]hen a case presents an issue of 'significant public importance', a court must [also] consider the public interest in addition to the traditional Crowe factors." Garden State Equal. v. Dow, 216 N.J. 314, 321 (2013).

Appellate courts are bound by the trial court's factual findings if they are supported by "substantial, credible evidence" in the record. Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292,315 (App. Div. 2010).

Under the first Crowe factor, a party who seeks injunctive relief must establish that injunctive relief is necessary to prevent irreparable harm and to preserve the status quo. Citizens Coach Co. v. Camden Horse R.R. Co., , 29 N.J. Eq. 299, 303 (E.&A. 1878). Irreparable harm is an "injury to be suffered in the absence of injunctive relief [that] is *substantial* and *imminent*." Waste Mgmt. of N.J., Inc. v. Union City Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Under the second Crowe factor, injunctive relief will be withheld when the legal right underlying the claim is unsettled. Citizens Coach, at ps. 304-05.

Under the third Crowe factor, the party seeking relief is obligated to present clear and convincing evidence that he / she has a reasonable probability of ultimate success on the merits. Therefore, injunctive relief will not be granted where there are material facts in controversy. Citizens Coach at ps. 305-06. The party who seeks injunctive relief must be prepared to demonstrate facts which support his case and "must make a preliminary showing of reasonable probability of success on the merits." Crowe, at p. 133.

The second and third Crowe factors involve fact-sensitive analysis that "requires a determination of whether the material facts are in dispute, and whether the applicable law is settled." Waste Mgmt., at p. 528.

Under the fourth Crowe factor, the party who seeks injunctive relief must address the issue of relative hardship to the parties and he must establish that, on balance, the equities favor the grant of temporary relief to maintain the *status quo* pending the outcome of a final hearing." Crowe at p. 134. The party seeking injunctive relief must prove his case by clear and convincing evidence. Brown at p. 183 and thus his burden is 'particularly heavy'. Guaman at p. 247.

N.J.S.A. 18A:12-2 states:

> **No member of any board of education shall be interested directly or indirectly in any** contract with or **claim against the board,** nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county. [Emphasis supplied.]

N.J.S.A. 18A:12-24(j) states:

> Nothing shall prohibit any school official, or members of his immediate family, from representing himself, or themselves,

> in negotiations or proceedings concerning his, or their, own interests.

In Board of Educ. of Sea Isle City v. Kennedy, 196 N.J. 1 (2008) a Board of Education member (the President of the BOE) and his wife had an autistic child for whom they sought an IEP. Litigation ensued between the Kennedys and the school district. Kennedy voluntarily resigned from the BOE. The parties reached a settlement. The following year, Kennedy was again elected to the BOE. Claiming that the school district had violated the settlement agreement, Mrs. Kennedy filed applications requesting a due process hearing and an emergent hearing seeking various relief, including payment for services which Mrs. Kennedy provided for her son, attorney's fees, expert's fees, costs, and expenses. The school district sought a declaratory ruling from the Commissioner that the applications created a conflict of interest, which was incompatible with Mr. Kennedy's continued BOE membership. The matter was referred to the Office of Administrative Law, where an ALJ issued a decision finding that Mr. Kennedy's conduct was permissible under the School Ethics Act (N.J.S.A. 18A: 12-21 to -34 because Kennedy's due process request was designed to protect the educational rights of his child and was permitted by N.J.S.A. 18A:12-24(j), which allows a school official to represent himself or his immediate family member concerning his / their own interests. Nonetheless, the Commissioner rejected the ALJ's recommendation, determined that Kennedy's actions created a disqualifying conflict of interest under N.J.S.A. 18A:12-2 and ordered Kennedy's removal from the BOE. The State Board of Education affirmed the removal. The Appellate Division also affirmed the removal.

The Supreme Court undertook the task of harmonizing the N.J.S.A. 18A:12-2 and N.J.S.A. 18A: 12-24j. In Kennedy, the Supreme Court held that not all controversies and disputes between parents and school districts should require a sitting board member's removal from office. The Court emphasized that what was needed was a fact-sensitive analysis in each individual case to determine whether the BOE member's interest constitutes a substantial conflict requiring his removal from office as the sole remedy. The Court noted that not all claims result in a substantial conflict. Because of this, the Court considers all factors such as whether the BOE member is pursuing a claim in the public interest or whether he is pursuing a claim for his own aggrandizement or financial

gain. The Court expressed its concern that BOE members who have handicapped children should not have to fear the loss of their elected office in the event that they question or challenge the appropriateness of their own children's education. The Supreme Court concluded that a BOE member should not be removed from office merely because he has advanced any claim "in a proceeding" against a school district involving the member's or an immediate family member's interests. However, in the Kennedy case, because the due process claim included a request for monetary relief, the Supreme Court affirmed the decision of the Appellate Division, as modified therein.

ANALYSIS OF THE ARGUMENTS ON THE PENDING MOTION

Counsel for D'Amico makes the following arguments pursuant to the four factors governing the granting of injunctive relief set forth in Crowe v. DiGioia, 90 N.J. 126 (1982).

D'Amico's counsel points out that in two Initial Decisions, Judge Kirk denied the relief sought by the Board's counsel and has dismissed the Verified Petition seeking to oust D'Amico. Counsel informs the Tribunal that D'Amico's KBOE email account has been disconnected, that she has been barred from participating in Board business, discussions and votes, that she has been removed from her position as a member of the Board, and that the Board is seeking to fill D'Amico's seat. Counsel argues that the Board's actions have deprived D'Amico from carrying-out the duties that she was elected to perform and from representing the people who elected her. Counsel argues that the Board's actions lack a foundation in the law and have been done unilaterally. Counsel argues that there has been no Final Decision issued by the Commissioner since Judge Kirk's February 18, 2022 Initial Decision, and so there is no finality to the matter from which to appeal to the Appellate Division. Therefore, in the interim, counsel has filed the present Petition of Appeal and Application for Emergent Relief.

The First Crowe Factor

Regarding the first Crowe factor, D'Amico's counsel notes that irreparable harm can be found when money damages is not a sufficient remedy, or when there is no adequate after-the-fact remedy available, or when the party seeking relief suffers severe

personal inconvenience. D'Amico's position is that the only adequate remedy is an Order compelling the Board to immediately restore her to her position on the Board. Her argument in support of proving irreparable harm is that she is being deprived and her constituents are being deprived of voicing their concerns and opinions on the Board and the opportunity to advocate and work towards achieving their policy goals in the schools.

The Board's counsel's arguments in opposition to D'Amico's counsel's first Crowe factor arguments are as follows. The Board's counsel argues that whatever right or privilege a BOE member may have to serve on the BOE is a qualified one. Having a conflict of interest is a limitation, actually a bar, to a person's privilege to serve on the Board. It is perfectly legitimate for fellow Board members to petition the Commissioner of Education to investigate a Board member's alleged conflict of interest and, if substantiated, to seek her removal from the Board. Counsel argues that the Board took exactly this type of action. The Board's counsel additionally argues that the Final Decision dated December 2, 2021 posed questions of fact, which have now been fully answered. The Acting Commissioner's December 2, 2021 Final Decision made it clear that if there was no resolution (and certainly there is none) and if D'Amico unilaterally placed her child into a private school, then she has (present tense) a conflict involving a monetary issue which precludes her continued service on the Board. Therefore, the harm of which D'Amico complains (her inability to personally advocate) is the result of her own action, and it cannot be considered to be an irreparable harm inflicted by anyone else. Therefore, D'Amico should not prevail on the first Crowe factor.

The Second Crowe Factor

Regarding the second Crowe factor, D'Amico's counsel argues that the legal rights underlying D'Amico's claim is well settled. Counsel points out that N.J.S.A. 18A:12-2 is silent as to removal of a BOE member. Counsel also points out that N.J.S.A. 18A: 12-3, which specifically covers the removal of members, covers removal only for specified reasons, none of which apply to D'Amico under the facts of this matter. Counsel notes that the KBOE's by-laws track N.J.S.A. 18A:12-3. Counsel's point is that there is no law that provides for the removal of a Board member by fellow Board members for an alleged violation of N.J.S.A. 18A:12-2. Thus, the Board had no power to remove D'Amico, but

nonetheless voted to remove her. Since the BOE lacked the power to remove D'Amico in the first place, the Board's removal of D'Amico should be immediately reversed by the issuance of the requested injunctive relief. Further, although the Commissioner of Education has the power to remove a conflicted Board member, the Commissioner has not removed D'Amico. Therefore, D'Amico is still a Board member and an Order directing the BOE to re-instate D'Amico is appropriate. Counsel also argues that the Board should be enjoined from removing D'Amico after her re-instatement and should be enjoined from filling D'Amico's seat with another person.

The KBOE's arguments in opposition to D'Amico's Counsel's second Crowe factor arguments are as follows. First, N.J.S.A. 18A:11-1 (c) indeed empowers a Board of Education to make rules for its own governance and that N.J.S.A. 18A: 11-1(d) empowers a Board of Education to do all things necessary for the conduct, equipment and maintenance of the public schools. Thus, D'Amico is incorrect when she asserts that the Board lacked the power to remove her. The Board is stating that the law is settled, and it is settled in favor of the Board, not D'Amico.

The Third Crowe Factor

D'Amico's counsel argues that D'Amico has two years from the date (8/13/2021) of her 10-day letter to decide whether to file a due process petition. D'Amico's point is that she has not technically made a "claim", which would create a conflict under N.J.S.A. 18A:12-2. D'Amico cites Judge Kirk's ruling on this point as a reason why she will ultimately succeed on the merits. Therefore, in the absence of such a claim she has no "conflict" and therefore she should be re-instated to the Board. In other words, D'Amico is saying that her right to seek re-imbursement is, at the present time, inchoate not actual.

The KBOE argues in opposition that in the December 2, 2021 Final Decision the Acting Commissioner stated in no uncertain terms that in the event that the parties have not resolved their dispute and in the event that D'Amico "followed through with the unilateral placement [of her child], [then] D'Amico has a claim for monetary relief against the Board that precludes her from continued service as a board member." The Board's

argument is that D'Amico presently has a conflict that precludes her continued service on the Board.

The Fourth Crowe Factor

D'Amico's argument in support of the fourth Crowe factor (that the relative harm to the parties falls heavier on her than it does the Board) is that with each passing day she loses the opportunity to serve the people who elected her.

The KBOE's argument in opposition is that the re-instatement of D'Amico to the Board would create a cloud of impropriety on the Board's activities in light of the Acting Commissioner's December 2. 2021 Final Decision, which set forth what facts would confirm (and which have since been established) that D'Amico has a conflict of interest that precludes her continued membership on the Board .

LEGAL ANALYSIS OF THE ARGUMENTS CONCERNING THE CROWE FACTORS AND CONCLUSIONS

Analysis of the First Crowe Factor: The Claim of Irreparable Harm

A party seeking injunctive relief must demonstrate the need for relief by clear and convincing evidence. Brown, *supra*. The party seeking injunctive relief must demonstrate that the claim of irreparable harm is substantial and imminent. Waste Mgmt., *supra.* D'Amico's point about being unable to work on Board business is well taken because the work of a BOE is important business. However, D'Amico has not demonstrated that the Board cannot carry-out its important business, but only that she herself has not been able to participate in that work personally. D'Amico has not carried her burden of producing clear and convincing evidence that her absence will cause irreparable harm either to the Board, or to the people of Kinnelon, or to herself. There has been no showing that her goals are so time-critical that they cannot be achieved without her immediate restoration to the Board.

In addition, D'Amico's filing of a 10-day letter combined with her unilateral placement of her child in a private school can be interpreted to reasonably "portend" future litigation. See, Board of Education of Sea Isle City v. Kennedy, 196 N.J. 1, 20 (2008). D'Amico has not demonstrated that the Board's action, requesting the Commissioner of Education to investigate and act on a perceived conflict of interest, was in any way improper. The Board was not inflicting harm when it sought the Commissioner of Education's involvement. Rather, it was acting upon its duty to investigate an apparent conflict and thereby safeguard the Board and the schools.

I **CONCLUDE** that D'Amico has not demonstrated irreparable harm and cannot prevail of the first Crowe factor.

Analysis of the Second Crowe Factor: Whether The Law is Settled or Not

D'Amico argues that there is no law that allows the members of a Board of Education to remove a fellow Board member. The Board cites N.J.S.A. 18A:11-1 (c) and (d) as authority to carry-out all lawful and proper business. D'Amico argues that removal is governed only by N.J.S.A. 18A:12-3. I disagree. The language of that section does not suggest that the enumerated reasons for removal are the only possible reasons permitted. For that matter, there is no specific statute directing members of a BOE to seek the Commissioner's assistance in such matters, but no one can reasonably doubt that such is the case. I **CONCLUDE** that the law is settled, and that N.J.S.A. 18A:11-1(c) and (d) permits a BOE to govern its own affairs, including the filing of a Verified Petition with the Department of Education to remove a conflicted BOE member. I **CONCLUDE** that D'Amico has not demonstrated that the law is settled and that it is settled in her favor.

Analysis of the Third Crowe Factor: That D'Amico has Shown a Reasonable Likelihood of Success on the Merits

On the issue of whether D'Amico can show a reasonable probability of success on the merits, the core of D'Amico's argument is that although she has admitted that she placed her child into a private school (engendering her right to seek monetary re-imbursement from the school district), she has not *yet* filed a due process petition actually

seeking such re-imbursement. Moreover, D'Amico's counsel has argued that D'Amico has two years to decide whether to do so. D'Amico's point is that she has not made a "claim", which would create a conflict under N.J.S.A. 18A:12-2, and so in the absence of such a claim she should be re-instated to the BOE. In other words, D'Amico is saying that her right to seek re-imbursement is inchoate not actual.

The Board's counsel's argument in opposition is based on the Acting Commissioner's statement, in the December 2, 2021 Final Decision. There, the Acting Commissioner stated that in the event that the parties have not resolved the matter and in the event that D'Amico "followed through with the unilateral placement [of her child], [then] D'Amico *has* a claim for monetary relief against the Board that precludes her from continued service as a board member." The Board's argument is that in light of the now well-established facts, the Acting Commissioner's decision means that D'Amico presently has a conflict that precludes her continued service on the Board.

Since the facts have been established, there is nothing that prevents anyone from following what the Acting Commissioner has already declared to be his ruling in this matter. There is no doubt about the outcome on the merits. I **CONCLUDE** that D'Amico has not demonstrated that she has a reasonable probability of success on the merits. Therefore, I **CONCLUDE** that D'Amico cannot prevail on the third Crowe factor.

Analysis of the Fourth Crowe Factor : Relative Harm to the Parties

D'Amico bears the burden of demonstrating by clear and convincing evidence that the harm she claims to suffer is both substantial and imminent. As noted above, D'Amico has not demonstrated that denial of injunctive relief will cause her to suffer irreparable harm. D'Amico has not demonstrated how she will be harmed to any greater extent than the Board. Therefore, I **CONCLUDE** that D'Amico cannot prevail on the fourth Crowe factor.

Application of the Kennedy Decision

Both parties cited the case of Board of Educ. of Sea Isle City v. Kennedy, 196 N.J. 1 (2008). The following is my analysis of the parties' arguments pursuant to the Kennedy decision.

The upshot of Kennedy case is that the Supreme Court held that removal should not be automatic, but rather should be appraised on a close factual analysis on a case-by-case. The Court would consider whether there is a substantial, disqualifying conflict of interest identified by the type of claim (one motivated by the desire to advance the benefit of the public at large versus one motivated, even in part, for personal aggrandizement or for financial reasons) or by the type of proceeding, i.e., whether it was brought under N.J.S.A. 18A:12-2 or under the School Ethics Act, N.J.S.A. 18A:12-21 to -34. The Court made it clear in Kennedy, that when the Board member has a financial interest in the claim, then he has a conflict of interest. Therefore, he cannot continue to remain on the BOE and he can be removed.

In the matter at bar, D'Amico placed her child in a private school thereby incurring expenses for which she will seek reimbursement if and when she files a due process petition. Her argument is that she might eventually decide not to pursue a financial claim and that she has two years to decide whether or not to file her due process petition. In the meantime, there is no reason to remove her from the Board because she has not filed the claim.

The Board's argument is based on the fact that D'Amico placed her child into a private school after she filed a 10-day letter. The Board argues that the very nature of a 10-day letter includes the assertion of the right to seek financial reimbursement. The Board also argues that D'Amico's actions go well beyond mere notice of a potential claim. Her actions constitute a present, actual claim (i.e., not an inchoate claim) for financial reimbursement. As such, her actions "portend the *likelihood* of protracted, and intractable litigation". The Board points out that in Kennedy, at p.21, the Court urges the Commissioner to ascertain whether a claim "*portends* the likelihood of protracted, and

intractable litigation between the parties". The Board argues that since D'Amico's actions presently portend the likelihood of litigation involving her assertion of the right to financial reimbursement, she has already created a substantial conflict of interest which disqualifies her from service on the Board. The Board points out that this is exactly the reasoning presented on p.4 of the Acting Commissioner's December 2, 2021 Final Decision.

In regard to the answers to the Acting Commissioner's fact questions: (1) a resolution did not occur and (2) D'Amico followed through with the unilateral placement of her child in a private school. The Acting Commissioner stated on p.4 of her Final Decision:

> If a resolution did not occur, and [D'Amico] followed through with the unilateral placement, [D'Amico] has a claim for monetary relief against the Board that precludes her continued service as a Board member.

The Acting Commissioner remanded the matter for further factual clarification. The facts, as set forth in the parties' Stipulation of Facts noted by Judge Kirk in her February 18, 2022 Initial Decision On Remand are now abundantly clear. The Acting Commissioner's first question on Remand asked whether the matter was resolved or not. After it was made clear that there was no resolution, then the second and only remaining question was whether D'Amico unilaterally placed her child in private school. The parties stipulated that D'Amico unilaterally placed her child in a private school. The Acting Commissioner's Final Decision at p.4 leaves no doubt as to how she would rule once she obtains this information. She made it clear that once the child is unilaterally placed in the private school D'Amico *has* (note the use of the present tense) a claim for monetary relief against the Board. The Acting Commissioner stated plainly that, pursuant to the Kennedy decision, such a claim would be substantial. Again referring to the Kennedy decision, the Acting Commissioner stated plainly that a claim for monetary relief would render D'Amico's removal from the BOE appropriate.

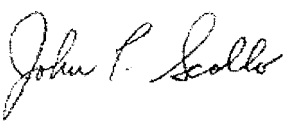
Therefore, in line with the Acting Commissioner's December 2, 2021 Final Decision, I **CONCLUDE** that there is a good reason under N.J.S.A. 18A:12-2 for her

removal from the Board. There is good reason to believe that the Acting Commissioner when she issues her Final Decision corresponding to Judge Kirk's February 18, 2022 Initial Decision, will continue to follow the reasoning set forth in her December 2, 2021 Final Decision and will rule that D'Amico must be removed from continued service on the Board. I **CONCLUDE** that there is no basis under Crowe or under Kennedy for granting the relief sought by D'Amico in her motion.

ORDER

It is hereby **ORDERED** that D'Amico's motion for emergent relief in the form of an Order compelling the BOE to re-instate her to her seat on the BOE is **DENIED**; It is further **ORDERED** that D'Amico's motion for emergent relief in the form of an Order prohibiting the BOE from removing D'Amico unilaterally is **DENIED**; It is further **ORDERED** that D'Amico's motion for emergent relief in the form of an Order adopting Judge Kirk's February 18, 2022 Initial Decision is **DENIED**; It is further **ORDERED** that D'Amico's motion for emergent relief in the form of an Order dismissing the BOE's Verified Petition is **DENIED**; and; it is further **ORDERED** that D'Amico's motion for emergent relief in the form of an Order awarding D'Amico other just, proper, and equitable relief is **DENIED**.

This order on application for emergency relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who 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.



March 15, 2022

DATE

JOHN P. SCOLLO, ALJ

db

65-22

OAL Dkt. No. EDU 05912-21
Agency Dkt. No. 196-7/16

New Jersey Commissioner of Education

Final Decision

State Operated School District of the City of Camden, Camden County,

Petitioner,

v.

New Jersey Department of Education, Office of Fiscal Accountability and Compliance and Robert J. Cicchino,

Respondents.

The record of this matter and the Consent Order transmitted by the Office of Administrative Law have been reviewed. The agency is a party to this matter; therefore, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the Consent Order is deemed to be the final decision in this matter.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 12, 2022
Date of Mailing: April 12, 2022

2022 MAR 21 P 3:50
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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STATE OPERATED CAMDEN CITY SCHOOL DISTRICT, Petitioners, v. NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE and ROBERT J. CICCHINO Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DEPARTMENT OF EDUCATION OFFICE OF CONTROVERSIES AND DISPUTES OAL DOCKET #: EDU 05912-2021S AGENCY REF.#: 196-7/16 **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into by and between the State-Operated Camden City School District (hereinafter referred to as "Camden"), with its offices located at 1033 Cambridge Street, Camden, NJ 08105 and the New Jersey Department of Education (hereinafter referred to as "NJDOE"), Office of Fiscal Accountability and Compliance (hereinafter referred to as "OFAC"), with its offices located at 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625-0500 (hereinafter collectively referred to as the "Parties").

WHEREAS, on December 10, 2015, OFAC issued a Consolidated Monitoring Report (hereinafter referred to as the "2015 CMR") containing findings regarding Camden's use of funds received in connection with federal programs ; and

WHEREAS, within Findings 9, 11, 13 and 16 of the 2015 CMR, OFAC made determinations regarding Camden's use of Title II and Title III funds and directed Camden to remit funds to the NJDOE; and

WHEREAS, on March 31, 2016, Camden filed a "Dispute of Monetary Findings" (hereinafter referred to as "DMF") seeking reversal of Findings 9, 11, 13, and 16; and

WHEREAS, on April 22, 2016, OFAC issued a final determination letter (hereinafter referred to as "the 2016 FDL"), which stated with respect to Findings 9, 11, 13, and 16 that "[t]he NJDOE has reviewed the district's appeal and has found no basis to overturn the findings," but noted that "[t]he project period for FY 2014-2015 has ended, therefore, no further action is required.";

WHEREAS, on July 21, 2016, Camden submitted a letter to OFAC confirming that OFAC's 2016 FDL reversed and rescinded the directive for Camden to repay the federal funds due to Findings 9, 11, 13, and 16; and

WHEREAS, on July 21, 2016, Camden filed the instant Petition of Appeal with the NJDOE, Office of Controversies and Disputes to preserve Camden's rights in the event OFAC interpreted the language in the 2016 FDL, that "[t]he project period for FY 2014-2015 has ended, therefore, no further action is required" to mean Camden must repay the funds described in Findings 9, 11, 13, and 16 of the 2015 CMR; and

WHEREAS, on July 1, 2021, OFAC filed an Answer, and the matter was subsequently transmitted to the New Jersey Office of Administrative Law; and

WHEREAS, the Parties are desirous of resolving the issues raised by the Petitioners and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the Parties agree as follows:

1. This Agreement resolves all issues that may arise from Findings 9, 11, 13, and 16 of the 2015 CMR.

2. The parties agree that the sentence included in the 2016 FDL which provides that ""[t]he project period for FY 2014-2015 has ended, therefore, no further action is required" means that Camden is not required to remit any funds in connection with this matter.

3. Because the parties agree that Camden is relieved of any outstanding obligations relating to this matter, Camden hereby withdraws its Petition of Appeal.

4. The resolution of the issues contained in this Agreement shall be without prejudice to the Parties' positions in any legal proceedings and shall be inadmissible in any legal proceedings between the Parties, except to enforce the terms thereof.

5. The Parties enter into this Agreement in order to reach a mutually agreeable compromise of the disputed claims. This Agreement shall not be treated as an admission on the part of Camden that Findings 9, 11, 13, and 16 of the 2015 CMR or the arguments set forth in the 2016 FDL are factually or legally correct. Nor shall this Agreement be treated as an admission on the part of the OFAC that Findings 9, 11, 13, and 16 of the 2015 CMR or the arguments set forth in the 2016 FDL are factually or legally incorrect.

6. This Agreement resolves all issues, known or that should have been known, between the Parties regarding the 2015 CMR, the 2016 FDL and Camden's July 21, 2016, Petition of Appeal. Respondent expressly agrees not to file any suit, or cause any suit, demand, administrative, judicial or other proceeding, claim, complaint or other action of any kind against

Camden or its officers, agents, employees or assigns, seeking repayment of the funds specified in Findings 9, 11, 13, and 16 of the 2015 CMR.

7. Each party shall bear their own attorneys' fees, costs, and/or fees, for the entirety of any matter or matters related to the subject matter of this Agreement.

8. The Parties recognize that each had the option of being represented by legal counsel or a representative of their own choosing, that they have signed the within Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein, and, therefore, accept these provisions in full and final satisfaction of all claims and demands which have been raised, or which could have been raised in any litigation relating to the 2015 CMR.

9. This Agreement contains the entire understanding of the Parties with respect to the subject matter hereof, and there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. Each party acknowledges and agrees that they are not relying upon any oral statements, representations, promises or expectations which are not expressly and explicitly set forth in this Agreement, which alone fully and completely expresses all agreements between the Parties.

10. A modification or waiver of any of the provisions of this Agreement shall be effective and enforceable, only if made in writing and executed with the same formality as this Agreement. The failure of any party to insist upon strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature, or of a continuation of an existing default.

11. This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey.

12. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective party.

13. The Parties may execute this Agreement in counterparts, each of which is deemed an original and all of which only constitute one original.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth.

WITNESS:

DATE: _____

DATE: _____

STATE OPERATED CAMDEN
CITY SCHOOL DISTRICT

BY: Raymond W Coxe
RAYMOND COXE
~~School Business Administrator~~

DATE: 3/18/2022

CAROLYN G. LABIN,
DEPUTY ATTORNEY GENERAL
MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF
THE STATE OF NEW JERSEY
ATTORNEY FOR DEFENDANT

DATE: 3/21/2022

66-22

OAL Dkt. No. EDU 10529-19
Agency Dkt. No. 155-6/19

New Jersey Commissioner of Education

Final Decision

Sherry Ferrera,

Petitioner,

v.

Board of Education of the Township of Hillsborough, Somerset County,

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. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that Paragraph 1 of the Agreement references actions that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 12, 2022
Date of Mailing: April 12, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10529-19

AGENCY DKT. NO. 155-6/19

SHERRY FERRERA,

Petitoner,

v.

HILLSBOROUGH TOWNSHIP BOARD OF EDUCATION, SOMERSET COUNTY,

Respondent.

Keith Waldman, Esq., for petitioner, Sherry Ferrera (Selikoff & Cohen, P.A., attorneys)

Vittorio S. LaPira, Esq., for respondent Hillsborough Township, Board of Education, Somerset County (Fogarty & Hara, Esqs., attorneys)

Record Closed: March 2, 2022 Decided: March 9, 2022

BEFORE **MARY ANN BOGAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 1, 2019, 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, along with the Board Resolution, 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.

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

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

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

March 9, 2022
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: March 9, 2022

Date Mailed to Parties: 3/10/2022

MAB/nmn

RECEIVED

2022 MAR -2 P 2:13

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

RESOLUTION

BE IT RESOLVED by the Hillsborough Township Board of Education ("the Board") that the terms, stipulations and conditions as established in the Settlement Agreement and Release between the Board S.F., a former employee whose name is on file in the Superintendent's office, and which Agreement is located in the student's file, are hereby adopted and approved by the Board. The Board President and Business Administrator/Board Secretary are hereby authorized and directed to execute the Settlement Agreement and Release, and any other documents necessary to effectuate the settlement.

ROLL CALL VOTE:

AYES: 7

NAYS: 0

ABSTENTIONS: 0

CERTIFICATION

I hereby certify that the within Resolution was adopted by the Hillsborough Township Board of Education by a majority vote at its duly authorized meeting on September 13, 2021.

Aiman Mahmoud
School Business Admin./
Board Secretary

DATED: September 14, 2021

RECEIVED

2022 FEB -2 P 3:11

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

FOGARTY & HARA, ESQS.
21-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
(201) 791-3432 Facsimile
Attorneys for Respondent,
Hillsborough Township Board of Education
Our File No.: 285

SHERRY FERRERA Petitioner, vs. **HILLSBOROUGH TOWNSHIP BOARD OF EDUCATION** Respondent.	:	State of New Jersey Office of Admin. Law **OAL Docket Number:** EDU 10529-2019S **Agency Reference Number:** 155-6/19 **SETTLEMENT AGREEMENT**

This Settlement Agreement is made and entered into in the dates set forth below by and between the Hillsborough Township Board of Education, with offices located at Hillsborough, New Jersey 08844 and Sherry Ferrera, whose address is 7 Brentwood Rd, Raritan, NJ 08869 (the Board and Ferrera are sometimes referred to jointly as "the Parties").

WITNESSETH:

WHEREAS, the Board previously employed Ferrera in various capacities as a non-certificated staff member; and

WHEREAS, on April 29, 2019, the Board eliminated a number of positions in the Hillsborough Township Public School District due to funding issues, one of which was a secretarial position held by Ferrera at that time; and

WHEREAS, Ferrera contended that she was a tenured employee, that the Board could not decline to renew her employment, and that had a right to a different position in the District instead; and

WHEREAS, the Board disputed Ferrera's claims, contending that she did not attain tenure as an employee in the District, and that it properly determined not to renew her contract as a result of its elimination of her position; and

WHEREAS, Ferrera instituted the above-captioned Verified Petition of Appeal against the Board, seeking reinstatement and back pay; and

WHEREAS, the Parties have determined it is in their mutual interests to conclude the employment relationship;

NOW, THEREFORE, in consideration of the aforementioned mutual premises and promises, and in exchange for the consideration more particularly set forth below, it is hereby agreed:

1. **Settlement Terms**. In consideration for Ferrera's waiver and release as set forth in Paragraph 2 of this Agreement, the Board, by and through this Agreement, shall pay Ferrera $19,000, which shall be taxable and will be subject to all customary deductions and withholdings as wages. The Board will not withhold union dues from the settlement proceeds. The Board will give Ferrera a preview of her paystub for the check as soon as practicable and in no event later than the conclusion of the seven-day revocation period set forth in Paragraph 3 of this Agreement. The payment of settlement proceeds is further conditioned upon Petitioner completing, executing, and returning to the law firm of Fogarty & Hara the following documents: (1) this Agreement; (2) a Child Support Judgment Lien search attached to the Agreement as Exhibit A; (3) a Stipulation of Dismissal with Prejudice in favor of the Respondent in the form

attached to the Agreement as Exhibit B to be held in escrow until such time as the settlement checks have been received by Petitioner's attorney and (4) Exhibit C, the attached completed IRS W-2 form.

2. Release. In exchange for the settlement terms described herein, Ferrera agrees to release the Board, including its officers, employees, agents, and servants, from any and all claims that Ferrera has or might have against the Board, including any and all lawsuits, charges, claims, complaints, demands, judgments, obligations, causes of action, controversies, 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 Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, and including the Older Worker Benefit Protection Act, the Federal Family Medical Leave Act, the Consolidated Budgetary Reconciliation Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, the New Jersey Workers' Compensation Act, New Jersey Wage and Hours law, New Jersey Statutes Title 18A, Education, and/or any other federal, State, or local employment, human rights, civil rights, wage hour, tenure, 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, collective negotiations agreement, or promise (whether express, oral, written or implied from any source), or any claim of intentional or negligent infliction of emotional distress, tortuous interference with contractual relations, wrongful or abusive discharge, constructive discharge, common law retaliation, defamation, prima facie tort, fraud, misrepresentation, negligence, estoppel against the Board including any

claim for attorneys' fees, that Ferrera, her 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 arising out of Ferrera's employment with the Board. This release excludes claims under New Jersey Workers Compensation Act, the pension laws, and any non-waivable claims. Ferrera certifies that she is unaware of any factual basis for such claims. Moreover, nothing in this Agreement or the documents referenced herein shall preclude Ferrera from bringing an action to enforce performance of any term of this Agreement should there be a default in performance.

3. **Mandatory Revocation Period.** Ferrera hereby waives any claim that the Board must provide her with at least twenty-one days to review this Agreement as required by the Older Workers Benefits Protection Act, specifically Section 7(f)(1)(F) of the ADEA as permitted by 29 CFR § 1625.22(e)(6). However, Ferrera shall have seven calendar days after signing this Agreement to revoke the Agreement if she chooses to do so ("Revocation Period"), consistent with Section 7(f)(1)(G) of the ADEA, and this Agreement shall not be effective until after the Revocation Period has expired. If Ferrera wishes to revoke this Agreement, she must notify the Board, in writing, of her intention to do so, and such notice must be delivered or emailed to the Board within seven days of her execution of this Agreement. Should Ferrera revoke this Agreement on a timely basis, she shall not be entitled to the consideration set forth in Paragraph 1 of this Agreement, and this Agreement will only be legally binding after the expiration of the Revocation Period.

4. **No Admission.** This Agreement is the compromise of disputed claims and shall never be treated as an admission of liability by either party for any purpose. All parties shall bear their own attorney's fees and costs for the entirety of any matter or matters related to the subject matter of this Agreement.

5. **Confidentiality.** This Agreement will remain confidential to the extent permitted by law. The Parties, including the Board's litigation control group, agree to take reasonable steps to ensure the confidentiality of this Agreement and the Board shall not provide a copy of this Agreement to the public unless otherwise required by law. Ferrera, as well as her representatives and attorney, agree not to provide a copy of this Agreement, or to disclose the terms of this Agreement or any discussions pertaining to the Agreement, to any person or entity unless otherwise required by a subpoena or an order of a court of competent jurisdiction. However, Ferrera may disclose the terms of the Agreement to her accountant, attorneys, income tax preparer, and/or the Internal Revenue Service, who shall be bound to this provision in the same manner. Ferrera agrees that should she receive a demand for information from the Internal Revenue Service, or is served with a properly and lawfully issued subpoena, or is ordered by a court of competent jurisdiction to dissolve the confidentiality provision of this Agreement, notice of the demand will be provided at least ten days prior to Ferrera releasing such information unless it is impossible for her to do so (in such circumstances, she shall provide such notice as soon as possible). Notice of the request shall be sent by certified mail to: Fogarty & Hara, Esqs., 21-00 Route 208 South, Fair Lawn, New Jersey 07410. Ferrera agrees to submit to the jurisdiction of the State of New Jersey, Somerset County in any action brought to enforce the confidentiality agreement of this Agreement. The Board, as well as its representatives and attorney, agree not to provide a copy of this Agreement, or to disclose the terms of this Agreement or any discussions pertaining to the Agreement, to any person or entity unless otherwise required by a request made pursuant to the Open Public Records Act, the common law right to access records, a subpoena, or an order of a court of competent jurisdiction. However, the Board may disclose the terms of the Agreement to its auditor, attorneys, and/or the Internal Revenue Service, who shall be bound to this provision in the same manner. The Board agrees that

should it receive a request under the Open Public Records Act or the common law right to access records, is served with a demand for information from the Internal Revenue Service, is served with a properly and lawfully issued subpoena, or is ordered by a court of competent jurisdiction to dissolve the confidentiality provision of this Agreement, notice of same will be provided at least ten days prior to the Board's releasing such information unless it is impossible for it to do so (in such circumstances, the Board shall provide such notice as soon as possible). Notice of the request shall be sent by certified mail to: Sherry Ferrera, 7 Brentwood Road, Raritan, NJ 08869. The Board agrees to submit to the jurisdiction of the State of New Jersey, Somerset County in any action brought to enforce the confidentiality agreement of this Agreement.

6. **No Reliance.** This Agreement constitutes the entire understanding of the parties with respect to the subject matter hereof, and there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. Each party acknowledges that they are not relying upon any oral statements, representations, promises, or expectations which are not expressly and explicitly set forth in this Agreement, which alone fully and completely expresses all agreements between the parties.

7. **Full Understanding.** The parties acknowledge that they are entering into this Agreement of their own accord and without any undue influence, coercion, or pressure of any kind; that all the provisions of this Agreement, as well as all questions pertinent thereto, have been fully and satisfactorily explained to them; that they have given due consideration to such provisions and questions, and understand them clearly; that the provisions embodied in this Agreement are in all respects acceptable to them and that they, therefore, accept these provisions in full and final satisfaction of all claims and demands which have been raised or which could have been raised in any litigation.

8. **Representation.** Both parties acknowledge that they have consulted with an attorney of their own choosing prior to signing this Agreement, and that they sign this Agreement as their own voluntary act and deed and fully understand the duties and obligations enumerated herein.

9. **Reformation and Non-Severability.** All terms of this Agreement are deemed material. Therefore, if any of the provisions contained in this Agreement are held illegal, invalid or unenforceable, the Parties agree, in advance, to reform the Agreement in good faith to provide each Party with the full benefit of the settlement memorialized by this Agreement, to the extent permitted by law. Should such reformation not prove possible, the remaining provisions shall not remain in full force and effect (the Agreement shall be voided).

10. **Modifications and/or Waivers.** A modification or waiver of any of the provisions of this Agreement shall be effective and enforceable only if made in writing and executed with the same formality as this Agreement. The failure of any party to insist upon strict performance of any of the provisions of this Agreement shall not be construed as a waiver of any subsequent default of the same or similar nature or of a continuation of an existing default.

11. **Non-Disparagement.** Ms. Ferrera and the Board, including its litigation control group, shall refrain from making any negative comments regarding each other, as well as each other's employees and/or agents.

12. **Governing Law.** This Agreement shall be subject to the laws of the State of New Jersey, without regard to its choice of law principles.

13. **Ratification.** This Agreement is subject to ratification by the Board, and is without prejudice to any party if the terms are not agreed upon.

14. **Subject to Ratification.** This Agreement shall only become effective upon the ratification and approval by the Board.

15. **Section Headings.** Section headings are for reference purposes only and shall not in any way affect the meaning or interpretation of any provision of this Agreement.

16. **Counterparts.** This Settlement Agreement may be signed in counterparts and facsimiles or scans of signatures will have the same force and effect as original signatures. When taken together, the signed counterparts (including scans or facsimiles) shall constitute but a single document when executed by all parties. This Settlement Agreement shall not be effective until such time as it has been duly authorized and executed by all parties.

IN WITNESS WHEREOF, the parties set their hands and seals to this agreement effective on the day and year set forth below.

HILLSBOROUGH TOWNSHIP BOARD OF EDUCATION

By: _____
Ms. Jean Trujillo
Board President

Dated:

WITNESS:

_____
Mr. Aiman Mahmoud
Board Secretary/Bus. Adm.

Dated:

PETITIONER

_____
Sherry Perrera

Dated: 10-27-21

WITNESS:

_____
Nathan Santaromita

Dated: 10-27-21

67-22
OAL Dkt. No. EDU 02994-21
Agency Dkt. No. 25-2/21

New Jersey Commissioner of Education

Final Decision

K.R. on behalf of minor child, G.H.,

Petitioner,

v.

Board of Education of the Eastern Camden County Northern Burlington County Regional School District, Camden 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 have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 12, 2022
Date of Mailing: April 12, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 02994-21
AGENCY DKT. NO. 25-2/21

K.R. OBO MINOR CHILD, G.H.,
Petitioner,

v.

BOARD OF EDUCATION OF THE EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,
Respondent.

Seth Broder, Esq., for petitioner (Broder Law Group, P.C., attorneys)

Anthony Padovani, Esq., for respondent (Sahli & Padovani, P.C., attorneys)

Record Closed: March 3, 2022 Decided: March 7, 2022

BEFORE **CARL V. BUCK III,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on March 19, 2021, 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 terms of settlement, and I **FIND**:

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

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

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

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

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

March 7, 2022
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: 3/7/2022

Date Mailed to Parties: 3/8/2022

/lam

SAHLI & PADOVANI
By: Anthony Padovani, Esq.
750 SOUTH WHITE HORSE PIKE
P.O. BOX 601 HAMMONTON, NJ 08037
1(609) 5679400
Solicitors for Respondent

G.H. a minor by his mother and legal guardian, K.R. Petitioner, V. EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT Respondent V. Ronald J. Haegele Third Party Respondent.	STATE OF NEW NEWJERSEY DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW AGENCY REF. NO.: 25 - 2121 OAL DOCKET NO.: EDU 02994-2024 **SETTLEMENT AGREEMENT AND RELEASE**

WHEREAS, Petitioner, K.R. ("Petitioner") is the mother of G.H. who is a 16 year old 11TH Grader and resides within the Eastern Camden County Regional School District ("District"), a ninth-through-twelfth-grade public school district operated by the Eastern Camden County Regional Board of Education ("Board"); and

WHEREAS, a dispute between the parties arose with regard to how and to which extent that the Board should respond to Third Party Respondent, R.H.'s (hereinafter referred to as " Third Party Respondent R.H.") inquiries with respect to his biological son, G.H.

WHEREAS, G.H. biological son of Third Party Respondent, R.H.

WHEREAS, G.H.'s biological mother is K.R, and K.R. and Third Party Respondent R.H. were divorced on January 23, 2007.

WHEREAS, K.R. and Third Party Respondent R.H. share joint legal custody of G.H. and K.R. is the parent of primary residence.

WHEREAS, K.R. has the authority pursuant to Court Order to make decisions regarding the health, education and welfare of G.H.

WHEREAS, pursuant to a Family Court Superior Court Order of Camden County dated July 11, 2019 the Order states "Defendant (R.H). shall not initiate direct communication with any coach, teacher, physician, etc. of G.H. unless said communication is in writing and the Plaintiff (K.R.) is copied on said communication. Defendant shall also not direct nor allow a third party to make said communications. Defendant shall be permitted to have an account on any Team Snap (parent access) or comparable parent portal, however, any communication with third parties on said portal, must be a private communication, i.e. not on a public message board, and shall copy the Plaintiff. If the Defendant wishes to have in-person communication with a teacher, coach, physician, etc. the Plaintiff shall be personally present for same at a mutually agreed upon time."

WHEREAS, G.H. and counsel for K.R. requested a meeting with the solicitor of the Board and other school personnel in order to determine the best route to take with respect to the unwarranted, antagonistic communications from Third Party Respondent R.H. to school personnel regarding G.H.

WHEREAS, it is alleged by Petitioner that at the meeting it was determined that there would be a standard communication used by school personnel in response to any communication from

R.H. stating that they would not provide information without approval of K.R. in accordance with the aforesaid Court Order;

WHEREAS, it is alleged by Petitioner that the Board Superintendent changed the agreed upon action and appointed the Director of Special Services as the "point of contact to assist.." Third Party Respondent R.H.

WHEREAS, it is alleged by Petitioner that the Director of Special Services has had contact with Third Party Respondent R.H. to the detriment of G.H.

WHEREAS, it is alleged in the petition filed by K.R. under Docket Number: EDU 02994-2021 in the Office of Administrative Law that Petitioner is requesting a court order providing that the agreement made between Respondent and Petitioner be reinstated;

WHEREAS, it is alleged in said filed Petition by K.R. that Third Party Respondent R.H. commenced communication with Board's representatives regarding G.H.'s athletics and education to the stress and detriment of G.H.

WHEREAS, the District filed a third party crossclaim against Third Party Respondent R.H. alleging that Third Party Respondent R.H. is an indispensable party and therefore subject to the terms of this litigation and any subsequent agreement.

WHEREAS, it is alleged by Third Party Respondent R.H. that he did not agree with the proposed arrangement and emailed his concerns to the Superintendent.

WHEREAS, it is alleged by the Respondent that the Superintendent's only role in response to a communication from Third Party Respondent R.H. was to act as a communicator and clear the misunderstanding by reiterating what already was in place and acting as a liaison between staff and Third Party Respondent R.H.

WHEREAS, it is alleged by Respondent that the Board's Superintendent did not change, alter, delete or add to the agreement that was in effect. In fact, it is stated that on October 30, 2020 the solicitor for Respondent Board wrote to Petitioner's counsel and stated:

"I intend on telling him that he can attend any game that he wishes; however, any other requests must be made with Mrs. Rucci Chase copied on same. I do not agree that the school has no obligation in responding to him as you say in your October 26, 2020 letter. The school cannot just say nothing to him, the standard response which you should have says that he should contact me at which point I was going to inform him that any request must have the approval of Mrs. Rucci Chase."

WHEREAS, the parties are desirous of resolving the issues raised by the Petition, and have reached an amicable resolution thereby avoiding the time and expense associated with litigation.

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

1. It is agreed between all of the parties that Third Party Respondent R.H. will communicate any concerns he has in writing, with Petitioner copied, to the Department Head of the District to which his concern pertains and, prior to the Department Head responding to such communication from Third Party Respondent R.H. (which must be in writing with a copy to Petitioner), there must be a 36 hour "pause" whereby Petitioner may respond to Third Party Respondent R.H.'s inquiry. Petitioner shall provide a copy of said response to the Department Head. Notwithstanding the terms set forth in this section 1, the current Special Education Department Head/Director of Special Services/504 Coordinator and any future title held thereof shall not have communication with Third Party Respondent R.H.
2. Notwithstanding the terms as set forth in number 1 above, G.H.'s guidance counselor, shall act as the Special Education Department Head for the purposes of this Agreement.

3. If Petitioner does not respond to the concern raised by Third Party Respondent R.H. within the 36-hour pause period, the Department Head shall respond to same.
4. All of the Parties agree and understand that the within settlement does not infringe upon the aforesaid court order and it gets information to Third Party Respondent R.H. in a timely fashion from the most knowledgeable person as long as Third Party Respondent R.H. also copies Petitioner, K.R. of his inquiry in accordance with the court order.
5. Petitioner AND Third Party Respondent R.H. acknowledge and understand that said agreement must first be approved by the Board at a regularly scheduled meeting of the Board.
6. Petitioner AND Third Party Respondent R.H. understand and agree that this Settlement Agreement and Release does not obligate the Board to undertake any action other than the action specifically and explicitly set forth above.
7. Petitioner and Respondents agree to comply with this settlement agreement.
8. It is acknowledged and agreed that each party shall bear their own attorney's fees, costs, expert witness fees, and/or costs of evaluations and expert reports for the entirety of any matter or matters related to the subject matter of this Settlement Agreement and Release.
9. It is acknowledged and agreed that in the event that G.H. is no longer domiciled in the District, the terms and conditions of this Agreement shall become null and void and the Board's financial and other responsibilities under this Agreement shall immediately cease.
10. It is acknowledged and agreed that in consideration for the Board's obligations described above, the Petitioner and Third Party Respondent R.H. or any persons or entity acting on his/her/their behalf, expressly agree to, and hereby do, waive and release any and all claims that they have or may have against the Board, financial or otherwise, known or

unknown, except for the Board's obligations set forth in this Settlement Agreement and Release, from the beginning of time through the date of this Settlement Agreement and Release, with regard to this litigation.

11. It is acknowledged and agreed that this Settlement Agreement and Release resolves all issues between the parties, known or unknown, specifically to be raised in the Petition or that could have possibly been raised from the beginning of time through the date of this Agreement, with regard to this litigation. Nothing contained herein shall be interpreted as preventing the parties from bringing an action to enforce the terms of this Settlement Agreement and Release.

12. It is acknowledged and agreed that the terms of this Settlement Agreement and Release represent the compromise of disputed claims between the parties. The Agreement shall not be treated as an admission on the part of the District. It shall not be treated as an admission that any of the parties have engaged in any wrongdoing or that any of the parties has failed to act in accordance with the law.

13. This Settlement Agreement and Release will be presented and recommended to the Board at the first possible regularly scheduled meeting, is subject to ratification by the Board, and is without prejudice to any party if the terms are not ratified by the Board. Petitioner and Third Party Respondent R.H. acknowledge and understand that this Agreement cannot be placed on the Board's agenda unless and until the Board first receives a fully executed copy of this Agreement. The representatives of the District shall recommend the terms of this Settlement Agreement and Release to the Board for approval at its first available regularly scheduled meeting upon receiving a fully executed copy of this Agreement from Petitioner.

14. The parties recognize that the Petitioner and Respondent have been represented by legal counsel and that they sign this within Settlement Agreement and Release as their own voluntary act and deed, and that they understand the duties and obligations enumerated herein. The parties further state that they are fully satisfied with the legal representation provided by their respective counsel.

15. It is acknowledged and agreed that this Honorable Court allowed the Third Party Respondent R.H. to be represented by Counsel and said Third Party Respondent R.H. refused to do so.

16. The parties understand and agree that none of the parties shall be considered a prevailing party under any statute, common law, or otherwise as a result of this Settlement Agreement and Release and it is expressly understood and agreed that this Settlement Agreement and Release shall be subject to the laws of the State of New Jersey.

17. Respondent and Petitioner, K.R., have jointly negotiated and prepared this Settlement Agreement and Release. Third Party Respondent R.H., while being made a party to this litigation and having been provided notice of all court dates and this Settlement Agreement and Release, has defaulted and opted not to participate in same as memorialized in writing through his letter to the Court dated July 16, 2021 and resent to the Court on August 16, 2021. As a result, Third Party Respondent R.H. waives any right to rescind, revoke or modify this Settlement Agreement and Release without the expressed, written permission of all parties.

[SIGNATURES TO FOLLOW ON THE NEXT PAGE]

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

WITNESS:

Business Administrator/
Board Secretary

DATED: 9/17/21

EASTERN CAMDEN COUNTY REGIONAL BOARD OF EDUCATION

Board President

DATED: 9/22/2021

WITNESS:

K.R. o/b/o G.H.

DATED: 8/20/21

DATED: 8/20/21

WITNESS:

RONALD J. HAEGELE

DATED: _____

DATED: _____

BOARD OF EDUCATION
EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT
1401 LAUREL OAK ROAD
VOORHEES TOWNSHIP, NJ 08043
(856) 784-4441

Kenneth Verrill
Business Administrator
Board Secretary

STATE OF NEW JERSEY)
COUNTY OF CAMDEN) SS:

KENNETH VERRILL, being first duly sworn on oath, deposes and says:

That the deponent is the Business Administrator/Board Secretary of the Eastern Camden County Regional School District in the County of Camden, State of New Jersey aforesaid, and that the following extract is a true and Exact copy of the motion that appears in the minutes of a meeting of the Board of Education of the EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT held on September 22, 2021;

Approve Consent Order Settlement-Moved by Hillary Garr and seconded by Veronica Parker, that the Board of Education of the EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT approve to accept the terms and conditions listed in The Settlement Agreement dated August 20, 2021 under OAL Docket No. EDU 02994-2021S Entitled:

G.H. a minor by his mother and legal guardian, K.R. vs. Eastern Camden County Regional School District vs. Ronald J. Haegele.

Roll Call Vote:

AYES (8) Brown, Deichert, Campbell, Asare, Parker, Garr, DeCicco, Chow

NOES (0)

ABSTAIN (0)

Motion Carries

Kenneth Verrill
Business Administrator/Board Secretary

68-22

OAL Dkt. No. EDU 07594-2021
Agency Dkt. No. 123-8/21

New Jersey Commissioner of Education

Final Decision

C.B., on behalf of minor children,
A.J.B. and J.B.,

Petitioner,

v.

Board of Education of the City of Newark,
Essex County,

Respondent.

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

The petition in this matter is the seventh filed by petitioner concerning her minor children. Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the allegations made in the current petition have all been raised in previous petitions that were dismissed by the Commissioner. The Commissioner further concurs with the ALJ, for the reasons thoroughly detailed in the Initial Decision, that petitioner's claims are barred by the doctrine of *res judicata* and/or are untimely pursuant to *N.J.A.C.* 6A:3-1.3(i). Furthermore, to the extent that any claims not barred for those reasons have been raised, they are so vague as to fail to state a claim upon which relief can be granted.

Accordingly, the Board's motion to dismiss is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 12, 2022
Date of Mailing: April 12, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER OF DISMISSAL
OAL DKT. NO. EDU 07594-2021
AGENCY DKT. NO. 123-8/21

C.B. ON BEHALF OF MINOR CHILDREN,
A.J.B. AND J.B.
Petitioner,

v.

CITY OF NEWARK BOARD OF
EDUCATION, ESSEX COUNTY,
Respondent.

C.B., pro se

Bernard Mercado, Esq. for respondent (Senior Associate Counsel, Office of the General Counsel, Newark Public Schools)

Record Closed: March 15, 2022 Decided: March 17, 2022

BEFORE: **MATTHEW G. MILLER,** ALJ

STATEMENT OF THE CASE

Petitioner, C.B., the parent of minor children A.J.B. and J.B., has filed a petition concerning access policies to Newark public schools, registration protocols at Central High School (where A.J.B. formerly[1] attended) and what appears to be the alleged misclassification of J.B. and for said misclassification to be removed from his transcript.

PROCEDURAL HISTORY

By letter dated August 3, 2021, Petitioner contacted the Commissioner of the Department of Education, asking that multiple matters "be review(ed)". This request was marked "Filed" by the Commissioner on August 11, 2021 and Respondent filed an Answer with the Commissioner on August 30, 2021. The Department transmitted this matter to the Office of Administrative Law (OAL) on September 7, 2021, for a hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An initial conference was ultimately held on October 29, 2021, which was followed by a second conference on December 10, 2021, after which Respondent filed a Motion to Dismiss. Following a conference on March 3, 2022, the record was held open briefly for the supplying of additional materials and was ultimately closed on March 15, 2022.

FACTUAL BACKGROUND

C.B. OAL Filing History

This matter is the seventh petition filed by C.B. concerning J.B. and/or A.J.B.

1. **C.B. o/b/o minor child, J.B. v. City of Newark BOE, Essex Co./Weaver, Deborah; Montes, Kishanda; Duke Jackson Kathy and Spring, Sakinah (EDU 10368-2018)**. This matter was transmitted to the OAL on or about June 12, 2018 and concerned a demand that J.B. be promoted to 8th grade which arose out of September, 2017 meetings with Lincoln School

[1] While this issue in not raised in this motion, the Court understands that A.J.B. is currently enrolled at West Side High School in Newark and not at Newark Central.

officials. This petition was voluntarily withdrawn by C.B. on or about September 28, 2018. **(Exhibits R-A and R-B)**

2. **C.B. o/b/o minor child, J.B. v. City of Newark BOE, Essex County (EDU 14526-2018)**. This matter was transmitted on an emergent basis to the OAL on October 4, 2018 and concerned a request to remove false and/or sensitive information from J.B.'s school records, that he be issued a diploma and from his middle school and that he be placed in the 10th grade. This petition was voluntarily withdrawn by C.B. on October 3, 2018.[2] **(Exhibits R-C and R-D)**

3. **C.B. o/b/o minor child, J.B. v. Board of Education of the City of Newark, Essex County (EDU 04507-2019), aff'd Commissioner of Education (February 20, 2020)**. This matter was transmitted to the OAL on April 1, 2019 and concerned a complaint that J.B. was wrongfully retained in 7th grade in 2017-18. In a January 16, 2020 decision, Ernest M. Bongiovanni, A.L.J. found that;

    a. The petition was time barred since it was filed in violation of the ninety day appellate time limitation of N.J.A.C. 6A:3-1.3(i).
    b. The claims made in the petition were moot, since they concerned J.B.'s retention in the 7th grade in 2017-18 and he was now in the 9th grade in the 2019-20 school year.
    c. The balance of the claims were "at best a jumble of vague ideas and notions", which, even if they were cognizable, would be time barred as well.

    The Initial Decision was adopted by the Commissioner of Education in a Final Decision dated February 20, 2020, ruling that the claims were time barred. **(Exhibits R-E and R-F)**

4. **C.B. o/b/o minor child, J.B. v. City of Newark Board of Education (EDU 17293-2019), aff'd, Commissioner of Education (October 19, 2020)**. This matter was transmitted to the OAL on December 9, 2019 and concerned a complaint regarding access to the Lincoln Elementary School, the promotion policy "put in place by the district regarding 8 grade graduation" and the district's suspension policy. In a September 2, 2020 decision, Thomas Betancourt, A.L.J. dismissed the petition as being time barred by N.J.A.C. 6A:3-1.3(i). The Initial

[2] While the dates may be confusing, it appears as if the Petition was actually filed on October 1 and withdrawn on October 3.

Decision was adopted by the Commissioner of Education in an October 19, 2020 Final Decision. **(Exhibits R-G and R-H)**

5. **C.B. o/b/o minor child, A.J.B. v. City of Newark Board of Education, Essex County (EDU 10179-2020), aff'd, Commissioner of Education (June 15, 2021)**. This matter was transmitted to the OAL on October 6, 2020 and concerned a complaint regarding the online process of enrolling A.J.B. at Central High School. In an April 21, 2021 decision, Margaret M. Monaco, A.L.J. dismissed the petition as moot, since A.J.B. was now enrolled in Central and there was no ongoing dispute. The Initial Decision was adopted by the Commissioner of Education in a June 15, 2021 Final Decision. **(Exhibits R-I and R-J)**

6. **C.B. o/b/o minor child, J.B. v. BOE of the City of Newark (EDU 04337-2021)**. This matter was transmitted to the OAL in March, 2021 and concerned multiple complaints regarding J.B.'s registration and treatment at what appears to be Newark Vocational High School in October, 2020 and February, 2021. Per an August 11, 2021 letter from Judge Monaco, this matter was withdrawn by C.B. via letter dated July 3, 2021. **(Exhibits R-K and R-L)**

7. **C.B. o/b/o minor children, A.J.B. and J.B. v. City of Newark BOE, Essex County** (**EDU 07594-2021**) (**current case**). As noted above, this matter was transmitted to the OAL on September 7, 2021 and concerns three issues; 1. the access issues raised in EDU 17293-2019; 2. the enrollment issues raised in EDU 10179-2020, and; 3. the "fraudulent faisfying (sic)[3] mis()classification on J.B." with a request that "this matter to be removed from (his) school transcript record", which appear to be the same issues raised in EDU 10368-2018. **(Exhibit C-1)**

Current Petition

In her current petition, C.B. specifically relates the access issues back to her earlier petition ["(t)his matter relates to the 2018-2019 petition"]. She also specifically relates the enrollment issue to an earlier petition [(t)hese…matter() relates to the 2020-2021 petition]". **(Exhibit C-1)**.

[3] I believe that this word is meant to be "falsifying".

While she does not relate the "misclassification" aspect of the petition back to the 2018 filing, the issues raised are identical.

The allegations raised in the petition read as follows[4];

1. This matter relates to the 2018-2019 petition (regarding) Newark Public Schools' policies on visitor ID scanner, attendance, promotion, suspension…these matters have been dismissed without being heard.

2. These matters…relate to the 2020-2021 petition regarding NPS C.B., minor child (A.L.B). The issue is that the Newark Public School wanted (me) to register personal information online to enroll A.J.B so he can go to Central High School in Newark NJ which I disagree. This matter was dismissed without being heard.

3. This matter relates to the fraudulent, falsifying misclassification on J.B.. I am asking for this matter to be removed from (his) school transcript record.[5]

MOTION

Respondent has filed a motion for to dismiss in lieu of an answer per N.J.A.C. 1:1 *et seq.* and N.J.A.C. 6A:3-1.5(g), making a three-fold argument;

1. That the allegations contained within the subject petition "have previously already been adjudicated both by the OAL and the New Jersey Department of Education and are therefore barred by the doctrine of *res judicata*.

2. That the petition is time barred in that Petitioner failed to comply with the ninety day time limit encoded in N.J.A.C. 6A:3-1.3(i) to appeal Respondent's decisions.

3. That the petition fails to state a claim upon which relief can be granted.

[4] Minor spelling and grammatical corrections have been made for clarity. The full document is attached as Exhibit C1.

[5] While this issue in not raised in this motion, the Court understands that J.B. is no longer enrolled in the Newark school system.

The only opposition to the motion filed by C.B. consisted of a single page in which she reiterated her disagreement with Respondent's policies on attendance and identification and that they were instituted without notification to parents and asking that the information concerning J.B. be removed from his record. She also advised that she would not be bullied. No legal arguments were propounded. **(Exhibit C-2)**.

A reply brief from Respondent highlighted Petitioner's lack of legal argument and reiterated the positions espoused in its original moving papers. **(Exhibit C-3)**.

A Motion to Dismiss per N.J.A.C. 6A:3-1.5(g) is the functional equivalent of a motion to dismiss for failure to state a claim filed in civil court per N.J.Ct.R. 4:6-2(e). Graves v. State Operated Sch. Dist. of Newark & Cami Anderson, 2017 N.J. Super. Unpub. LEXIS 2417. The Court stated the standard for the granting of same;

> When reviewing a Rule 4:6-2(e) motion, a court must determine the adequacy of the pleading and decide whether a cause of action is "suggested" by the facts. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). The court must "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)).
>
> Id. at 7.

LEGAL ARGUMENT

Petitioner

None. At best, C.B. infers in her petition that her claims have never received a proper hearing.

Respondent

As noted above, Respondent makes two primary arguments in support of the dismissal of Petitioner's claims.

First, it argues that this petition is simply a rehash of the claims made in the first six petitions, all of which have either been withdrawn, dismissed, found to be moot or insufficiently pled so as to form a justiciable claim upon which relief can be granted. Given that, this petition should be barred in its entirety by the doctrine of *res judicata*. Citing to, amongst other cases, McNeil v. Legislative Apportionment Comm'n of State, 177 N.J. 364, cert. denied, 540 U.S. 1107 (2004) and In re Estate of Gabrellian, 372 N.J. Super. 432 (2004), it argues that since these cases involved decisions involving the same issues and the same parties, dismissal is appropriate.

Second, it argues that Petitioner failed to comply with the with the ninety day time limit encoded in N.J.A.C. 6A:3-1.3(i) to appeal the denial of her requests for relief. Citing to cases such as Riely v. Hunterdon Central Bd. of Educ., 173 N.J. Super. 109 (App. Div. 1980) and Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572 (1993), Respondent notes that all of the claims being pursued in the instant petition (admittedly) date back several years, with decisions such as they were, being made as far back as 2017.

Finally, Respondent argues that at least some aspects of the claims do not fall within the jurisdiction of the OAL. To the extent that vague references to ethical issues, the Anti-Bullying Act, financial damages, etc., Respondent points to the decision in C.B. o/b/o J.B. v. City of Newark BOE, Essex Co., (EDU 14526-2018), which deemed them to be non-cognizable in this forum.

LAW AND ANALYSIS

Before delving into the law, we must first review the specific allegations made in this Petition. They are;

Allegation #1 - Newark Public Schools' policies on visitor ID scanner, attendance, promotion, suspension.

As detailed above, C.B. admitted that this allegation relates to the "2018-2019 petition". In reviewing the prior cases, this issue was specifically raised in C.B. o/b/o J.B. v. City of Newark Board of Education (EDU 17293-19) and was dismissed as having been filed in violation of N.J.A.C. 6A:3-1.3(i) as she had been aware of the ID policy since at least November, 2018 and the retention, promotion and suspension policies since at least May, 2017. This decision was upheld by the Commissioner of Education in an October 19, 2020 Final Decision.

In fact, the retention policy was also raised in C.B. o/b/o minor child, J.B. v. Board of Education of the City of Newark, Essex County (EDU 04507-2019) and was similarly dismissed for C.B. having failed to comply with the ninety day time limit of N.J.A.C. 6A:3-1.3(i). This decision was upheld in a February 20, 2020 Final Decision.

Allegation #2 - Newark Public Schools' policies concerning A.J.B. and the online enrollment practices of Newark Central High School.

As detailed above, C.B. admitted that this allegation relates to the "2020-2021 petition". In reviewing the prior cases, this issue was specifically raised in C.B. o/b/o A.J.B. v. BOE of the City of Newark (EDU 04337-2021) and was dismissed as moot, since he ultimately successfully enrolled at Central. That decision was adopted by the Commissioner of Education in a June 15, 2021 Final Decision.

Allegation #3 – The alleged misclassification of J.B. and a request to have same removed from his transcript.

In reviewing the prior cases, this issue was specifically raised in C.B. o/b/o J.B. v. City of Newark BOE, Essex County (EDU 14526-2018) which was voluntarily withdrawn by C.B. on October 3, 2018.

Claims concerning J.B. and his classification were also raised in C.B. o/b/o minor child, J.B. v. Board of Education of the City of Newark, Essex County (EDU 04507-2019) and was similarly dismissed for C.B. having failed to comply with the ninety day time limit of N.J.A.C. 6A:3-1.3(i) since she first became aware of his special education classification in 2012, which continued until she removed him from such classes in May or June, 2017. This decision was upheld in a February 20, 2020 Final Decision.

RES JUDICATA

The seminal New Jersey case involving the doctrines of *res judicata* and collateral estoppel is Sacharow v. Sacharow, 177 N.J. 62 (2003), which provided the following primer;

> The doctrine of collateral estoppel...is 'that branch of the broader law of res judicata which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action.' Woodrick v. Jack J. Burke Real Estate, Inc., 306 N.J. Super. 61, 79 (quoting State v. Gonzalez, 75 N.J. 181, 186 (1977)) certif. granted, Woodrick v. Fox & Lazo, Inc., Realtors, 153 N.J. 214, and app. dismissed, 157 N.J. 537 (1997).
>
> Id. at 76.

As to res judicata, the Court held;

> "Preclusion can occur only "[w]hen an issue of fact or law is actually litigated and determined by valid and final judgment." Hernandez v. Region Nine Housing Corp.,146 N.J. 645, 659 (1996) (citing Restatement (Second) of Judgments § 27 at 250 (1982)) (emphasis omitted); Mazzilli v. Accident & Cas. Ins. Co. of Winterthur, Switzerland, 26 N.J. 307, 334 (1958) ("'[I]t is only upon such matters as were actually litigated and determined that the judgment is conclusive.'") (quoting City of Paterson v. Baker, 51 N.J. Eq. 49, 53 (Ch. 1893))."
>
> Id. at 76-77.

The Court in Hernandez v. Region Nine Housing Corp., 146 N.J. 645 (1996) addressed the issue of res judicata in somewhat more detail;

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. [Restatement (Second) of Judgments § 27 at 250 (1982) (emphasis added).]
>
> New Jersey law also requires that the issue presented in the later action must be identical to the issue decided in the earlier adjudication. Morristown Trust Co. v. Thebaud, 43 N.J. Super. 209, 217, 128 A.2d 288 (Ch. Div. 1957). The Restatement adds, however, that issue preclusion cannot be invoked when:
>
> > (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or...(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or...(5) There is a clear and convincing need for a new determination of the issue...because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action,...[Restatement (Second) of Judgments, (supra), § 28 at 273.]
>
> Hernandez, 146 N.J. at 659.

In 2010, the Appellate Division reiterated the standards for the applicability of the doctrine of res judicata;

> (T)he question of whether an action is barred by the doctrine of res judicata "is a question of law 'to be determined by a judge in the second proceeding after weighing the appropriate factors bearing upon the issue.'" Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 173 (App. Div. 2000) (quoting Colucci v. Thomas Nicol Asphalt Co., 194 N.J. Super. 510, 518 (App. Div. 1984)). Since we are presented with a question of law, we owe the trial court's decision no deference.

> Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).
>
> Broadly stated, the doctrine of res judicata bars "relitigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991). It provides that "a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." Ibid. The doctrine fosters "the important policy goals of 'finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness . . . .'" First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352 (2007) (quoting Hackensack v. Winner, 82 N.J. 1, 32-33 (1980)). It also "maintain[s] judicial integrity by minimizing the possibility of inconsistent decisions regarding the same matter." Velasquez v. Franz, supra, 123 N.J. at 505.
>
> For the doctrine of res judicata to bar an action, there must be "substantially similar or identical causes of action and issues, parties, and relief sought" between the two actions, and a final judgment must have been entered in the earlier action by a court of competent jurisdiction. Culver v. Ins. Co. of N. Am., 115 N.J. 451, 460 (1989).
>
> Selective Ins. Co. of Am. v. Capoferri, 2010 N.J. Super. Unpub. LEXIS 589 at 5-6.

Or, as put in the case of Green v. State Farm Ins., 2008 N.J. Super. Unpub. LEXIS 1513;

> The preclusionary doctrine of res judicata involves elements that are all present here: common parties, common subject matters, common issues and common evidence, as well as a final judgment rendered in the first action on the merits. See Velasquez v. Franz, 123 N.J. 498, 505-06 (1991); see also Restatement of Judgments (Second) § 19 (1982). Even if a claim is not specifically raised in the first proceeding, it is precluded from being litigated in the ensuing action if there previously was a fair opportunity to have raised it. See Brunetti, supra, 68 N.J. at 587-88, see also McNeil v. Legislative Apportionment Comm'n. 177 N.J. 364, 395 (2003),

> cert. denied, 540 U.S. 1107, 124 S.Ct. 1068, 157 L.Ed. 2d 893 (2004).
>
> Green, 2008 N.J. Super. Unpub. LEXIS 1513 at 9.

As was noted in McNeil;

> The doctrine of res judicata is primarily one of public policy and only secondarily of private benefit to individual litigants.... [I]ts roots lie in the principle that public policy and welfare require a definite end to litigation when each of the parties has had a full, free and untrammeled opportunity of presenting all of the facts pertinent to the controversy. The primary object of res judicata (public policy) is based upon the maxim *reipublicae ut sit finis litium* -- it concerns the commonwealth that there be a limit to litigation. [(citations omitted).] [Kugler v. Romain, 110 N.J. Super. 470, 484 (Ch. Div. 1970) (quoting Desmond v. Kramer, 96 N.J. Super. 96, 107 (Cty. Ct. 1967)(quoting Coca-Cola v. Pepsi-Cola Co., 172 A. 260 (Del. 1934)))].
>
> Id. at 399-400.

The Court in Bressman v. Gash, 131 N.J. 517 (1993) confirmed that the doctrine of res judicata should not only apply to court decisions, but also to administrative ones;

> As a general rule, an adjudicative decision of an administrative agency "should be accorded the same finality that is accorded the judgment of a court." Restatement (Second) of Judgments § 83 comment b (1982) (Restatement); see Kenneth C. Davis, 4 Administrative Law Treatise § 21.9 (2d ed. 1983). [*527] Underlying the doctrine of res judicata is concern for the stability of results. Restatement, supra. The application of res judicata to adjudicative decisions of administrative agencies, like its application to judicial decisions, rests on policy considerations such as "finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness . . . ." Hackensack v. Winner, 82 N.J. 1, 32-33, 410 A.2d 1146 (1980).
>
> Id. at 526-27.

As was argued by Respondent and detailed above, all three claims being pursued by Petitioner in this case have been substantively adjudicated previously, with the claims in the first allegation having been dismissed as being time barred in separate decisions that were both upheld by the Commissioner of Education in a Final Decision, the claims in the second allegation having been dismissed as moot in another decision upheld by the Commissioner in a Final Decision and the claims in the third allegation having been dismissed as being time barred in the yet another decision that was upheld in a Final Decision.

C.B. did not provide any legally meaningful opposition to the motion, but simply reiterated her prior positions that various actions taken by Respondent were improper.

Given the above, I **FIND** that all aspects of and claims contained in C.B.'s petition have been fully litigated previously between the parties and that there is no need or compelling reason for same to be relitigated.

Therefore, I **CONCLUDE** that all aspects of and claims contained in C.B.'s current Petition are barred by the doctrine of res judicata and must be dismissed for failure to state a claim.

STATUTE OF LIMITATIONS

In addition to being barred by the doctrine of *res judicata*, it should be noted, as it was in both C.B. o/b/o minor child, J.B. v. Board of Education of the City of Newark, Essex County (EDU 04507-2019) and C.B. o/b/o minor child, J.B. v. Board of Education of the City of Newark, Essex County (EDU 04507-2019), that the clams posited by C.B. in the instant are time barred.

The regulation concerning appeals is N.J.A.C. 6A:3-1.3(i), which reads as follows;

> Filing and service of petition of appeal - 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*, that 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.
>
> **(emphasis added)**

This rule (along with others in this chapter of the Administrative Code) can be "relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice". N.J.A.C. 6A:3-1.16.

In exploring the case law surrounding the relaxation of the ninety day rule, it becomes very apparent, very quickly, that the courts do not look indulgently on same. One of the most oft-cited cases involving this issue is Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572 (1993). Kaprow involved the termination of a tenured assistant superintendent effective June 30, 1981. After a rather complicated series of events involving RIF[6] rights and the "re-creation" of assistant superintendent positions year later, Kaprow filed a petition with the Commissioner on August 1, 1988 asserting a claim to one of the re-created positions. He amended that petition on December 16, 1988 to assert, for the first time, that the 1981 RIF was improper and had been made in bad faith. Id. at 576-78.

In the face of a partial victory for Kaprow in the underlying OAL case, the Commissioner dismissed the petition, finding, in part, "that the bad-faith claim was untimely instead of unsupported". That decision was affirmed by the State Board of Education, which found that the August 1, 1988 petition "was time barred by the ninety-

[6] Reduction in force.

day limitations period of N.J.A.C. 6:24-1.2(c)" and the Appellate Division affirmed the Board's decision. Id. at 578.

The bar can be relaxed "when strict adherence would possibly result in an injustice." Grompone v. State Operated Sch. Dist. Of Jersey City, 1999 N.J. AGEN LEXIS 786 (Dec. 20, 1999) at 17., app. denied, 1994 N.J. Super. Unpub. LEXIS 4, cit. Bogert v. East Orange Bd. of Educ., OAL DKT. NO. EDU 6245-82 (January 26, 1983), aff'd Commissioner of Education (March 14, 1983). See also, Morris-Union Jointure Commission v. Bd. of Ed. of South River, 92 N.J.A.R 2d (EDU) 453 (1992).

However, Morris-Union confirmed that "it is petitioner's burden to show that it will suffer injustice if the 90-day rule is strictly enforced." Id. at 471.

Here, C.B. has produced no evidence or argument that she has either complied with the ninety day rule or which would justify its relaxation. For those reasons, and the reasons expressed in the prior decisions cited above, I **FIND** that C.B. failed to comply with the requirements of N.J.A.C. 6A:3-1.3(i) and I further **FIND** that she has failed to demonstrate that the enforcement of those requirements would lead to an injustice. I also **CONCLUDE** that even if the petitioner was not barred by the doctrine of res judicata, it would be dismissed due to the violation of N.J.A.C. 6A:3-1.3(i). I further **CONCLUDE** that the petitioner should be dismissed for failure to state a claim on this basis in addition to res judicata.

FAILURE TO STATE A CLAIM

While I **FIND** that all of C.B.'s claims have been addressed by both the discussions of res judicata and the appellate time bar, to the extent that any ancillary issues may not have been addressed, I **CONCLUDE** that they fail to state a claim upon which relief may be granted.

Vague allegations of disrespect, violations of the Anti-Bullying Act, financial damages, etc. are simply not cognizable in this forum. See generally, Robinson v. Union Twp. Bd. of Educ., 2020 N.J. Agen Lexis 12 (December 13, 2019).

To the extent that those allegations are made in this petition, I **FIND** that they are outside the jurisdiction of the OAL and must be brought in another forum. I therefore **FIND** that those allegations must be dismissed for failure to state a claim.

CONCLUSION

Given the totality of the evidence, I **CONCLUDE** that Petitoner's claims are barred by the doctrine of res judicata, are time-barred and/or are not cognizable in the OAL.

ORDER

Based on the foregoing, Respondent's motion to dismiss Petitioner's appeal for failure to state a claim per Rule 4:6-2(e) be and is hereby **GRANTED** and;

It is hereby **ORDERED** that judgment be **ENTERED** on behalf of respondent and that the Petitioner's appeal be and is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 17, 2022
DATE

/Matt Miller
Matthew G. Miller, ALJ

Date Received at Agency: March 17, 2022

Date Mailed to Parties: March 17, 2022

MGM/mm

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

None

For respondent:

R-A	June 12, 2018 C.B. petition in C.B. o/b/o minor child, J.B. v. City of Newark BOE, Essex Co./Weaver, Deborah; Montes, Kishanda; Duke Jackson Kathy and Spring, Sakinah (EDU 10368-2018)
R-B	September 28, 2018 letter from Respondent to Judge Testa confirming Petitioner's withdrawal of EDU 10368-2018
R-C	October, 2018 C.B. petition in C.B. o/b/o minor child, J.B. v. City of Newark BOE, Essex Co. (EDU 14526-2018)
R-D	October 23, 2018 letter from C.B. withdrawing EDU 14526-2018
R-E	February, 2019 petition in C.B. o/b/o minor child, J.B. v. City of Newark BOE, Essex Co. (EDU 04507-2019)
R-F	New Jersey Department of Education's Final Decision and Judge Bongiovanni's Initial Decision in EDU 04507-2019

R-G	November, 2019 petition in C.B. o/b/o minor child, J.B. v. City of Newark Board of Education (EDU 17293-2019)
R-H	New Jersey Department of Education's Final Decision and Judge Betancourt's Initial Decision in EDU 17293-2019
R-I	October, 2020 C.B. petition in C.B. o/b/o minor child, A.J.B. v. City of Newark Board of Education, Essex County (EDU 10179-2020)
R-J	New Jersey Department of Education's Final Decision and Judge Monaco's Initial Decision in EDU 10179-2020
R-K	March, 2021 C.B. petition in C.B. o/b/o minor child, J.B. v. BOE of the City of Newark (EDU 04337-2021)
R-L	August 11, 2021 letter from Judge Monaco confirming C.B.'s withdrawal of EDU 04337-2021.

Court:

C-1	September 7, 2021 Petition in C.B. o/b/o minor children, A.J.B. and J.B. v. City of Newark BOE, Essex County (EDU 07594-2021) (current case)
C-2	February 18, 2020 Petitioner letter in opposition
C-3	March 14, 2022 Respondent reply brief

69-22
Agency Dkt. No. 29-3/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of Debra Graham, School District of the City of Newark, Essex County.

For the Petitioner, Sabrina Styza, Esq.

No appearance by or on behalf of Respondent, Debra Graham

This matter was opened before the Commissioner of Education on March 1, 2022, through tenure charges of unbecoming conduct certified Roger Leon, Superintendent of the Newark School District ("District"), together with supporting evidence against respondent, Debra Graham, a tenured teaching staff member in the District's employ. The District provided respondent with written notice of such certification at the respondent's current known address, via certified mail. The District also provided the tenure charges to the attorney for the Newark Teachers Union.

On March 2, 2022, the Commissioner directed the respondent via regular mail to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent was employed by the District as a tenured teacher. The

Statement of Evidence indicates that the respondent has a history of excessive absenteeism and has been in AWOL status since March 2020.

Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against him at the District level and before the Commissioner, the Commissioner finds that the District's charge of unbecoming conduct has been proven and overwhelmingly warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from his tenured position with the Woodbine 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.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 12, 2022
Date of Mailing: April 12, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

70-22

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

IN THE MATTER OF THE TENURE HEARING OF	)	
	)	OPINION
CRYSTAL SAYLOR, RESPONDENT	)	AND
SCHOOL DISTRICT OF WEST NEW YORK	)	DECISION
	)	
DKT NO. 236-12/21	)	

Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE RESPONDENT

Sanford R. Oxfeld, Esq., Oxfeld Cohen, P.C.

FOR THE DISTRICT

Lester E. Taylor, III, Esq., Partner, Steinhardt, Cappelli, Tipton & Taylor, LLC

BACKGROUND INFORMATION COMMON TO ALL CHARGES

"Respondent was hired by the West New York Board of Education (Board) as the secretary to the Business Department commencing January 16, 2010 and entered an employment contract for the remainder of the 2009-2010 school year, with an annual salary of $33,000. She was reappointed to the same secretarial position for the 2010-2011 and 2011-2012 school years. In November 2011, the Board contracted to employ Saylor for the 2011-2012 school year as the Administrative Assistant to the Assistant Superintendent of Educational and Personnel Services, with an annual salary of $40,000. She was reappointed to that position for the 2012-2013, 2013-2014 and 2014-2015 school years with modest raises. On July 1, 2015, the assistant superintendent with whom Respondent had been working since November 2011 was promoted to superintendent. Two weeks later, the Board approved the new superintendent's recommendation to appoint Respondent as Secretary to the Superintendent of Schools at a pro-rated salary of $72,500. Respondent remained in that position until her termination in June 2018."

"During her employment with the Board, Respondent was, at all times, subject to the terms and conditions of her employment contracts. These contracts obligated Respondents to faithfully perform the duties of the position in accordance with any and all Board policies and any and all applicable laws, rules and regulations."

West New York Board of Education Policy No. 4281 *Discipline* states: "The Board of Education directs all support staff members to observe statutes, rules of the State Board of Education, policies of this Board, and duly promulgated administrative rules and regulations governing staff conduct. Violations of those statutes, rules, policies, and regulations will be subject to discipline. The immediate supervisor and/or the Director of Human Resources shall deal with disciplinary matters on a case-by-case basis. Discipline will include, as appropriate, verbal and written warnings, transfer, suspension, freezing wages, and dismissal; discipline will provide, wherever possible, for progressive penalties for repeated violations. In the event disciplinary action is contemplated, notice will be given to the employee in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based; the text of the statute, policy, rule, or regulation that the employee is alleged to have violated; a date when the employee may be heard and the administrator who will hear the matter; and the penalty that may be imposed."

West New York Board of Education Policy No. 4281 *Inappropriate Staff Conduct* states: "The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within this school district…there exists a professional responsibility for all school staff to protect a pupil's health, safety and welfare." Furthermore, the Policy states that: "The Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. In appropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district."

SPECIFICATION OF CHARGES

CHARGE 1

CONDUCT UNBECOMING A PUBLIC EMPLOYEE AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S INAPPROPRIATE CONDUCT

The foregoing background information, and the facts alleged therein, are incorporated by reference as it fully set forth herein. Crystal Saylor has engaged in unbecoming conduct including misconduct, insubordination and other just cause by her acts and omissions relative to her employment by the Board. These acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming and insubordination.

Count 1

On January 19, 2017, at or about 1:30 pm, Respondent left her post unattended, and did not return for work for the remainder of the afternoon. Respondent failed to provide notification to her primary supervisor, the Superintendent of Schools, with regards to her absence. Further, at no time did the Superintendent approve her absence.

Count 2

On June 5, 2018, while in the common area outside of the Superintendent's office, and in earshot of other Central Office employees, Respondent aggressively confronted the Superintendent of Schools, used vulgar, threatening, and inappropriate language towards the Superintendent, and Respondent's overall conduct throughout the day was unbecoming a public employee. On the same day, Respondent was given a notice of immediate

termination of employment with the West New York Board of Education and was relieved of her duties effective immediately.

CHARGE 2

INSUBORDINATION AND CONDUCT UNBECOMING FOR USE OF INAPPROPRIATE AND VULGAR LANGUAGE TOWARDS SUPERINTENDENT

The foregoing background information, and the facts alleged therein, are incorporated by reference as it fully set forth herein. Crystal Saylor has engaged in unbecoming conduct including misconduct, dishonesty, insubordination and other just cause by her acts and omissions relative to her employment by the Board. These acts and omissions, as specifically set forth below, constitute just cause for immediate dismissal due to conduct unbecoming and insubordination.

Count 1

On June 5, 2018, Respondent exhibited conduct demonstrative of insubordination in her use of inappropriate, threatening, and vulgar language towards the Superintendent in the work area outside the Superintendent's Office and within earshot of other Central Office employees. Respondent also engaged in defiant conduct throughout the same day, resulting in her immediate termination.

CHARGE 3

CONDUCT UNBECOMING A STAFF MEMBER AND/OR OTHER JUST CAUSE REGARDING RESPONDENT'S CONDUCT

The foregoing background information, common to all charges, and the facts alleged therein, are incorporated by reference as it fully set forth herein.

Each of the foregoing charges and counts individually warrant dismissal. Additionally, in their totality within the context of the Respondent's behavior, it is evident that she engaged in a pattern of unbecoming conduct, neglect of duty, incapacity, and insubordination or other just cause, warranting dismissal. The allegations, jointly and severally, demonstrate her unfitness to continue to serve in a position of trust, warranting her immediate dismissal.

Dated: November 29, 2021

Clara Brito Herrero, Superintendent

MOTION TO DISMISS – LACHES

In lieu of an Answer to the Tenure Charges, Respondent submitted a letter memorandum dated December 22, 2021 to Acting Commissioner Allen-McMillan in support of her Motion "to dismiss the tenure charges administratively due to the application of the doctrine of laches."

Respondent notes that "on June 5, 2018 the Board of Education gave Ms. Saylor a 'Notice of immediate termination' due to an alleged incident that was witnessed by no one, with no investigation, and most importantly despite her tenured status. She was never interviewed and none of the rights she possessed as a tenured secretary were afforded to her in that the Board knowingly simply ignored her tenured status…"

Respondent asserts that "the Board's filing of the instant tenure charges, at the outset, are stale and are being filed over three and a half years after the only alleged incident which gave rise to Ms. Saylor's illegal immediate termination. As Ms. Saylor notes in her Certification, three and a half years is a

long time to try to remember one incident. Memories fade over time. No statements were taken at the time to help refresh her recollection (See paragraph 10 of the Saylor Certification). This inexcusable delay, especially when the Board was specifically advised at the time of Ms. Saylor's rights and the procedure which ought to have been followed, mandates an analysis of the doctrine of laches to the undisputed facts of this matter."

"However, there is an additional salient factor which must be considered and mandates that the Doctrine be applied and the Board's tenure charges dismissed forthwith. The single incident was provoked by the actions of the superintendent (the same superintendent who is now filing the instant charges) as to the medical treatment required of Ms. Saylor's partner, Justin Feurtado, who was employed at the time by the Board as a technology engineer (See paragraph 8 of the Saylor Certification). In short, the superintendent was aware of Mr. Feurtado's 'serious health issues' and was also aware of said doctor's appointment. Clearly overstepping her boundaries and any semblance of propriety, the superintendent cancelled Mr. Feurtado's doctor's appointment, and did not even have the decency to advise him beforehand. It was when Mr. Feurtado went to the appointment that his doctor informed him that the superintendent had cancelled his appointment."

"What is relevant, at this point to our inquiry, is not the superintendent's unconscionable conduct immediately prior to the run-in from over three and a half years ago; rather it is the fact that Mr. Feurtado died on August 23, 2019 (See paragraph 6 of the Saylor Certification). Had the Board followed the

appropriate procedure and certified tenure charges against Ms. Saylor on or about June 5, 2018 (or perhaps if the Board had done even a rudimentary investigation and interviewed Mr. Feurtado at the time), then Ms. Saylor would have been able to prove all of the above by having Mr. Feurtado testify."

"To be clear, the only reason that Ms. Saylor cannot now avail herself of Mr. Feurtado's testimony, which is of tremendous relevance herein, is because the Board, despite receiving actual notice, determined to ignore the law and wait over three and a half years to first file tenure charges against Ms. Saylor."

"The law on point is both clear and supports our application herein. In Fox v. Polymer Packaging, 201 N.J. 401, 417 (2012), the New Jersey Supreme Court held that laches is an equitable doctrine that precludes relief when there is an 'unexplainable and inexcusable delay' in exercising a right, which results in prejudice to another party. Here the delay is both unexplainable and inexcusable, not only because the courts have sustained our position, but because we specifically advised the Board of the law pertaining to tenured secretaries at the time. Moreover, there is clearly prejudice to Ms. Saylor as her key witness had died in the interim. In Lavin v. Hackensack BOE, 90 N.J. 145, 152 (1982), the Court held 'The length of delay, reasons for the delay, and changing conditions of either or both parties during the delay are the most important factors that a court considers and weighs…The length of the delay alone or in conjunction with the other elements may result in laches.'"

"It is submitted the Board's actions herein mandate the application of the doctrine of laches so as to preclude it from receiving any relief by way of the

instant tenure charges. Frankly, the Lavin matter appears to directly parallel precisely what the Board has done herein. While the superintendent has remained the same all these years later, the board secretary/business administrator has changed and, most significantly, Mr. Feurtado had passed away, in the interim."

Whereas the Respondent argued that the application of the doctrine of laches to the instant case was a question for the Commissioner to resolve, she acknowledges that this motion to dismiss on the grounds of laches has been referred to the undersigned Arbitrator pursuant to N.J.S.A. 18A:6-16 as discussed above.

Second Count – Violation of NJSA 18A:6-17.1 (b)(3)

In the second count of its Motion to Dismiss the Tenure Charges, the Respondent contends that the Board has violated NJSA 18A:6-17.1(b)(3), which reads as follows:

A) It reads in pertinent part, at NJSA 18A:6-17.1(b)(3), as follows:

> *Upon referral of the case for arbitration*, the employing board of education *shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses with a complete summary of their testimony,* to the employee or the employee's representative. The employing *board shall be precluded from presenting any additional evidence* at the hearing, except for purposed of impeachment of witnesses.

6. To be clear, let's parse this section of the statute.it clearly and unequivocally mandates that the West New York board of education was *required* (after all that is the legal meaning of "shall") to provide Ms. Saylor or the undersigned, with all evidence, to:

The Respondent maintains that the above section of the statute "clearly and unequivocally mandates that the West New York Board of Education was

required (after all that is the legal meaning of 'shall') to provide Ms. Saylor or the undersigned, with all evidence, including, but not limited to:

a. All documents and electronic evidence,
b. Statements of all witnesses, and
c. A list of their witnesses with a complete summary of their testimony."

The Respondent emphasizes that it is "upon referral...for arbitration" when the "above 'evidence' and disclosures are made." Moreover, Respondent notes that the statute provides that if the employing board, "herein the West New York Board of Education, does not fulfill this clear statutory mandate the Board can present no evidence in addition to what it has disclosed pursuant to the statutory requirements. As this board has identified no witness statements, provided no statements, and proffered no list of witnesses (even without a complete summary of their testimony), there is absolutely nothing the employing board can present in its case in chief."

Inasmuch as the Board was notified by the Commissioner that the instant matter was referred to the Arbitrator on December 29, 2021, the Board should have known that "its pre-trial disclosures, mandated by the aforesaid statute, were required to be served "upon Respondent's counsel on or about that time."

In further support of its Motion to Dismiss on the ground that the Board failed to comply with NJSA 18A:6-17.1(b)(3), the Respondent alludes to the Interrogatories it propounded to the Board, by email dated January 17, 2022, specifically Question #16. It reads:

> "On what date did the board of education provide Ms. Saylor or her representative with the following:

a. All evidence, including, but not limited to, documents and electronic evidence.
b. Statements of all witnesses."

In its response to Question #16, the Board wrote for subparts (a), (b) and (c).

"The West New York Board of Education objects to this Interrogatory to the extent that it is vague, overbroad, and lacking the specificity required for an answer."

The Respondent argues that the Board's response is disingenuous "because Question 16 specifically and directly requested but one thing, the date that the board might claim it complied with the statutory pretrial disclosures. They were supposed to have been made on or about December 29, 2021, and it is submitted, rather than acknowledging its total failure to do what was required of it, it chose to prevaricate."

In addition, the Respondent relies on a recent case, specifically the decision of Arbitrator Gerard G. Restaino, dated October 13, 2021, in Atlantic City Board of Education v. John Toland, DOE DKT. No. 167-8/20. In the Toland case, Respondent filed a Motion in Limine, seeking to preclude the Board of Education from presenting any additional evidence at the hearing except for the purposes of impeachment" based on its non-compliance with N.J.S.A. 18A.6-17(b)(3).

In granting the Respondent's Motion in Limine, Arbitrator Restaino, inter alia, found:

"What is missing from the Petitioner's exhibits is a list of witnesses with a complete summary of their testimony.

***

[The Board] failed to do so and I have no recourse other than to adhere to the language of the statute. I do not have the authority

> to state that the Petitioner complied with NJSA 18A:6-17.1(b)(3) in spirit.
>
> The specifics of the Legislative intent do not grant me leave to ignore the requirements of the statute. The language in question is specific not general and must be given full force and weight."

In concluding that the statute required him to bar the testimony of undisclosed witnesses, including the Respondent, the Arbitrator wrote:

> "The specifics of the Legislative intent do not grant me leave to ignore the requirements of the statute. The language in question is specific not general and must be given its full force and weight."

"The arbitrator, in his opinion ruling on plaintiff's motion to dismiss, found that based on Board's failure to comply with such section of the statute in the manner noted above and due to the failure to authenticate the videos, that the tenure charges filed against plaintiff should be dismissed."

The Court upheld the Restaino Award pursuant to the relevant statute and concluded:

> Continuing (on Page 11) of the Court's decision,
>
> "The court finds the arbitrator's findings as to these issues as the basis of his award was based on the strict statutory language contained in the relevant statute and was based on substantial, credible evidence in the record as it is not disputed that Board failed to adhere to the cited statute and the arbitrator found the statute required such since the statute utilized "shall be precluded" from presentation at the hearing."

The Court reinforced the remedy for non-compliance imposed by the statute, namely: "The employing Board of Education shall be precluded from presenting any additional evidence at the hearing except for the purposes of impeachment."

Finally, Respondent rejects the Board's contention that "laches should not apply because the three-and-a-half-year delay in filing tenure charges is

'excusable delay.'" According to the Respondent, the letter Respondent's counsel sent to the Board on August 1, 2018 following her termination by the Board on June 5, 2018 – "prior to the commencement of any litigation – notifying the Board that Ms. Saylor was tenured and could not be terminated without the filing of tenure charges" should have sufficed. "The Board chose to ignore that letter. In doing so, the Board gambled and lost – that was a strategic choice, not an excusable delay."

With respect to its claim that the Board failed to comply with N.J.S.A. 18A:6-17.1(b)(3), which required the Board "upon referral of the case to arbitration" to produce all evidence including a list of witnesses with a complete summary of termination, the Respondent distinguishes the Board's obligations under N.J.S.A. 18A:6-17.1(b)(3) from the employee's disclosures. Contrary to the Board's position, it is only the employee who "[a]t lease 10 [business] days prior to the hearing...shall provide all evidence upon which he will rely including but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative."

In finding that the Board misconstrued the statute as well as the Doctrine of Laches, the Respondent reiterates that its Motions to Dismiss the tenure charges against Ms. Saylor should be granted on both procedural grounds.

Board Position

For its part, the Board maintains that "the Doctrine of Laches does not apply to the instant tenure charges" because "the Board's decision to now file

said charges can, in no way, constitute an 'unexplainable and inexcusable delay in exercising a right, which results in prejudice to another party.'" The Board recalls that "[before the institution of the present tenure charges, both Respondent and the Board were involved in litigation regarding the nature of Respondent's employment within the District; whether Respondent was a tenured employee and therefore, whether the Board had the right to terminate Respondent without bringing tenure charges against her."

In support of its contention that the Doctrine of Laches is inapplicable in the instant case, the Board provided the following chronology of events:

"On June 5, 2018, Respondent was terminated from the District. See Exhibit A. On August 23, 2018, Respondent appealed her termination from the District at the OAL level. See Exhibit D. The Administrative Law Judge, Gail Cookson, issued a decision on June 8, 2019, finding that Respondent did not have tenure, thereby affirming the propriety of the Board's decision to terminate Respondent without filing tenure charges. See Exhibit D. Respondent appealed the OAL decision to the Commissioner of Education which, once again, affirmed the Board's termination of Respondent's employment without tenure charges on September 26, 2019. See Exhibit E. Respondent subsequently appealed the Commissioner of Education's decision to the Appellate Division. See Exhibit F. On May 12, 2021, the Appellate Division issued a decision overturning Judge Cookson's decision at the OAL level and the subsequent adoption of said decision by the Commissioner of Education. See Exhibit F. On June 1, 2021, the Board filed a petition for certification to the New Jersey Supreme Court,

Respondent's termination on June 5, 2018 and the filing of tenure charges on December 16, 2021 should not be dispositive of the instant case.

The Board further maintains that "Respondent has not demonstrated that she had incurred prejudice as the result of the Board's filing tenure charges." Unlike the plaintiffs in Knorr who were harmed in "undertaking significant costs associated with discovery seeing as defendants could have brought a motion to dismiss fourteen months prior...," the present tenure charges could have only been filed once the underlying issue of Respondent's employment and the existence of her tenure were resolved.

In response to Respondent's claim that she has been prejudiced by the Board's failure to conduct an investigation or file tenure charges in 2018, specifically her inability to call Mr. Feurtado, her partner, as witness, the Board argues that "[c]onsidering the litigation undertaken in the past three years, Respondent had the ability to submit a signed certification of Mr. Feurtado or call Mr. Feurtado as a witness and have his testimony on the record. Respondent did neither (See Exhibit F at 3-4 and Exhibit L-OAL Transcript with Witness List 05/20/2019) and is now attempting to characterize this failure to call Mr. Feurtado as a relevant witness, as prejudice being the current tenure charges. However, Respondent's tenuous analysis does not address the crux of the prejudice requirement. The inability of Mr. Feurtado to now testify in a tenure hearing is not an effect of the Board's filing of tenure charges at this juncture, after the completion of the accompanying litigation. Finally, any attempt to characterize Respondent's financial status as prejudice for purposes of laches is

irrelevant and immaterial. Respondent's salary in back payments for the past three years was only warranted upon the outcome of the accompanying litigation leading to the filing of the present tenure charges against Respondent."

It was the decision of the Appellate Division and subsequent denial of the Board's petition at the Supreme Court level that necessitated the Board's resort to its "only remaining recourse in relieving itself of Respondent's employment – bringing the present tenure charges." In its decision, the Supreme Court wrote:

> [Respondent] was thus entitled to face tenure charges at the tenure hearing. N.J.S.A. 18A:6-10
> Reversed and remanded for proceedings consistent with this opinion.

Finally, on this point, the Board contends that the Respondent's laches argument could only have meant "if he had waited three years after the Supreme Court's denial of certification to file the present charges and failed to take any other recourse..."

In response to the Respondent's second ground of its Motion to Dismiss, namely non-compliance with N.J.S.A. 18A:6-17.1(b)(3), the Board states that it "has not failed to comply with N.J.S.A. 18A:6-17.1 as no hearing has been scheduled by Arbitrator Simmelkjaer, which would trigger the time indicated by statute to introduce all evidence."

After citing N.J.S.A. 18A:6-16(b)(3), the Board argues that "Respondent's interpretation of the statute governing arbitration is patently false." Since the undersigned Arbitrator "has not yet set a hearing date for these charges (See Exhibit M – Hearing Schedule from Arbitrator Simmelkjaer) all the evidence the Board plans to present during a tenure hearing on the charges, including

Superintendent Herrera's summary of testimony, is therefore, not precluded by statute."

Whereas the Board acknowledges that Arbitrator Restaino's decision in the Toland case "to dismiss the tenure charges and not allow the Petitioner to present any additional evidence is based on a strict reading of the statute," it maintains that even if a "similar, strict interpretation were to be applied in this case, the matter could not be dismissed summarily because no hearing date has been scheduled. Therefore, it cannot be said that the Board has violated the relevant statute warranting dismissal of the instant tenure charges."

The Board has focused on language in the Toland Award which it construes as requiring the entirety of its evidence to be submitted within 10 days of a scheduled hearing as follows:

> Respondent's motion to dismiss the charges is granted on the basis of the District's substantial and unexplained failure to meet the timeliness mandate in N.J.S.A. 18A:6-17.1(b)(3)...Hearings in the matter at bar are scheduled to start on Monday, November 30, 2020 and continue to December 4, 2020...Part of due process is compliance with a specified time frame. In this matter, the Petitioner was required to submit its witness list and summary of their testimony no later than November 20, 20[20]. They failed to do so and I have no recourse other than to adhere to the language of the statute. I do not have the authority to state that Petitioner complied with N.J.S.A. 18A:6-17.1(b)(3) in spirit. (*Id.* 5-6).

In describing the legislative intent of the statute is to allow Respondent enough time to set forth defenses to the charges against them (See Toland at 4-5), the Board contends that absent a scheduled tenure hearing date "Respondent has yet to establish the Board has failed to comply with the statutory requirements set forth in N.J.S.A. 18A:6-17(b)(3)." It also notes that

"Respondent makes its argument notwithstanding the fact that a full evidentiary hearing was conducted before the OAL on 05/20/2019, during which, Superintendent Herrera testified at length and cross-examined by Respondent's counsel."

In addition to its position that "the Respondent has failed to demonstrate how the present charges must be dismissed as a matter of law, the Board asserts that "the version of events which led to the filing of the present tenure charges differ between the parties and can only be resolved in an evidentiary hearing."

The Board reiterates its" Counterstatement of Facts" wherein Superintendent Herrera's recollection of her interaction with Respondent on June 5, 2018 is set forth, specifically the Respondent's alleged "use of inappropriate, threatening and vulgar language towards Superintendent Herrera, her supervisor, evincing insubordination." According to the Board, "Respondent's actions exceeded far more than an aggressive tone" and undermined her "position of confidential secretary which is one of trust...Respondent's conduct, therefore, warrants termination not only on the basis of insubordination and conduct unbecoming a public employee, but because Respondent's actions threatened the confidential nature of her employment relationship with Superintendent Herrera."

"Further, Respondent's certification that her partner, Mr. Feurtado, was directly involved in the incident in question, bears direct contradiction to the tenure charges sworn to by Superintendent Herrera as said tenure charges

address only Respondent's actions and behavior on the date in question. See Exhibit A. The contradictory nature of the issues involved in this matter warrant an evidentiary hearing."

DISCUSSION

Considering the positions of the parties in their entirety, the Arbitrator finds that the Respondent's Motion to dismiss should be granted based on the Board's non-compliance with N.J.S.A. 18A:6-17.1(b)(3). Although the Arbitrator is not persuaded that the Respondent has established that the Doctrine of Laches is applicable in the instant case, he is persuaded that the Board, "upon referral of the case to arbitration," failed to provide Respondent or Respondent's counsel with "all evidence including, but not limited to documents, electronic evidence, statements of witnesses with a complete summary of their testimony..."

I. Motion to Dismiss – Doctrine of Laches

The Respondent's Motion to Dismiss based on laches is largely predicated on the three- and one-half-year delay which preceded the Board's filing of the tenure charges on December 16, 2021. In filing the tenure charges 3-1/2 years after the June 5, 2018 incident, which gave rise to the charges, the Board purportedly engaged in an "unexplainable and inexcusable delay" which prejudiced the Respondent. According to the Respondent, the delay resulted in the unavailability of a key witness in Ms. Saylor's defense, namely, her partner, Mr. Feurtado, who died on August 29, 2019. As the Respondent puts it, "[h]ad the Board followed the appropriate procedure and certified tenure charges against Ms. Saylor on or about June 5, 2018 (or perhaps if the board had done

even a rudimentary investigation at the time) then Ms. Saylor would have been able to prove all of the above by having Mr. Feurtado testify."

Additionally, Respondent contends that the "inexcusable and unexplainable delay" could have been avoided had the Board adhered to the specific advice provided by Respondent's counsel pertaining to tenured secretaries at the time. Rather than "knowingly" ignore the Respondent's tenured status in terminating her employment, which caused the Respondent to appeal her termination from the District at the Office of Administrative Law ("OAL") and later appeal the OAL decision to the Commissioner of Education, and subsequently appeal the decision of the Commissioner of Education to the Appellate Division, the Board had an opportunity to avoid the inexcusable delay. Ultimately, the Appellate Division overturned the decision of Judge Cookson at the OAL level and subsequent adoption of said decision by the Commissioner of Education.

In the Arbitrator's opinion, the delay caused by the parties' litigation of Ms. Saylor's tenure status cannot be solely attributed to the Board. Given its belief at the time (circa June 2018) that the Respondent did not have tenure, as the Board correctly deserves, "there would have been no reason for the Board to bring tenure charges against Respondent in 2018." Evidence that the Board acted in good faith in not bringing tenure charges in 2018 is confirmed by the OAL decision on July 8, 2019, subsequently adopted by the Commissioner of Education on September 20, 2019, "affirming the propriety of the Respondent's termination and the non-existence of Respondent's tenure within the District."

Clearly, if the status of Respondent's tenure was self-evident, as the Respondent contends, the extensive litigation on the subject which ensued would have been unnecessary. However, as OAL Judge Cookson found that for tenure purposes Respondent's position as Secretary to the Business Department was inconsistent and not contguous with her position as Administrative Assistant to the Assistant Superintendent and "confidential employee," concluding that her employment in the latter position was "without union or statutory rights," the interpretation of Respondent's tenure rights was debatable.

In addition to the ambiguity concerning Respondent's tenure status, it is undisputed that Respondent was a party to the OAL decision having appealed the Board's decision to terminate her employment on June 5, 2018, the appeal of the OAL decision to the Commissioner of Education, and the appeal of the Commissioner of Education's decision to the Appellate Division. Moreover, as the Board correctly notes, once the Appellate Division overturned the OAL's decision on May 12, 2021, "the Respondent was, nevertheless a party to the Board's petition for certification to the Supreme Court and the Supreme Court's subsequent denial on November 16, 2021."

Given the foregoing sequence of litigation, Respondent cannot reasonably assert that it was not mutually responsible for the three-year delay. Since the Board filed the instant tenure charges one month after the Supreme Court's denial of the Board's certification on December 16, 2021, the Arbitrator maintains that it acted timely and in good faith. As a result, the three-year delay can be attributed to both parties. The Arbitrator concurs with the Board in its analysis

that laches would be only appropriate if the Board had waited three years after the Supreme Court's denial of certification to file the tenure charges.

The Arbitrator is further persuaded that the Respondent has not been prejudiced by the Board's delay in filing tenure charges. Insofar as the unavailability of Mr. Feurtado's testimony is concerned, given the three-year delay to which the Respondent was a party, the Respondent was not precluded from obtaining a signed certification from Mr. Feurtado or conducting a de bene esse deposition.

Assuming arguendo that the Board was solely responsible for the delay, the Respondent here, unlike the plaintiffs in Knorr, supra, who incurred significant discovery costs, has not shown evidence of prejudice.

Finally, Respondent adduced no evidence that she detrimentally relied on the Board's representation that it had abandoned its intent to terminate Respondent's employment, as the parties were mutually engaged in litigation since 2019.

II. Non-Compliance with N.J.S.A. 18A:6-17.1(b)(3)

In the Arbitrator's opinion, the Board has misconstrued N.J.S.A. 18A:6-17.1(b)(3) to the extent it has conflated the obligations of the employing board with those of the employee. On the one hand, N.J.S.A. 18A:6-17.1(b)(3) clearly states that "[u]pon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses with a complete summary of their testimony to the employee or the employee's representative. The employing

board shall be precluded from presenting any additional evidence at the hearing, except for the purpose of impeachment of witnesses."

On the other hand, also set forth in N.J.S.A. 18A:6-17.1(b)(3), it states: "At least 10 [business] days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses."

These are two clearly distinct provisions in the statute. Whereas the obligations of the employing board are triggered "upon referral of the case for arbitration," the obligations of the employee emerge "at least 10 [business] days prior to the hearing." The Board has undoubtedly conflated its obligations as the "employing board" with those of the "employee" and exchanged or reversed its obligations under N.J.S.A. 18A:6-17.1(b)(3).

As the Respondent correctly notes, the Board has not fulfilled its clear statutory mandate because "upon referral of Ms. Saylor's tenure charges to the Arbitrator on December 29, 2021, it did not serve its pre-trial disclosures "upon Respondent's counsel on or about that time." Since there is no evidence in the record that on or about December 29, 2021, the Board provided witness statements, a list of witnesses, or a complete summary of the witnesses' testimony, the Arbitrator is compelled to conclude that the Board failed to comply with N.J.S.A. 18A:6-17.1(b)(3).

For its part, the Board has erroneously argued that "since the undersigned Arbitrator has not yet set a hearing date for these charges (See Exhibit M – Hearing Schedule from Arbitrator Simmelkjaer) all the evidence the Board plans to present during a hearing on the charges, including Superintendent Herrera's summary of testimony, is therefore, not precluded by statute."

In the Arbitrator's opinion, the West New York Board of Education has undoubtedly and unequivocally misconstrued the statute. The 10 [business] days prior to the hearing's evidentiary limitation strictly applies to the employee and not the employing board. The scheduling of the hearing date(s) by the Arbitrator will impose a 10 [business] day limitation on Respondent in terms of her ability to provide the evidence upon which she will rely. It will have no bearing on the Board because its obligations to produce the evidence upon which it will rely will have expired around December 29, 2021.

This matter has been recently addressed in the Toland Award, supra, in which Arbitrator Restaino granted a Motion in Limine to preclude the Board of Education from presenting any additional evidence based on its non-compliance with N.J.S.A. 18A:6-17.1(b)(3). In Toland, as in the instant case, the Board failed to present a list of witnesses or a complete summary of their testimony. In finding that he had "no recourse other than to adhere to the language of the statute, "Arbitrator Restaino was compelled to "bar the testimony of undisclosed witnesses, including the Respondent." He continued: "The language in question is specific not general and must be given its full force and effect."

In sustaining Restaino's Award, the Court found that "the arbitrator's findings as to these issues as the basis of his award was based on strict statutory language contained in the relevant statute and was based on substantial credible evidence in the record as it is not disputed that the Board failed to adhere to the cited statute..."

The Board's interpretation of the Toland Award conflates disparate sections in the Award language. The Arbitrator first notes that "hearings in the matter at bar are scheduled to start Monday, November 30, 2020." Later, in his decision, he writes "What is missing from Petitioner's (Board's) Exhibits is a list of witnesses with a complete summary of their testimony. Contrast that omission with the Respondent's Statement of Evidence dated November 18, 2020" (i.e., at least 10 days before the commencement of the hearing). "Respondent complied with all requirements of N.J.S.A. 18A:6-17.1(b)(3)."

Later, the Board quotes an excerpt from the opinion of Arbitrator Denenberg in DOE 267-9/14, Marie Ebert vs. State-Operated School District, City of Newark which states: "the Respondent's motion to dismiss the charges is granted on the basis of the District's substantial and unexplained failure to meet the timeliness mandate in 18A:6-17.1(b)(3)." "The arbitrator determined that the 'dismissal is without prejudice to the District's right to file the charges again.'"

Next, Arbitrator Restaino finds that "the Petitioner's response to the Motion in Limine falls short of full compliance with N.J.S.A. 18A:6-17.1(b)(3) due to a lack of a witness list with a complete summary of their testimony."

In a subsequent paragraph, which appears to contain two typos, Arbitrator Restaino writes:

> The purpose of N.J.S.A. 18A:6-17.1(b)(3) is to guarantee that a tenure teacher is guaranteed due process when tenure charges are filed against that individual. Part of due process is compliance with a specified timeframe. In this matter, the **Petitioner** was required to submit its witness list and summary of their testimony no later than November 20, **2002**. They failed to do so and I have no recourse other than to adhere to the language of the statute. I do not have the authority to state that the Petitioner complied with N.J.S.A. 18A:6-17.1(b)(3) in spirit.

Where it states "Petitioner (Board) was required to submit its witness list and summary of their testimony no later than November 20, 2002," Arbitrator Restaino apparently meant to write "Respondent was required to submit its witness list and summary of their testimony no later than November 20, 2020."

In the last paragraph, Arbitrator Restaino concludes: "The Respondent's Motion to bar the testimony of previously undisclosed witnesses is granted."

As noted in the Restaino Award, the consequences of non-compliance with N.J.S.A. 18A:6-17.1(b)(3) are mandatory. The West New York Board of Education, as per N.J.S.A. 18A:6-17.1(b)(3), "shall be precluded from presenting any additional evidence at the hearing except for the purposes of impeachment."

Given the failure of the Board to produce any of the disclosures required of it by N.J.S.A. 18A:6-17.1(b)(3) and as a result the Board is statutorily prohibited from calling any witnesses and/or producing any evidence on its case-in-chief as it has disclosed no witnesses nor identified any evidence. Since the remedy for non-compliance with N.J.S.A. 18A:6-17.1(b)(3) is statutorily

mandated, the Board, as the charging party, will not be able to meet its burden of proof by a preponderance of the credible evidence.

Accordingly, the Arbitrator grants Respondent's Motion to Dismiss the tenure charges against Ms. Crystal Saylor, DKT No. 236-12/21, without prejudice.

Robert T. Simmelkjaer

April 12, 2022 Robert T. Simmelkjaer

STATE OF NEW JERSEY}
COUNTY OF BERGEN}

On the 12th day of April 2022 before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument which is his Award.

April 12, 2022

_____
Notary Public

74-22

OAL Dkt. No. EDU 08894-21
Agency Dkt. No. 182-9/21

New Jersey Commissioner of Education

Final Decision

Brianna Butts,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

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

Petitioner in this matter was employed by the Board and was released from employment after a 90-day working test period. Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Commissioner lacks jurisdiction to adjudicate petitioner's claims, as claims related to working test periods fall under the jurisdiction of the Civil Service Commission.

The Commissioner notes that the ALJ refers in the Initial Decision to a motion to dismiss filed by the Department of Education. The Department of Education is not a party to this matter and the motion to dismiss was filed by the Newark Board of Education, a separate entity. Nonetheless, this correction does not alter the Commissioner's analysis or conclusion.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 14, 2022
Date of Mailing: April 14, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT.NO. EDU 08894-21
AGENCY DKT. NO. 182-9/21

BRIANNA BUTTS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK,

Respondent.

Samuel Wenocur, Esq. for petitioners (Oxfeld Cohen, attorneys)

Bernard Mercado, Esq., for respondent, (Newark City Board of Education)

Record Closed: February 24, 2022 Decided: March 2, 2022

BEFORE **KIMBERLY A. MOSS**, ALJ:

Appellant Brianna Butts appeals the determination by respondent Board of Education of the City of Newark (Newark) releasing her from employment following a ninety-day working test period. The matter was transmitted to the Office of Administrative Law on October 27, 2021, for determination as a contested case. Respondent filed a motion for summary decision on October 26, 2021. Petitioner filed opposition on February

8, 2022. Respondent replied to the opposition on February 24, 2022, on which date the record closed.

FACTUAL DISCUSSION

Petitioner was a civil service employee hired by Newark as a custodial worker under a ninety-day working test period on June 9, 2021. She worked at the South Seventeen Street school during the working test period. Petitioner's performance was rated unsatisfactory during the ninety-day working test period. Petitioner was issued a letter of termination at the end of her ninety-day test period on September 9, 2021. The letter stated that petitioner had a right to appeal to the New Jersey Civil Service Commission in writing within twenty days of receipt of the letter. Petitioner filed an appeal with New Jersey Department of Education on or about September 29, 2021. Petitioner filed the appeal as pro se on September 17, 2021. A notice of appearance by Lorenzo Hall, President of Local 617 on behalf of petitioner was signed by petitioner on September 17, 2021. Hall took part in a telephone conference at OAL on petitioner's behalf.

LEGAL ARGUMENT AND CONCLUSION

At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason. N.J.A.C. 6A:3-1.10.

The New Jersey Commission of Education has jurisdiction only over controversies and disputes that arise under the school laws. The New Jersey Civil Service Commission hears disputes that arise under civil service law involving its employees. The Civil Service commission among other things renders final decisions in appeals concerning employees in there working test period including termination at the end of the working test period for unsatisfactory performance. N.J.S.A. 11A:2-6(a)(4).

Petitioner was a civil service employee who was sent a termination notice on September 9, 2021, which specifically stated that to appeal the decision she would have to file an appeal with the Civil Service Commission within twenty days. She filed the appeal within twenty days, but with the Department of Education, not the Civil Service Commission. Petitioner states that she filed the petition on September 17, 2021, as pro-se. However, a notice of representation was also filed on her behalf by Lorenzo Hall, president of Local 617 on September 17, 2021. Petitioner was represented by the union before the expiration of the twenty-day period.

R.1:13-4(a)On Motion. Subject to the right to be prosecuted by indictment, if any court is without jurisdiction of the subject matter of an action or issue therein or if there has been an inability to serve a party without whom the action cannot proceed as provided by R. 4:28-1, it shall, on motion or on its own initiative, order the action, with the record and all papers on file, transferred to the proper court, or administrative agency, if any, in the State. The action shall then be proceeded upon as if it had been originally commenced in that court or agency.

In Driggins v. Board of Education of the City of Newark, 93 N.J.A.R. 2d (EDU) 371 the Commissioner of Education remanded the case to OAL to determine if the matter should be dismissed for failure to comply with the ninety day rule. An initial decision had previously been rendered on the merits. Driggins had requested back pay and benefits because of being acquitted of criminal charges. Newark stated that he was precluded from back pay due to the circumstances regarding his retirement. Driggins filed a complaint in Middlesex County Superior Court seeking damages because of not receiving back pay. Middlesex County Superior Court transferred the matter to Essex County Superior Court. At that time the Commissioner of Education requested that the matter be transfer to the Commissioner of Education.

In this matter, petitioner filed a petition with the wrong agency not the wrong court. In addition, in the Driggins case the Commissioner of Education requested that the matter be transferred from Superior Court to the Commission of Education. It then remanded

the matter. In this case the Department of Education elected to file a motion to dismiss the petitioner. The Department of Education does not handle civil services matters. Petitioner is requesting that the Department of Education to transfer the matter to Civil Service Commission. The Department of Education has decided to file a motion to dismiss. This is distinguished from Driggins where the Commissioner of Education requested that the matter be transferred from Superior Court to the Commissioner of Education.

Petitioner received a letter from Newark stating that if she wanted to appeal her termination, the appeal had to be filed with the Civil Service Commission within twenty days. Petitioner filed her appeal within twenty days but with the Department of Education.

Petitioner argued that she was pro se when she filed the petition. Petitioner had a representative Lorenzo Hall, President of Local 617 file an appearance on her behalf on on or about September 17, 2021, which is the same day she filed the petition. She had representation with the union within twenty days of the notice of termination.

I **CONCLUDE** that the Petitioner filed her petition with the wrong agency. The Department of Education Decided to file a Motion to Dismiss in this matter and not transfer it to the Civil Service Commission.

I further **CONCLUDE** that petitioner was represented by the president of Local 617 on September 17, 2021, within twenty days of the date she received the termination notice.

ORDER

It is therefore **ORDERED** that the respondent's Motion to Dismiss the petition be and hereby is **GRANTED**.

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

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

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

March 2, 2022

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: March 2, 2022

Date Mailed to Parties: March 2, 2022

ljb

75-22E

OAL Dkt. No. EDU 01995-22
Agency Dkt. No. 48-3/22

New Jersey Commissioner of Education

Order on Emergent Relief

J.G. and S.G., on behalf of minor child, A.G.,

Petitioners,

v.

Board of Education of the Freehold Regional School District, Monmouth 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's finding that petitioners J.G. and S.G. have not demonstrated an entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Nevertheless, the Commissioner disagrees with the ALJ's determination that the petitioners failed to establish a likelihood of success on the underlying claim.

In this matter, petitioners are seeking an Order directing the Freehold Regional Board of Education (Board) to allow A.G. to return to Colts Neck High School following a two-day suspension that was issued by the Board on February 10, 2022. Following an investigation, the Board determined that A.G. had made multiple false claims, including that she experienced

numerous health conditions; that she had been raped and/or sexually assaulted by a teacher; and that she was friends with a convict. In addition to the two-day suspension, the Board informed petitioners that A.G. would not be permitted to return to school until she had been cleared by a licensed medical professional pursuant to District Policy 5350 – Student Suicide Prevention (Policy 5350). The Board found that A.G.'s outrageous conduct raised significant concerns of self-destructive behavior based on the warning signs listed in Policy 5350, including signs of a tendency to become more impulsive or aggressive than usual; a preoccupation with nonexistent physical ills; and sudden changes in personality and anxiety.

Following the two-day suspension, A.G. began receiving home instruction and continues to remain on home instruction which involves a combination of synchronous and asynchronous instruction. The petitioners have since provided the Board with letters from three medical professionals who all state that A.G. is cleared to return to school and that she does not pose a danger to herself or others. After meeting with A.G. and her parents, however, the Board's mental health professional has advised that A.G. may benefit from participating in an outpatient program and recommended that A.G. continue to remain on home instruction to allow her to focus on the recommended treatment. The petitioners have met with the Board's Child Study Team and additional evaluations of A.G. are currently being conducted.

In accordance with *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). This standard requires petitioners to demonstrate that: A.G. will be irreparably harmed if the requested relief is not granted; the legal right underlying the petitioners' claim is settled; there is a substantial likelihood

of prevailing on the merits of the claim; and, in balancing the interests of the parties, the greater harm will fall upon A.G. if the relief is not granted.

In evaluating the petitioners' likelihood of prevailing on the merits of the underlying claim, it is necessary to evaluate the disciplinary regulations as well as Policy 5650. The regulations clearly state that "[a]t the completion of a short-term suspension, the district board of education shall return a general education student to the general education program from which he or she is suspended" *N.J.A.C.* 6A:16-7.2(a)5.ii. A.G. was issued a two-day suspension on February 10, 2022, following the Board's investigation, and still has not been permitted to return to school. The Commissioner is mindful that under the regulatory provisions governing long-term suspensions, boards of education have the discretion to continue the suspension based on certain criteria, including "the results of relevant testing, assessments, or the evaluation of the student." *N.J.A.C.* 6A:16-7.3(c). That discretion, however, is not applicable to short-term suspensions and the Board cannot circumvent the regulatory provisions by converting the short-term suspension into a de facto long-term suspension. Therefore, the Board does not have the authority to preclude A.G. from returning to the general education program based on disciplinary reasons.

Regarding Policy 5350, the Board maintains that it is necessary for A.G. to continue home instruction under the applicable policy provisions based on its obligation to ensure the health and safety of all of its students, and to get a better understanding of the support that A.G. may need. Pursuant to Policy 5350, in certain circumstances when warning signs exist that suggest a student may be contemplating suicide, the student will be required to obtain

medical or psychiatric services before the student may return to school. Policy 5350 further provides:

> The parent(s) will be required to submit to the Superintendent a written medical clearance from a licensed medical professional selected by the parent(s) and acceptable to the Superintendent, indicating the student has received medical services, does not present a risk to himself/herself or others, and is cleared to return to school. The Superintendent will not act unreasonably in withholding approval of the medical professional selected by the parent(s). The written medical clearance may be reviewed by a Board of Education healthcare professional before the student is permitted to return to school.

Certainly, based on the nature of the warning signs presented by A.G., the Board's initial decision requiring A.G. to receive medical services, and to obtain medical clearance from a licensed medial professional was not arbitrary capricious or unreasonable.

After the Board's directive requiring A.G. to seek medical treatment, the petitioners provided the Board with a letter, dated February 23, 2022, from a Licensed Clinical Social Worker clearing A.G. to return to the school stating. The letter also stated that A.G. has received medical treatment and that she does not present with any symptoms that would pose a danger to herself or others.[1] Despite the medical clearance letter, the Board has not permitted A.G. to return to the general education program based on the recommendation of its medical professional that A.G. would benefit from continuing home instruction. Although Policy 5350 indicates that the Board's medical professional may review the medical clearance before the student is permitted to return to school, there is nothing in Policy 5350 authorizing the Board's medical professional to override the medical clearance provided by the licensed medical professional selected by the parents. Moreover, there is no relevant statutory or regulatory provision that would enable a board of education to preclude a student indefinitely

[1] Two additional medical professionals also provided letters indicating that A.G. should return to in-school learning.

from the general education program when medical clearance has been obtained and there is no pending disciplinary action. Therefore, the Commissioner finds that the petitioners have met their burden of establishing a likelihood of success on the merits to the extent necessary under *Crowe, supra.*[2]

The Commissioner is in accord with the ALJ's determination concerning the remaining *Crowe* factors, namely: that the petitioners' legal right is settled, but that the petitioners did not demonstrate that the harm A.G. would experience is greater than that of the Board when balancing the equities; and that the petitioners have not demonstrated that A.G. will suffer irreparable harm if she is not immediately returned to in-school learning. It is important to note that the petitioners may be able to establish that A.G. will be irreparably harmed, and that greater harm will fall upon A.G. in the future, if the appropriate measures are not taken by the Board to streamline the current evaluation process.

Accordingly, the petitioners' request for emergent relief is denied. This case shall continue at the OAL on an expedited basis with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 14, 2022
Date of Mailing: April 14, 2022

[2] Although the petitioners satisfied the *Crowe* factor involving the likelihood of success on the underlying claim, the Commissioner has not made a final determination on the merits of the underlying claim at this stage of the proceedings.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 01995-22
AGENCY DKT. NO. 48-3/22

J.G. & S.G. ON BEHALF OF MINOR CHILD, A.G.,

Petitioners,

v.

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

Respondent.

Howard S. Mendelson, Esq., for petitioner (Davis & Mendelson, LLC, attorneys)

Andrew W. Li, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: March 21, 2022 Decided: March 22, 2022

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Petitioners filed a petition for due process on behalf of their child, A.G., seeking, among other things, an order directing the Freehold Regional Board of Education (Board or respondent) to allow A.G. to return to school following A.G.'s suspension. In the current proceeding, petitioners seek an order of emergent relief granting this sought after relief immediately pending the due process proceeding.

PROCEDURAL HISTORY

On March 15, 2022, the petition was filed with the New Jersey Department of Education, along with a request for emergent relief. On March 16, 2022, the emergent matter and request for due process were transmitted to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Oral arguments for the emergent relief request were heard on March 21, 2022.

FACTUAL DISCUSSION

A.G. is an eleventh-grade student attending Colts Neck High School, located in the Freehold Regional School District. A.G. appears to be a bright student involved in many extracurricular activities at her school and has no prior history of disciplinary infractions.

On February 8, 2022, a student reported to school staff that A.G. had accused a third student of raping and/or sexually assaulting A.G. Consequently, A.G. was called to meet with several members of the school's administration regarding the allegation.

Due to the nature of the allegation involved, the Board conducted an investigation. Through the investigation it appeared that A.G. had been making multiple false claims including that she experienced numerous health conditions (e.g., seizures, cancer and chemotherapy, brain bleeds, a gunshot wound, and open-heart surgery), that she had been raped and/or sexually assaulted by a student and a teacher, that a teacher and

student were in a sexual relationship, and that she was friends with an escaped convict. (See generally Respondent's Ex. D.)

As a result of the investigation the Board determined that A.G.'s outrageous conduct raised significant concerns of self-destructive behavior based on the warning signs listed in District Policy 5350. Namely, warnings signs of a tendency to become more impulsive or aggressive than usual; a preoccupation with nonexistent physical ills; sudden changes in personality; and anxiety. (See Respondent's Ex. C.)

On February 10, 2022, school staff met with A.G. and her parents, S.G. and J.G., where petitioners were advised that because of the results of the Board's investigation A.G. would be suspended for two days (i.e., February 11 and February 14, 2022). The Board also advised petitioners that A.G. would not be permitted to return to school until she had been cleared by a licensed medical professional, in accordance with District Policy 5350. The relevant portion of the policy states that this medical professional may be selected by the parents, but must be approved by the superintendent, and the clearance letter may be reviewed by the Board's healthcare professional before the student is permitted to return to school. The policy is intended to address the Board's recognition of the increasing severity of depression and self-destructive behaviors among students, and that such students cannot benefit fully from their education program and may pose a threat to themselves or others. (Respondent's Ex. A.)

A.G. was given home instruction beginning on February 16, 2022. A.G.'s homeschooling has been a combination of both remote synchronous and asynchronous instructions. The Board stated during oral arguments that only A.G.'s physics class is provided asynchronously. There does appear to be a dispute between the parties on the number of instructional hours provided to A.G. and the comparative quality of these instructions.

On February 23, 2022, petitioners submitted to the Board a letter from Wendy Huntley (Huntley), a licensed clinical social worker (LCSW), who has been seeing A.G.

for bi-monthly psychotherapy sessions since October 11, 2021. Huntley's letter stated that A.G. presented as stable and that A.G. self-reported no history or current expression of self-harm behaviors. Huntley opined in her letter that A.G. is capable of functioning in school and does not present symptoms which would pose a danger to herself or others. (Petitioner's Ex. C.)

On February 25, 2022, petitioners submitted a letter from A.G.'s pediatrician, Dr. Sonal Shah (Dr. Shah). (Petitioner's Ex. D.) Dr. Shah opined in his letter that it would be in A.G.'s best interest to return to school, and that she has denied any intent to harm herself or others. Ibid.

On March 8, 2022, petitioners submitted a letter by Dr. Steven Dyckman, a licensed psychiatrist, which stated in its entirety: "[A.G.] was evaluated in this office today and is not a danger to herself or others. Therefore, she is psychiatrically cleared to return to school as soon as possible. If you have any questions or concerns, please contact this office." (Petitioner's Ex. F.)

The Board's mental health professional, Dr. Loren B. Amsell (Dr. Amsell), met with A.G. and petitioners on March 9, 2022, to evaluate whether A.G. should be cleared to return to school. After receiving documents from the Board which contained screenshots of A.G.'s prior communications and claims to other students Dr. Amsell requested a second meeting to evaluate A.G. The group met again on March 17, 2022.

On March 18, 2022, the petitioners met with the Board's Child Study Team to discuss evaluating A.G. to determine if she was eligible for special education or other related services.

Also on March 18, 2022, Dr. Amsell wrote to the Board providing an informal recommendation that A.G. may have a Cluster B personality disorder, which Dr. Amsell noted is characterized by dramatic, overly emotional, and unpredictable thinking or erratic behavior, and that individuals with this personality disorder may exhibit harmful coping

strategies. She advised that A.G. may benefit from participating in an outpatient program and opined that A.G. should continue to remain on homeschooling, in part to allow A.G. to participate and focus on the recommended treatment. Dr. Amsell also noted that the letters provided by petitioners' medical professionals did not reflect a formal assessment of A.G.'s psychological functioning nor a knowledge of the text messages and statements Dr. Amsell reviewed.

Colts Neck High School was scheduled to administer the New Jersey Graduation Proficiency Assessment (NJGPA), a recent prerequisite for graduation, during the week of March 14, 2022. The school's scheduled make-up dates are taking place during the week of March 21, 2022. The New Jersey Department of Education also provides for students to retake the NJGPA in the summer and fall, as well as submitting a portfolio appeal. A.G. is also scheduled to take the SAT on May 7, 2022.

The petitioners agreed that for purposes of this emergent request, the only relief they request is A.G.'s immediate return to attending school in-person.

LEGAL DISCUSSION

In an application for emergent relief the standards which must be met by the moving party 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 petitioners must satisfy all four prongs of the Crowe test.

Irreparable Harm

"Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, the standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury, or the right affected. Crowe, 90 N.J. at 133. For example, in Crowe the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded only after a distant hearing. Ibid. The threshold standard for irreparable harm in the area of education is showing that once something is lost, it cannot be regained. M.L. o/b/o S.L. v. BOE of the Township of Ewing, OAL Dkt. No. EDU 04949-09, Emergent Relief (June 15, 2009).

One of the reasons cited for petitioners' request is due to the alleged failure by the Board to provide A.G. with adequate home instruction since her suspension. Claiming that home instruction did not begin until February 16, 2022, that the school has not yet provided petitioners with a written plan for A.G.'s home instruction, and that A.G. has received at most eight hours per week of educational instruction during her suspension. In response the Board has stated that A.G. has been provided, and is participating in, a combination of "live" (i.e., synchronous) and asynchronous remote home instruction. However, the Board has not disputed that the petitioners have not received a written plan for A.G.'s continued instructions, nor whether the instruction provided is consistent with the education A.G. would have received if she was allowed to attend school in-person.

Petitioners also seek A.G.'s return to school so that she may take the NJGPA, and eventually the SAT. The dates set for this assessment were during the week of March 14, 2022, with make-up dates set for the week of March 21, 2022. The Board and the New Jersey Department of Education have stated that students have the option to retake

the NJGPA in the summer or fall, utilize alternative assessments, or complete a portfolio appeal. While no plan has been put forward yet on how A.G. may take the SAT, as this assessment is not scheduled until early May, there is an absence of immediacy to this potential harm which necessitates ordering such a plan be provided at this point in the proceedings.

The record does not show that A.G. will experience a substantial and immediate harm which cannot be rectified at a later date if she remains on home instruction during the pendency of this matter. While home instruction may not be optimal it is an accepted form for delivery of education services if circumstances warrant. It does not on its face constitute irreparable harm. This tribunal does expect the parties to remain diligent in monitoring A.G.'s educational progress and take reasonable steps to provide a comparable education while A.G. remains on home instruction, or to provide some form of remedial coursework to ensure A.G. is caught up with her classmates within a reasonable time of returning to school. Accordingly, I **CONCLUDE** that petitioners have not demonstrated that A.G. will suffer irreparable harm if emergent relief on this request is not granted.

Settled Legal Right

In order to grant a motion for emergent relief in advance of a plenary hearing, a judge must be satisfied that "[t]he legal right underlying petitioner's claim is settled." N.J.A.C. 6A:3-1.6(b)(2). In other words, a judge "must not grant an injunction in cases when the principal of law on which it depends is disputed, and has not been settled in this state." Stevens v. Paterson & N. R. Co., 20 N.J. Eq. 126, 132 (Ch. 1869).

Petitioners argue that the law in their case is well-settled through the State's Constitution, which provides that school districts have an obligation to provide students with a "thorough and efficient" free public-school education. New Jersey Constitution, Art. 8, § IV, ¶ 1. While this is a well-settled right, it does not require an in-person education for all students at all times. See e.g., N.J.A.C. 6A:16-7.2, -7.3, -10.1.

However, it is also well-settled that actions within a school board's authority are entitled to a presumption of validity and will not be overturned in the absence of an affirmative showing that the decision was arbitrary, capricious, or unreasonable. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). Further, the exercise of a school board's 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). See also D.K. o/b/o M.O'K. v. Belmar Borough Bd. of Educ., OAL Dkt. No. EDU 00100-00, Final Decision (May 5, 2000). 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). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M. v. Moorestown Bd. of Educ., OAL Dkt. No. EDU 02780-07, Initial Decision (February 6, 2008).

Therefore, I **CONCLUDE** that petitioners have demonstrated that the legal right underlying their claim is settled. However, the Board's similarly settled right to deference in exercising its discretionary powers also comes into play with the remaining prongs.

Likelihood of Prevailing

The third prong requires that all material facts in the matter are uncontroverted, which requires the petitioners to demonstrate that there is a reasonable probability they will prevail on the merits of the underlying claim. Crowe, 90 N.J. at 133.

In support of the particular relief sought for this emergent matter, petitioners argue that the Board acted arbitrarily and capriciously both in suspending A.G. and in continuing to refuse her re-entry to school. As previously stated, a board of education acting within

the scope of its discretionary powers, which includes disciplinary actions, is entitled to deference, and its actions will not be overturned absent an affirmative showing that the decision was arbitrary, capricious, or unreasonable even if it is later determined that the Board's decision was incorrect. Thomas, 89 N.J. Super at 332. See also Kopera, 60 N.J. Super. at 294. 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). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., OAL Dkt. No. EDU 02780-07. It is a weighty burden.

A determination on whether the Board acted in such an arbitrary, capricious, or unreasonable manner is fact specific, and based on the record as it stands it is not clear that the Board acted in such a manner. The record shows that the Board determined that A.G.'s behavior matched several indicators of suicidal or self-destructive behavior according to District policy. Whether or not it is later determined the Board made the incorrect conclusion, at this point the petitioners have not demonstrated that the Board's decision was arbitrary, capricious, or unreasonable, or otherwise done in utter disregard of the circumstances before it.

Viewed through the prism of the current emergent relief application, the legal questions presented are at best disputed as to their likelihood of success and accordingly, I **CONCLUDE** that petitioners have not sufficiently demonstrated that they have a likelihood of succeeding on the merits of the underlying claim.

Balancing the Equities

The final consideration a judge must consider is whether, when balancing the equities and hardships involved, have the petitioners demonstrated that the harm they would experience if their request is denied is greater than that which would befall the respondent. Crowe, 90 NJ at 134.

Petitioners argue that prior to her suspension A.G. was a "devoted and committed student" who was frequently on the honor roll and that being suspended has caused her trauma and distress. Her treating pediatrician's letter stated that returning to school was in A.G.'s best interest and that this was also A.G.'s fervent desire.

On the other hand, the Board cites to its ethical and legal obligation to care for the health and safety of all its students and that until the Board has a better understanding of the supports A.G. may need, it would be putting both A.G. and the other students in the school at potential risk of harm if she is returned to school too soon.

Petitioners have argued that A.G. has expressed a strong desire to return to school, claiming that the desires of the student should be one of the primary factors considered in the decision. However, the best interest of a child does not necessarily match what the child desires or believes to be in their best interest. While A.G. is unhappy about her current homeschooling situation and misses attending class with her friends and teachers, the record otherwise shows that while at home she is safe and receiving an education (even though the quality of such is in dispute). Considering the obligations of the Board and the uncertainty as to A.G.'s current mental health and needs, I **CONCLUDE** that petitioners have not demonstrated that the harm they may experience if their requested relief is denied is greater than that which may befall the respondent.

Based on the foregoing, petitioners' request for emergent relief is **DENIED**. However, it should be stated that it is the expectation of this tribunal that the parties will

continue to act with diligence in supporting A.G. and make reasonable efforts to reach a satisfactory solution as to her present educational needs.

ORDER

For the foregoing reasons, I **CONCLUDE** that petitioners are not entitled to the requested emergent relief and that the petitioners request for emergent relief is **DENIED**. The matter will now be scheduled for plenary hearing on the underlying due process petition, as the parties agreed at oral argument that the decision on emergent relief would not resolve all open issues.

Itis further **ORDERED** that on Thursday, May 5, 2022, at 4:00 pm a telephonic conference call shall be conducted between counsel for the parties and the undersigned for the purpose of determining the course and format of any further proceedings as to the remaining open issues. Official notice of the conference will be provided to counsel.

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.

March 22, 2022
DATE

ELIA A. PELIOS, ALJ

EAP/dw

76-22

OAL Dkt. No. EDU 08416-20
Agency Dkt. No. 168-8/20

New Jersey Commissioner of Education

Final Decision

John Moylan,

Petitioner,

v.

Board of Education of the Borough of Saddle River, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

Petitioner has been employed by the Board as a music teacher since 2005. Throughout that time, the Board implemented several reductions in force (RIF), and petitioner's employment fluctuated between part-time and full-time. Petitioner is currently a part-time employee teaching 60 percent of a full-time schedule, and he alleges that the Board is improperly employing a non-tenured teacher in a full-time position for which petitioner is qualified, in violation of petitioner's tenure rights. Specifically, a teacher who was assigned to teach physical education and health for 60 percent of a full time schedule was also assigned to teach Response to Intervention (RTI) – a type of basic skills course – for 40 percent of a full-time schedule, bringing that teacher's schedule to full-time. Petitioner asserts that he should have been assigned to teach the RTI courses so that he would be a full-time employee. The Administrative Law Judge (ALJ) found that petitioner was

asserting seniority rights to a position that he had never held, and therefore petitioner was not entitled to that position.[1]

In his exceptions, petitioner argues that he was subject to a RIF in April 2019 that activated his tenure and seniority rights. Petitioner argues that his tenure right does not require him to have previously provided RTI instruction, as his tenure rights encompass all the endorsements to his instructional certificate that he held at the time of the April 2019 RIF. Petitioner notes that in April 2019, he held an instructional certificate with endorsements as a Teacher of Music, Elementary School Teacher K-6, and Teacher of Supplemental Instruction: Reading and Mathematics K-8. According to petitioner, he had tenure rights to all positions within the scope of any of those endorsements, including the RTI courses, and it was improper for the Board to assign a non-tenured teacher to the RTI courses rather than petitioner.

In reply, the Board argues that the April 2019 RIF was rescinded by the Board in June 2019, such that petitioner was employed for the same number of hours for the 2019-2020 school year as he had been in 2018-2019, and therefore there was no RIF to trigger petitioner's tenure rights. The Board notes that, at the time of the previous RIF in the spring of 2017, petitioner only had a Teacher of Music endorsement, which does not entitle him to tenure rights to a position other than a music position.

Upon review, the Commissioner finds that a RIF did not occur in April 2019. While the Board voted to reduce petitioner's hours, it rescinded that vote and petitioner suffered no reduction in hours. In order to be eligible for reemployment following a RIF, the teacher must have

[1] The Commissioner notes that a tenured teacher seeking reemployment to a position for which he holds the appropriate endorsement is entitled to preference in a RIF over a non-tenured teacher, even if the tenured teacher has no experience in the position he is seeking. *Capodilupo v. Bd. of Educ.*, 218 *N.J. Super.* 510 (App. Div. 1987). Seniority becomes an issue when ranking two or more tenured teachers for the same position. For this reason, the ALJ's analysis is inapplicable to this matter, in which petitioner is a tenured teacher and the teacher holding the position which petitioner is seeking is not tenured. However, for the reasons explained herein, petitioner does not have any right to the position held by the non-tenured teacher.

been dismissed. *N.J.S.A.* 18:28-12. The same principle applies when a teacher's hours are reduced following a RIF – the teacher's hours must have actually been reduced. No reduction occurred here, as petitioner served as a 0.6 full-time equivalent employee in the school year before the RIF and the school years after. As no RIF occurred in April 2019, petitioner's tenure right to reemployment was not triggered at that time.

It is undisputed that, at the time of the previous RIF in spring 2017, petitioner did not possess an Elementary School or Supplemental Instruction endorsement, and only possessed a Teacher of Music endorsement. Accordingly, while petitioner retains his tenure right to reemployment for a greater number of hours should a vacancy arise in the district within the scope of his Teacher of Music endorsement, he has no right to reemployment for any position requiring another endorsement. *See Francey v. Bd. of Educ. of City of Salem, Salem Cty.*, 286 *N.J. Super.* 354 (App. Div. 1996) (holding that reemployment rights are based on the certificates and endorsements held at the time of the RIF and that endorsements acquired after the date of the RIF do not give rise to reemployment rights); *Lobello v. Bd. of Educ. of Warren Hills Regional School Dist. Warren Cty.*, Commissioner Decision No. 161-11 (Apr. 27, 2011).

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelina Allen McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 14, 2022
Date of Mailing: April 14, 2022

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 08416-20
AGENCY DKT. NO. 168-8/20

JOHN MOYLAN,
Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,
Respondent.

Kathleen Naprstek Cerisano, Esq., for Petitioner (Zazzali, Gazelle, Nowak, Kleinbaum and Friedman, P.C., attorneys)

Mark A. Wenczel, Esq., for Respondent (Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys)

Record Closed: February 3, 2022 Decided: February 28, 2022

BEFORE: **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a petition with the Commissioner of the New Jersey Department of Education alleging a violation of his tenure rights. The matter was transferred to the Office of Administrative Law (OAL) as a contested matter September 4, 2020.

A prehearing conference was held on October 1, 2020, and a Prehearing Order was entered by the undersigned on the same date.

Respondent filed a Motion for Summary Decision dated September 17, 2021. Petitioner filed his responsive brief, dated November 8, 2021. Respondent filed its reply brief, dated December 8, 2021.

Oral argument was held on the motion on February 3, 2022.

FACTUAL DISCUSSION

Petitioner began his employment with the Respondent Board in the 2005/2006 school year as a .6 full time equivalent (FTE) music teacher and a .4 FTE computer teacher. Petitioner continued in that employment for the 2006/2007 school year.

During the 2007/2008 and2008/2009 school years Petitioner was employed as a .8 FTE music teacher.

From October 28, 2009 through the 2011/2012 school year Petitioner was employed as a full-time 1.0 FTE music teacher.

During the 2012/2013 and 2013/2014 school years Petitioner was employed as a .8 FTE music teacher due to a reduction in force (RIF).

During the 2014/2015 school year Petitioner was employed as a full-time 1.0 FTE music teacher.

During the 2015/2016 school year Petitioner was employed as a .8 FTE music teacher due to a RIF.

Petitioner continued as a .8 FTE music teacher during the 2016/2017 school year.

During the 2017/2018 school year Petitioner was employed as a .6 FTE music teacher due to a RIF.

During the 2018/2019 school year Petitioner was offered and accepted employment as a .6 FTE vocal music/basic skills instructor.

When the Board made its employment assignments on May 31, 2018, Petitioner did not possess an Elementary School Teacher K-6 endorsement.

At the time of his initial hire, Petitioner possessed an instructional certificate with an endorsement as a Teacher of Music, issued the New Jersey Department of Education. On or about June 14, 2018, Petitioner received an endorsement as an Elementary School teacher K-6 to his instructional certificate. By memo dated September 12, 2018, Petitioner advised Dr. Cinotti, the Board Superintendent to advise her that he held endorsements to his instruction certificate for Teacher of Music, Elementary School Teacher K-6, and Teacher of Supplemental Instruction: Reading and Mathematics K-8. In November 2018 Petitioner was issued a certificate of eligibility as a Teacher of Preschool through Grade 3.

Dr. Gina Cinotti began as Superintendent on July 1, 2018. Petitioner's assignment for the 2018/2019 school year was changed from .6 FTE vocal music/basic skills instructor to .6 FTE employment as Vocal Music and Instrument, which Petitioner accepted. This assignment consisted of .4 FTE music teacher and .2 FTE music instrumental instruction.

The Board had intended to reduce Petitioner's position to a .4 FTE position due to a RIF. After Petitioner advised of his intention to exercise bumping rights, Petitioner

was offered continued employment as a .6 FTE music teacher, which Petitioner accepted.

During the 2019/2020, 2020/2021 and 2021/2022 school years the District has offered, and Petitioner has accepted, employment as a .6 FTE music teacher.

During his employment with the Respondent Board, Petitioner only worked as a music teacher, other than the 2005/2006 and 2006/2007 school years, when he was employed as a .6 FTE music teacher and .4 FTE computer teacher.

The Respondent Board eliminated the Basic Skills Program at the end of the 2018/2019 school year. It was replaced by a Response to Intervention (RTI) program so as to comply with New Jersey Quality Single Accountability Continuum (NJQSAC) requirements of the New Jersey Department of Education.

Petitioner has provided music instruction in Vocal Music, Recorders, and Music Infusion since the 2019/2020 school year. Another teacher in the classroom is responsible for instruction in other areas. During this school year Petitioner was assigned to Linda Garage's classroom on Tuesday and Wednesday to provide music infusion into the classroom. During his time in Ms. Garage's classroom, Petitioner assisted with non music instruction. This assistance with non music instruction was not what he was employed to do. This non music instruction was undertaken without the knowledge or approval of Respondent.

When Ms. Garage retired Respondent employed Anthony Verdi, who holds a provisional certificate as a Teacher of Health and Physical Education issued in January 2020, and a certificate of eligibility as an Elementary School Teacher K-6, for the 2020/2021 school year to a full-time position, which included RTI instruction.

LEGAL ANALYSIS AND CONCLUSION

Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. At 536 (citation omitted).

A careful reading of the certifications submitted both in support of, and opposition to, the motion for summary decision demonstrates that there are no material relevant facts in dispute.

Petitioner claims as disputed fact his assignment to teach music infusion during his 2019/2020 school year, presumably on the basis of his claim in his certification that he, in fact, assisted Ms. Garage with non music instruction. While this may well be true, Petitioner was not employed to teach non music instruction. Accordingly, he could not obtain tenure or seniority rights for choosing to assist Ms. Garage outside the scope of his employment. This may be a fact. It is not a material fact as Petitioner assisting Ms. Garage does not give rise to a claim of tenure or seniority.

Based on the foregoing, I **CONCLUDE** that there are no relevant material facts in dispute and the matter is ripe for summary decision.

Tenure Rights

The tenure of teaching staff is authorized by the Tenure Act, N.J.S.A. 18A:28-1, et seq. A teaching staff member must hold a valid certificate to "teach, administer, direct or supervise the teaching, instruction, or educational guidance of . . . pupils in such public schools and of such other certificate, if any, as may be required by law." N.J.S.A. 18A:26-2. In order to attain tenure, a teaching staff member must hold the appropriate certificate for his or her position. N.J.S.A. 18A:28-4. In addition to certification, the teaching staff member must also be employed by the school district or board for: "(a) [t]hree consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or (b) [t]hree consecutive academic years, together with employment at the beginning of the next succeeding academic year; or (c) [t]he equivalent of more than three academic years within a period of any four consecutive academic years." N.J.S.A. 18A:28-5.

There are three types of educational certificates issued by the Board of Examiners: (1) instructional; (2) administrative and supervisory; and (3) educational services. N.J.A.C. 6:11-2.3. The Board of Examiners may also issue special "endorsements" under the appropriate certificates. Ibid. A teaching staff member must have the appropriate certificate and endorsement for his or her position. For example, an art teacher would be required to hold an instructional certificate with an art endorsement, which "authorizes the holder to teach art in all public schools." N.J.A.C. 6:11-6.2(a)(2). A teaching staff member may possess multiple endorsements under a certificate, qualifying him or her to fill any position covered by the corresponding endorsement. For example, an art teacher holding an instructional certificate with an art endorsement and an english as a second language endorsement is authorized to teach both art and English as a second language in all public schools. N.J.A.C. 6:11-6.2(a)(2), (a)(8).

Seniority is determined in accordance with N.J.A.C. 6A:32-5.1(b), as follows:

> Seniority, pursuant to N.J.S.A. 18A:28-13 et seq., shall be determined according to the number or fraction of academic or calendar years of employment in the school district in specific categories as hereinafter provided. The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay, and unpaid absences granted for study or research, except for leaves of absence or suspension resulting from confirmed discipline, shall be credited toward seniority. All other unpaid absences or leaves of absence shall not receive seniority credit.

N.J.A.C. 6A:32-5.1(l)18ii states:

> Any person employed at the elementary level in a position requiring an educational services certificate or an instructional endorsement shall acquire seniority only in the elementary category and only for the period of actual service under such educational services certificate or instructional endorsement.

Petitioner asserts seniority to a position he never held. He cannot claim seniority for a position which he did not hold, notwithstanding his claim to the contrary in his certification. What he, and Ms. Garage, chose to do in her classroom beyond the scope of his employment contract does not give rise to a claim of seniority.

Nothing set forth in the Certification of Petitioner and the Certification of Ms. Garage give rise to Petitioner's assertion that he is entitled to seniority rights. He never held the position to which he claims seniority. His employment was that of a music teacher.

Based upon the foregoing, I **CONCLUDE** that Respondent must prevail as a matter of law.

ORDER

It is hereby **ORDERED** that Petitioner's Complaint 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, 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 28, 2022
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: February 28, 2022

Date Mailed to Parties: February 28, 2022

db

APPENDIX

List of Moving Papers

For Respondent:

Motion for Summary Decision
Certification of Dr. Gina Cinotti., with Exhibits A through L
Brief in Support of Motion for Summary Decision
Reply Brief in Support of Motion for Summary Decision

For Petitioner:

Brief in opposition
Certification of John Moylan, Petitioner, with Exhibits A through S
Certification of Linda Garage

77-22SEC

SEC Dkt No. C67-20
OAL Dkt. No. EEC 01469-21
Agency Dkt. No. 64-2/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Richard Quelch, Barnegat Board of Education, Ocean County.

The Commissioner has reviewed the record of this matter and the February 25, 2022 decision of the School Ethics Commission (Commission). The Commission found that respondent, a member of the Barnegat Board of Education (Board), violated *N.J.S.A.* 18A:12-24.1(d) – by sending communications to school personnel where he referenced himself as a board member and demanded actions and responses to his inquiries, thereby improperly administering the Board's schools. The SEC found that the respondent violated *N.J.S.A.* 18A:12-24.1(j) – by attempting to conduct an investigation before administrative action was taken. The Commission recommended a penalty of censure for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's actions. Accordingly, respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 14, 2022
Date of Mailing: April 14, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-01469-21
SEC Docket No.: C67-20
Final Decision

William Junker,
Complainant

v.

Richard Quelch,
Barnegat Board of Education, Ocean County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on October 30, 2020, by William Junker (Complainant), alleging that Richard Quelch (Respondent), member of the Barnegat Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* More specifically, the Complaint alleges that Respondent violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) of the Code of Ethics for School Board Members (Code). On December 29, 2020, Respondent filed an Answer.

At its meeting on January 26, 2021, and after reviewing the Complaint and the Answer filed by the parties, the Commission voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing on the alleged violations of the Code. The matter was filed at the OAL on February 9, 2021. The Honorable Dorothy Incarvito-Garrabrant, Administrative Law Judge (ALJ Garrabrant) issued a prehearing Order on May 26, 2021. The matter was reassigned to the Honorable Carl V. Buck III, Administrative Law Judge (ALJ Buck), and Complainant filed a motion for summary decision on September 17, 2021. Subsequently, on September 30, 2021, Respondent filed an answer to the motion with a cross-motion for summary decision, Complainant filed a surreply to Respondent's cross-motion on October 8, 2021, and the oral argument on the motion and cross-motion was held on October 18, 2021.

On November 30, 2021, ALJ Buck issued an *Initial Decision* detailing his findings of fact and legal conclusions on the motions. The Commission acknowledged receipt of ALJ Buck's *Initial Decision* on the date it was issued (November 30, 2021); therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was January 14, 2022. Prior to January 14, 2022, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions (if any). Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until February 28, 2022.

On December 1, 2021, Respondent filed Exceptions to ALJ Buck's *Initial Decision*. On December 9, 2021, Complainant filed a response to Respondent's Exceptions.

At its meeting on January 25, 2022, the Commission considered the full record in this matter, including the filed Exception and the filed reply. Thereafter, and at a special meeting on February 25, 2022, the Commission voted to adopt the findings of fact from ALJ Buck's *Initial Decision*; to adopt the legal conclusion that, based on the admissible evidence, there is sufficient credible evidence to establish a violation of *N.J.S.A.* 18A:12-24.1(d) and (j) of the Code; and to adopt the recommended penalty of censure.

II. Initial Decision

In the *Initial Decision*, ALJ Buck offered the following ***findings of fact*** based on the testimony and documentary evidence:

1. Complainant is employed as a teacher by the Board;
2. Complainant is the Barnegat Education Association (BEA) President, the BEA represents members of the Association on various matters;
3. Respondent is a member of the Board and has been a member since January 2020;
4. Respondent is currently the Board Vice President;
5. Dr. Brian Latwis is the Superintendent of Schools for the District and was employed in that role at the time of the incident;
6. Robert Davis is a teacher employed by the Board;
7. Mr. Davis served as the head coach of the varsity football team at Barnegat High School during the fall 2020 football season;
8. Prior to the game on October 2, 2020, several Barnegat football team members knelt during the national anthem;
9. On October 3, 2020 at 7:01 a.m., Respondent sent an email to Coach Davis, and copied the Superintendent, which contained a photograph of the team showing some players kneeling. Respondent stated in the email:

> *I would like a full explanation for what some of our players did last night. This is not who we are in Barnegat! I am outraged and saddened by this and there are hundreds more people like myself that have the same feelings.*
>
> *Rick Quelch*
> *Barnegat Board of Education Member*

10. The Superintendent responded to Respondent's email that same day at 7:31 a.m. (October 3, 2020) stating:

> *I saw your text when I got home from the game last night.*[1]

[1] Information about a text on October 2, 2020, was not presented to the tribunal.

The New Jersey Football Coaches Association and the New Jersey Football Officials Association released a joint statement prior to the start of the fall sports season permitting peaceful protests, such as kneeling, citing they "will treat those participants with the utmost dignity and respect as we support and recognize an individual's freedom to peacefully express their personal, social and political views."

We recognize their authority over what happens on the field and although Rob [Davis] and myself [(sic)] may not agree with "how" those students chose to advocate for their beliefs the fact is we do not have the authority to mandate otherwise. Having had parents and grandparents that served I can assure you it bothers us when anyone kneels during the National Anthem. [(sic)] However, it is within their freedom to do so and not a violation of the code of conduct.

Thanks,
Brian

11. That same day (October 3) at 8:04 a.m., Respondent replied to the Superintendent and copied the football coach, stating:

These young men have no idea the harmful affect [sic] they are displaying for our town and themselves. Most of them have no idea what they are kneeling for or why. I had members of our local PD, fire, EMS and veterans asking what the hell is going on!!!!! Coach you need to speak to this team before it gets out of hand and Barnegat football loses respect in this town.

Rick

12. That evening at 7:59 p.m., Respondent sent a third email to the Superintendent and copied the coach, stating:

I am still waiting to hear from you Mr. Davis about this matter. If you think for one minute I am going to let this disrespectful stunt go you are wrong.

As an elected official you are disrespecting me for not giving me your side of the story. I am giving this until Monday.

Richard Quelch
Barnegat BOE Member

13. Shortly thereafter at 8:23 p.m., the Superintendent responded to Respondent's email, stating:

> *Good Evening,*
>
> *Respectfully, Mr. Davis will not be giving you an explanation. As a parent you are more than welcome to express your displeasure. As a board member you are not to give a directive to my staff.*
>
> *As superintendent you are well within your right to request information from me ... which you received this morning.*
>
> *Thanks,*
> *Brian*

14. Immediately following at 8:25 p.m., Respondent sent another email to the Superintendent stating:

> *I think you are forgetting who is your boss. I will see you Monday morning![2]*

15. Shortly thereafter at 8:36 p.m., the Superintendent sent an email to Respondent (with copy to Board President Michael Hickey), stating:

> *Ill [sic] see you then.*

16. At 9:01 p.m. on October 3, 2020, Respondent sent an email to the Superintendent (with a copy to the Board President), stating:

> *Dina McGowan this is not my picture but a picture posted on a Pinelands [Facebook] group. Not 1 kid, coach, or parent behaved as disrespectful as the Barnegat football team did last night. They should have been made to forfeit for their actions and not allowed to play. So as a taxpayer and parent of 2 Wildcat children we may have lost the game score wise but morally we won by raising respectful children. Im [sic] absolutely embarrassed by these kids['] behavior. I was born and raised in Barnegat and still have property there this is an embarrement [sic] display of disrespect. The field is no place for politics or political statements, they need to choose another better way to raise awareness.*

17. Shortly thereafter, at 9:21 p.m., the Board President sent an email to the Superintendent and Respondent, stating:

[2] Coach Davis was not copied on this email from Respondent.

Rick,

I understand this is an emotional issue for everyone involved right now, but we will discuss this Monday morning. We'll see you at the office in the morning.

Respectfully,

Michael Hickey
Board President
Barnegat Township Board of Education

18. On Wednesday, October 7, 2020, at 8:43 a.m., Respondent sent an email to the Board President (with copy to the Superintendent), stating:

I still have not received any response since we spoke Monday morning?

During the debate last night you heard right out of Mrs. Bivins['] mouth that the coaches were responsible for this entire debacle. I would still like a statement from the coaches about this matter. Pushing there [sic] political views on these students definitely warrants suspension and an apology to this community.

Thank you
Rick

19. At 1:50 p.m., on October 7, 2020, the Superintendent responded to Respondent (with copy to the Board President), stating:

Good Afternoon Rick – I can circle back with Rob and John again but as I stated Monday when we spoke – they conveyed the students brought this to the coaches and not the other way around. I was there last night and also heard what she said. I stated Monday there is zero ground to go further and I am not going to recommend suspension. I will ask Rob and let you know if their stance changed.
As discussed –I am not sure if you saw this article –
[URL omitted]

Brian

20. At 1:59 p.m., on October 7, 2020, Respondent sent an email to the Superintendent, stating:

Thank you for getting back to me.

I was only recommending the suspension based on what I heard last about the coach pushing his views.

Thank you
Rick

21. At 2:09 p.m., that same day, Respondent sent another email to the Superintendent, stating:

> *I would still like a written statement from Davis and Villez regarding what happened because I am hearing different versions of this story from both sides.*

22. On Wednesday, October 7, 2020, at 3:19 p.m. the Superintendent sent an email to Respondent (with copies to Board counsel and the Board President), at 3:40 p.m., Respondent sent an email to the Superintendent (with copies to Board counsel and the Board President) and at 4:01 p.m., the Superintendent sent an email to Respondent copying the same. All of these emails were redacted.

23. On October 7, 2020, at 5:50 p.m., the Board President sent an email to the Superintendent (with a copy to Respondent), stating:

> *Rick,*
>
> *Also, just because Ms. Bevins made that statement, that does not make the [sic] it a fact nor does it compel us to move forward with any action.*
>
> *She was very upset about social media. Has she made peace with the comments Chrysta made on uncensored about the students yet?*
>
> *Respectfully,*
> *Michael Hickey*
> *Board President*
> *Barnegat Township Board of Education*

24. On October 7, 2020, at 5:59 p.m., Respondent sent an email to the Board President (with copy to the Superintendent), stating:

> *Well you can leave my wife out of this ... Thank you for your concern.*

25. On Friday, October 9, 2020, at 2:37 p.m., Board counsel sent an email to the Superintendent and Respondent (with copy to the Board President), which was redacted, with the exception at the end of the message:

> *If I can be of additional assistance on this matter to any of you gentlemen, let me know.*
>
> *Have a nice weekend,*
> *Marty*

26. On October 9, 2020, at 2:40 p.m., Respondent sent an email to Board counsel (with copies to the Superintendent and the Board President), stating:

> *I thought you should of [sic] been attached to this. I will not in the future.*

Initial Decision at 2-9.

After outlining the findings of facts, ALJ Buck presents his conclusions of law. Regarding the motions for Summary Decision, ALJ Buck asserts that a genuine issue as to the material facts does not exist and the only issues presented are whether the respondent's conduct rose to the level of a violation of the Code of Ethics or whether it should be considered as an appropriate display of concern by a Board member. *Initial Decision* at 10.

ALJ Buck notes Respondent's position as a Board member "holds a position of public trust." *Id.* ALJ Buck further notes a "full understanding of the parameters of ethical conduct for board members can be achieved only with training and experience" and although some "conflicts of interest and ethical constraints are obvious" the "complex distinction between the role of a board member and that of administration is not a matter that a board member can easily intuit." *Id.*

ALJ Buck notes Respondent "points out that [C]omplainant is the Association representative at the BOE" and was not part of the email exchange that transpired among Respondent, the Superintendent, the Board President, the coach and/or Board counsel. *Id.* at 11. Respondent further "points out" "none of the email recipients filed a complaint … However, this nexus is not sufficient to demonstrate a disingenuous intent." *Id.*

In evaluation of a violation of *N.J.S.A.* 18A:12-24.1(c), ALJ Buck cites the administrative Code and asserts, "Although he requested, nay, demanded action and responses to his inquiries, [R]espondent did not effectuate policy. He attempted to, but the effort was dealt with, judiciously and successfully, by other communicants. Notwithstanding [R]espondent's attempt, the charge brought under this section has not been proven by a preponderance of the evidence." *Id.* at 12.

As to a violation of *N.J.S.A.* 18A:12-24.1(d), ALJ Buck contends Respondent "demanded action and responses to his inquiries. He did not do so as a parent, but as a Board member,

leaving no inference as to his intent unspoken." *Id.* at 13. Therefore, ALJ Buck further contends, "Such statements document that the charge brought under this section has been proven by a preponderance of the evidence." *Id.*

Regarding a violation of *N.J.S.A.* 18A:12-24.1(e), ALJ Buck contends Complainant did not provide proof that Respondent made "any personal promises or took any private action that might have compromised the Board." *Id.* at 14. Although Respondent "made statements in his emails that may have cast the Board in a negative light if made public," his statements "as far as the tribunal is aware, were not transmitted to the public." *Id.* Moreover, ALJ Buck notes, "While [R]espondent's statements were inappropriate and may have been distressing to the email recipients, there was nothing in them to indicate that [R]espondent's statements had the potential to compromise the Board." *Id.* ALJ Buck further contends, "no action on any perceived 'threat' by [R]espondent could be taken without the vote of the entire Board." *Id.* Since Respondent "had no capacity to act alone to bring about any change in personnel," ALJ Buck maintains the "charge brought under this section has not been proven by a preponderance of the evidence." *Id.*

As to a violation of *N.J.S.A.* 18A:12-24.1(i), ALJ Buck asserts that although Complainant maintains that Respondent's comments were "intimidating" ALJ Buck notes "they were inappropriate, but were not such deliberate action that could undermine, oppose, compromise or harm him [(Complainant)] in the performance of his duties." *Id.* ALJ Buck further asserts Respondent did not have the "authority to change [C]omplainant's position; only the Board could do that." *Id.* Therefore, "the charge brought under this section has not been proven by a preponderance of the evidence." *Id.*

Regarding a violation of *N.J.S.A.* 18A:12-24.1(j), ALJ Buck contends Respondent "did not attempt to resolve a complaint, but arguably did attempt to conduct an investigation before any administrative action was taken through his demands for statements." *Id.* at 15. Even after the Superintendent informed Respondent about the State's position on conduct that occurs during a sporting event, Respondent "continued to demand a statement and explanation" from the coach; therefore, ALJ Buck contends, "the charge brought under this section has been proven by a preponderance of the evidence." *Id.*

Turning to the penalty, ALJ Buck asserts "the violation in question clearly cannot be said to be de minimis; the entire chain of communication, tenor of the communication, and presumption of superiority over the other communicants evidences a serious lack of judgement." *Id.* at 16. ALJ Buck further asserts, "Ameliorating this position, to an extent, is [R]espondent's statement in his affidavit as to his state of mind in expectation of how the students' actions would reflect negatively on the school and show a lack of deference to military and service individuals, and his presumption that the action was promoted by the team coaches." *Id.* ALJ Buck maintains, although Respondent issued a "statement of remorse, imposition of one of the enumerated sanctions is appropriate." *Id.* ALJ Buck concludes Respondent has "exhibited remorse and has pledged to curtail his actions in the future to the correct venue" and, therefore, ALJ Buck concludes the appropriate sanction is censure. *Id.*

In summary, ALJ Buck orders, based on the findings of facts and conclusions of law, that the Complaint filed by Complainant against Respondent be affirmed to the extent of the

violations of *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(j), and orders the Complaint be dismissed to the extent of the violations of *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(i).

III. Exceptions

Respondent's Exceptions

In his Exceptions, which were filed on December 1, 2021, Respondent contends he does not "challenge any of the factual findings," nor the conclusions of law; however, Respondent "submit[s] that for all the reasons the [ALJ] identified as warranting leniency in this matter, the penalty should be reduced from censure to reprimand."

Complainant's Reply to Respondent's Exceptions

Complainant asserts, "For the reasons cited in the [I]nitial [D]ecision," the Commission should adopt the ALJ's recommended penalty of censure.

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission **adopts** ALJ Buck's findings of fact, and **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(j), but did not violate *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(i).

In finding a violation of *N.J.S.A.* 18A:12-24(d), ALJ Buck correctly determined that certain communications from Respondent to school personnel, wherein Respondent demanded action and responses to inquiries, constituted a violation as they were signed by Respondent and patently included a reference to himself as a board member in his signature. The Commission further concurs that Respondent violated *N.J.S.A.* 18A:12-24.1(j). Through his demands for statements, Respondent attempted to conduct an investigation before any administrative action was taken.

V. Decision

The Commission adopts ALJ Buck's *Initial Decision* finding that Respondent violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(j), but did not violate *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(i)

VI. Penalty

For the reasons set forth by ALJ Buck in his *Initial Decision*, the Commission **adopts** the recommended penalty of **censure.**

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to

the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but ***not*** *disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (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 brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: February 25, 2022

Resolution Adopting Decision in Connection with C67-20

Whereas, by correspondence dated February 9, 2021, the School Ethics Commission (Commission) transmitted the above-referenced matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, at the OAL, both Respondent and Complainant filed Motions for Summary Decision; and

Whereas, the Honorable Carl V. Buck III, Administrative Law Judge (ALJ Buck) issued an *Initial Decision* dated November 30, 2021; and

Whereas, in his *Initial Decision*, ALJ Buck ordered the Complaint filed by Complainant against Respondent be affirmed to the extent of the violations of *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(j), and ordered the Complaint be dismissed to the extent of the violations of *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(i); and

Whereas, on December 1, 2021, Respondent filed Exceptions to the *Initial Decision*; and

Whereas, on December 9, 2021, Complainant filed a reply to Respondent's Exceptions; and

Whereas, at its meeting on January 25, 2022, the Commission reviewed and discussed the record, including ALJ Buck's *Initial Decision*, the filed Exception, and the filed reply; and

Whereas, at its meeting on January 25, 2022, the Commission discussed adopting the findings of fact from the *Initial Decision*, adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(j), but did not violate *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(i), and adopting the recommended penalty of censure; and

Whereas, at a special meeting on February 25, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on January 25, 2022; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at a special meeting on February 25, 2022.

Kathryn A. Whalen, Esq.
Director, School Ethics Commission
(For Submission Only)

78-22SEC

SEC Dkt No. C68-20
OAL Dkt. No. EEC 04009-21
Agency Dkt. No. 65-2/22

New Jersey Commissioner of Education

Final Decision

In the Matter of James Morgan, Ridgewood Board of Education, Bergen County.

The Commissioner has reviewed the record of this matter and the February 25, 2022 decision of the School Ethics Commission (Commission). The Commission found that respondent, a member of the Ridgewood Board of Education, violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24.1(g) in connection with public comments that he made regarding litigation filed by a fellow Board member and his failure to recuse himself from executive session discussing the litigation. The Commission recommended a penalty of censure for the violations. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's actions.

Accordingly, respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 14, 2022
Date of Mailing: April 14, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-04009-21
SEC Docket No.: C68-20
Final Decision

Laurie Weber,
Complainant

v.

James Morgan,
Ridgewood Board of Education, Bergen County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on November 4, 2020 by Laurie Weber (Complainant) alleging that James Morgan (Respondent) violated *N.J.S.A.* 18A:12-24(b) and (c), and *N.J.S.A.* 18A:12-24.1(g) (in Count 1) and *N.J.S.A.* 18A:12-24(b) and (c) (in Count 2) because he made public comments about a Board candidate's lawsuit against the Board related to a denied OPRA request for documents, including Respondent's official email information, and then Respondent attended the executive session meetings regarding the litigation. At its meeting on February 23, 2021, the Commission voted to deny the Motion to Dismiss in its entirety; found the Complaint was not frivolous; denied Respondent's request for sanctions and directed Respondent to file an Answer to the allegations. On March 9, 2021, Respondent filed an Answer denying any allegations of unethical conduct. On April 27, 2021, the Commission found probable cause to credit the allegations that Respondent violated *N.J.S.A.* 18A:12-24(b) and (c) in Counts 1 and 2, and *N.J.S.A.* 18A:12-24.1(g) in Count 1, and transmitted the matter to the OAL.

On May 27, 2021, the Honorable Nanci G. Stokes, Administrative Law Judge (ALJ Stokes), conducted telephone conferences to discuss "needed discovery." "Subsequently, the parties agreed that the material facts were largely undisputed, and a motion for summary decision could be appropriate." On August 25, 2021, the parties presented a joint stipulation of facts and ALJ Stokes "set a motion schedule as no hearing was necessary to resolve the facts or legal issues presented." On October 15, 2021, Respondent and Petitioner (Commission) "filed their motions for summary decision, including supporting certifications and briefs." Neither party submitted a response and, therefore, on November 4, 2021, ALJ Stokes closed the record.

ALJ Stokes issued an *Initial Decision* on December 1, 2021. Thereafter, on December 14, 2021, Respondent filed Exceptions to ALJ Stokes' *Initial Decision*, and Petitioner filed a response to Respondent's Exceptions on January 5, 2022.

At its meeting on January 25, 2022, the Commission considered the full record in this matter, including the filed Exception and the filed reply. Thereafter, and at a special meeting on

February 25, 2022, the Commission voted to adopt the findings of fact from ALJ Stokes' *Initial Decision*; to adopt the legal conclusion that, based on the admissible evidence, there is sufficient credible evidence to establish a violation of *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24.1(g) of the Code; and to adopt the recommended penalty of censure.

II. Initial Decision

In the *Initial Decision*, ALJ Stokes offered the following ***findings of fact***:

1. Respondent is a former Board member.
2. Respondent was the Board Vice President for the 2019-2020 Board year.
3. Respondent's term as a Board member expired in May 2020 and he did not seek re-election.
4. On May 4, 2020, the Board held a regularly scheduled public meeting.
5. The Board notified that it would be holding another meeting on May 7, 2020, to discuss the status of a pending legal matter and a matter pertaining to pupil/personnel.
6. The legal matter concerned an OPRA lawsuit that was filed by Saurabh Dani, a candidate for the Board's upcoming elections on May 12, 2020.
7. Specifically, the legal matter related to whether Board members ever configured their email settings in a manner that would allow them to retrieve Board emails on non-Board devices or non-Board email accounts.
8. The only named respondent parties to the OPRA litigation were the Board and the Board Secretary, who is also the official custodian of public records for the Board.
9. While Respondent was not a named party to the OPRA lawsuit, the information that was being requested pertained to his personal devices and email accounts.
10. On March 13, 2020, after hearing oral arguments by counsel of the parties in the OPRA lawsuit, and after consideration of written submission, the ALJ entered an order whereby the Board must produce certifications from Board members Morgan and Brogan "attesting to the manner in which they access emails from any and all non-Board devices and/or non-Board email accounts.
11. In the March 13 Order, the ALJ also determined that Mr. Dani was entitled to "attorneys' fees and costs," and ordered that the parties' counsel attempt to agree upon a reasonable amount of fees.
12. It was also determined that if the "parties failed in their attempt to negotiate reasonable attorneys' fees and costs, [Mr.] Dani's attorney would submit a certification of service within fourteen days of the March 13, 2020, Order, and the Board would render a response within twenty-one days of same Order."
13. At the May 7, 2020, special Board meeting, Board member Smith-Wilson advised that she had received some questions when notification of that day's meeting went out, she did not provide an answer about the notification, and instead explained the Board had two matters to discuss in executive session, one matter required action by the Board and, therefore, needed to be public.
14. Board member Smith-Wilson then made a motion to go into executive session to discuss matters related to litigation and a separate matter pertaining to pupil/personnel. Board member Smith-Wilson further advised the public that

although the Board is not taking action on the litigation matter in executive session, the Board can take action related to the pupil/personnel matter in executive session.

15. Board member Smith-Wilson did not disclose the identity of the Complainant in the matter nor did she divulge the substance of the complaint.
16. Board member Brogan seconded the motion to go into executive session.
17. After the motion was moved and seconded, Respondent opposed the motion and requested to read a statement to the public via Zoom.
18. Respondent first stated he did not object to discussing the pupil/personnel matter in executive session; however, he did object to discussing the litigation matter in executive session, which he divulged pertained to a settlement proposal that was brought to the Board by the attorney of one of the candidates who was running for a seat on the Board in next week's election.
19. Respondent publicly commented that based on his personal knowledge of the facts and the advice of the Board attorneys, the Board opposed the lawsuit and that none of the material being sought in the lawsuit existed.
20. Respondent then claimed that the judge in the litigation matter asked the Board for additional information, which the Board supplied, but to date, has not issued an opinion on the lawsuit and that serious questions remain about the future of this case.
21. Respondent then divulged that the candidate's lawsuit against the Board was based on an OPRA claim, which permits the plaintiff's attorneys to request the District to pay their legal fees, if the Board is found to be in violation of the law.
22. In his public statement, Respondent also asserted that the Board has not yet been ordered to pay attorney's fees and that it was far from certain that such fees would be awarded.
23. Respondent claimed that because the candidate did not want to have pending litigation that would disqualify him from taking a seat on the Board should he be elected, the candidate's attorney approached the Board to propose that the Board pay $6,674.45 in attorney's fees in exchange for the candidate dismissing the OPRA claims.
24. Respondent expressed that it was his personal opinion that because the Board cannot take actions on litigation matters during executive session, the legal matter involving the candidate for a seat on the Board should be discussed in public since the Ridgewood taxpayers had a right to know how the Board is spending its funds.
25. No one else on the Board made any public comments.
26. On January 30, 2020, the Record newspaper and at least one local blog site previously reported on the OPRA litigation.

Based on the documents submitted in support of and in opposition to the motions for summary decision, ALJ Stokes also issued the following ***findings of fact***:

27. In response to the March 13, 2020, Order, Respondent Morgan and Board member Brogan supplied certifications to Mr. Dani on March 17, 2020, after an unresolved deficiency letter, Mr. Dani filed a motion to enforce litigant's rights, maintaining Board member Brogan and Respondent Morgan failed to adhere to Judge Mizdol's Order requirements. Mr. Dani sought an award of attorney's fees and costs, and his counsel provided a certification of attorney services to Judge Mizdol.

28. On May 11, 2020, Respondent publicly posted that his and Board member Brogan's emails were the subject of Mr. Dani's lawsuit.
29. On May 14, 2020, Judge Mizdol entered an Order finding the Board violated litigant's rights, ordered the Board's compliance with sections 1(c) and (d) of the March 13, 2020, Order, and entered judgment against the Board for reasonable counsel fees and costs.
30. At the Board meeting on May 18, 2020, Board member Smith-Wilson, motioned for an executive session to discuss the litigation and a personnel issue. Before the executive session, Respondent again stated that the Board should discuss the litigation publicly because it "involves a candidate for the Board of Education" Board member Brogan advised she would recuse herself from the executive session concerning the litigation, but Respondent did not. Upon return to the public meeting, Board member Smith-Wilson reported that both Respondent and Board member Brogan recused themselves from the executive session concerning the litigation. The Board discussed the "next steps" to the litigation, and Board member Mahmoud motioned to appeal the recent court decision and not resolve the case. Neither Board member Brogan nor Respondent participated in the vote on the motion.

With the above in mind, ALJ Stokes made the following ***conclusions of law***: in this present matter a "genuine issue" of material facts does not exist, and the only issues presented are whether Respondent's public comments before the May 7 and May 18, 2020, executive sessions, his failure to recuse himself from the May 7, 2020, executive session, and/or his failure to recuse himself before going into the May 18, 2020, executive session are violations of *N.J.S.A.* 18A:12-24(b), (c) and/or *N.J.S.A.* 18A:12-24.1(g) and if so, what sanction is appropriate. ALJ Stokes notes, "no genuine issue exists" that Respondent served as the Board Vice President when he made public comments concerning the litigation, including its status and subject matter and his belief that the Board should discuss the litigation publicly; the litigation against the Board concerned a denied OPRA request by a Board candidate seeking Respondent's and Board member Brogan's official email accounts' forwarding settings to determine if either individual was sharing Board information to their non-Board electronic devices; Respondent did not recuse himself from the executive discussion on May 7 and although Board member Smith-Wilson reported that Respondent recused himself from discussion during the May 18 executive session, Respondent did not recuse himself before the executive session as Board member Brogan did. Therefore, ALJ Stokes ***concludes*** this case is ripe for summary discussion.

ALJ Stokes asserts, Respondent's comments against Mr. Dani and "his lawsuit against the Board damaged [Mr.] Dani's reputation and created an unfair advantage to other candidates of [Respondent's] choosing in violation of *N.J.S.A.* 18A:12-24(b)." Moreover, "Because a member of the public hearing [Respondent's] comments could reasonably believe that [Respondent] intended his statements to influence the election in favor of other candidates," ALJ Stokes ***concludes*** a preponderance of the evidence exists that Respondent violated *N.J.S.A.* 18A:12-24(b), and moreover, the fact that Mr. Dani secured a Board seat in the election is immaterial as the Commission only needed to find the school official attempted to secure unwarranted privileges for another.

ALJ Stokes further asserts that Respondent was personally involved in the litigation and the Court required him to disclose personal information about his email and devices; however, Respondent did not recuse himself from the executive session discussions on May 7, 2020, even though he was the subject of the Order. Furthermore, on May 18, 2020, Respondent went in to executive session, without first recusing himself (as Board member Brogan did). Although the meeting minutes reflect that Respondent later recused himself from discussion, Board member Smith-Wilson did not report this until after the executive session. ALJ Stokes notes the problem arises when the school official "has an interest not shared in common with the rest of the public"; therefore, ALJ Stokes ***concludes*** a preponderance of the evidence exists that Respondent had, at minimum, an "indirect personal interest" in the outcome of the litigation. ALJ Stokes further notes the OPRA lawsuit involved Respondent's email and devices and, therefore, ALJ Stokes further ***concludes*** "that a member of the public could justifiably believe that [Respondent's] objectivity was impaired when discussing the litigation, a resolution of the lawsuit, or the Board's 'next steps' concerning the case."

ALJ Stokes maintains that Respondent should have recused himself from the discussion on May 7 and before entering executive session on May 18. According to ALJ Stokes, the Board moved to appeal the May 14, 2020, Order directing Respondent to supply the information he previously failed to provide and this action created a benefit for Respondent; therefore, ALJ Stokes ***concludes*** that Respondent acted in his official capacity on both dates in a matter where he had personal involvement and received a benefit in violation of *N.J.S.A.* 18A:12-24(c).

ALJ Stokes contends that the Record reported the litigation and its subject or the OPRA request made by Mr. Dani in January 2020, making it public. Moreover, documents filed with the Superior Court are also available to the public. According to ALJ Stokes, the March 13 Order notes that the information sought was related to Board member Brogan's and Respondent's email accounts and devices. Mr. Dani's counsel supplied an attorney certification of services to the court and sought an award of attorney's fees and costs, thereby making it public. Therefore, ALJ Stokes ***concludes*** a preponderance of the evidence does not exist that Respondent made the information public. However, ALJ Stokes ***concludes*** that Respondent's public comments on May 7, against litigant candidate Mr. Dani and the lawsuit's status were inaccurate and misleading. More specifically, on May 7 Respondent advised the public that the judge had not yet issued an opinion on the case or that the judge had not yet ordered the District to pay Mr. Dani's attorney's fees when in fact on March 13, 2020, Judge Mizdol found Mr. Dani to be a prevailing party and that the Board owed Mr. Dani attorney's fees and costs associated with the OPRA litigation. Furthermore, Judge Mizdol also ordered that Respondent and Board member Brogan provide certifications as to their email used and forwarding settings. In addition, Judge Mizdol directed the parties to resolve the issue of fees and costs, or she would decide the fee amount after receiving submission on fees. ALJ Stokes notes on March 17, 2020, Respondent and Board member Brogan supplied Mr. Dani with certifications, which demonstrate that Respondent was aware of the Order on March 13, 2020. Contrary to Respondent's statement, an "award of fees was not an 'if'" regardless of whether the Board later appealed, and Mr. Dani was not "senselessly" demanding materials that "did not exist."

ALJ Stokes further contends on May 7, 2020, Respondent also stated the settlement offer scheduled for discussion by the Board was so that Mr. Dani would not have pending litigation

against the Board that would disqualify him from office and that Mr. Dani sought attorney's fees in exchange for a dismissal of the OPRA claims. However, Respondent's statements were misleading because the March 13 Order concluded that Mr. Dani's counsel was entitled to fees and the Board members' certifications, were not a dismissal in exchange for those fees. Furthermore, Respondent believed the Board should discuss the matter publicly because Ridgewood residents had the right to know how the Board spent its "limited resources." ALJ Stokes maintains Respondent made a similar comment at the May 18 meeting, and he was incorrect. According to ALJ Stokes, the Board should only discuss litigation matters in executive session, not in public and even if Respondent, as a "seasoned [B]oard member, and its vice-president, incredibly believed that the Board could publicly discuss litigation against the [B]oard, his public statements should have been accurate." Therefore, ALJ Stokes concludes that a preponderance of the evidence exists that Respondent violated *N.J.S.A.* 18A:12-24.1(g). ALJ Stokes notes Respondent's preface that his statements were "in his opinion" appropriately made public does not excuse the inaccuracies of those comments as a mistake, a personal opinion, or because of developing circumstances.

Having found Respondent violated *N.J.S.A.* 18A:12-24(b), (c) and *N.J.S.A.* 18A:12-24.1(g) and because Respondent is no longer a Board member, ALJ Stokes ***concludes*** that **censure** is an appropriate penalty. ALJ Stokes maintains Respondent did not vote upon or execute a settlement agreement; Mr. Dani's complaint was not against Respondent individually; Respondent inaccurately commented on litigation in public on May 7 and May 18; Respondent attended the May 7 executive session; went in to the May 18 executive session without recusing himself, knowing the Board was going to discuss action regarding Mr. Dani's OPRA lawsuit; Board member Smith-Wilson publicly advised the subject matter of both executive session and ALJ Stokes concluded that Respondent had a personal involvement and interest in the outcome of the litigation. ALJ Stokes notes Respondent's conduct fell short of his ethical obligations as a Board member.

ALJ Stokes ***orders*** that Complainant's motion for summary decision is granted and Respondent's motion for summary decision is denied and ***orders*** that Respondent be ***censured***.

III. Exceptions

Respondent's Exceptions

In his Exceptions, which were filed on December 14, 2021, Respondent initially argues that ALJ Stokes' "conclusion and imposed penalty are improper and too severe under the circumstances." Respondent continues to deny that he violated the Act and notes that even "if the facts as alleged constitute violations," a censure "is not an appropriate penalty."

As to a violation of *N.J.S.A.* 18A:12-24(b) (Counts 1 and 2), Respondent maintains and ALJ Stokes concurs that Respondent "recused [himself] from the executive session concerning the litigation," on May 18, 2020, and "there are no facts suggesting that Respondent took any action such [as] a vote in favor of settling the litigation matter" on May 7, 2020, contrary to the respondents as cited in Friends and Somerville. Regarding the violation of *N.J.S.A.* 18A:12-24(c) (Count 1 and 2), Respondent reasserts the statements he made before the executive sessions were

"for the benefit of the pubic and due to his personal opinion." Respondent contends that his statements were made to "reinforce public trust rather than to violate it." As to a violation of *N.J.S.A.* 18A:12-24.1(g) (Count 1), Respondent maintains that "holding [him] liable for violating the inaccurate information provision is unacceptable because it is holding him to the standard of a practicing attorney, and fails to consider that the inaccurate information provision has safe-harbors for inaccurate information told due [to] 'reasonable mistake or personal opinion, or was not attributable to developing circumstances.'" Respondent asserts his statements at the Board meetings were due to either reasonable mistake or personal opinion and, therefore, Respondent did not violate *N.J.S.A.* 18A:12-24.1(g).

Turning to the penalty, Respondent argues ALJ Stokes cites several cases, namely, Grimsley, Rodriguez, Kilmurray, Famularo and Friends, all of which, according to Respondent, involve "aggravating circumstances" that are not contained in the present matter. Respondent once again notes he did not vote on the litigation matter and maintains the Commission "seems to give some leeway" to individuals who operate under "false belief" and who make mistakes. Therefore, Respondent asserts the appropriate penalty is reprimand because his conduct "falls far short of the conduct included in the cases cite by" ALJ Stokes.

Complainant's Reply to Respondent's Exceptions

In Petitioner's (SEC) Reply to Respondent's Exceptions, Petitioner maintains the *Initial Decision* is "well reasoned, amply supported by evidence, and should be adopted in its entirety."

Petitioner argues that ALJ Stokes' finding that Respondent violated *N.J.S.A.* 18A:12-24(b) is correct. Petitioner maintains the "record shows that Respondent's comments were not just limited to informing the public about the nature of the OPRA lawsuit," as Respondent claims, nor "did they solely pertain to his opinion that the public should be more informed about lawsuits that may result in expenditure of their tax dollars." Petitioner asserts that Respondent's explanations "do nothing to dispute the fact that he publicly 'proceeded to denigrate the merits of [Mr.] Dani's claims and any expenditure of Ridgewood's resources on the lawsuit.'" As to a violation of *N.J.S.A.* 18A:12-24(c), Petitioner argues once again ALJ Stokes' findings were correct. Petitioner notes ALJ Stokes accurately concluded that "because the OPRA lawsuit specifically sought an order that would 'require[] [Respondent] to disclose personal information about his email and devices ... a preponderance of the evidence exists that [he] had at a minimum an indirect personal interest' in the outcome of the litigation, which a public member could justifiably believe would impair his objectivity during executive sessions 'when discussing the litigation, a resolution of the lawsuit, or the Board's next steps concerning the case.'"

As to a violation of *N.J.S.A.* 18A:12-24.1(g), Petitioner contends ALJ Stokes' finding that "Respondent could not preface his demonstrably inaccurate statements as being the result of a mistake, personal opinion, or developing circumstances" is appropriate.

Finally, Petitioner agrees that the penalty of censure is appropriate. Petitioner asserts ALJ Stokes' conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24.1(g), as well as "finding that said violations warrant a penalty of censure, should both be adopted."

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission **adopts** ALJ Stokes' findings of fact, and **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b), and *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24.1(g).

In finding a violation of *N.J.S.A.* 18A:12-24(b), ALJ Stokes properly concluded that Respondent's comments against Mr. Dani and "his lawsuit against the Board damaged [Mr.] Dani's reputation and created an unfair advantage to other candidates of [Respondent's] choosing in violation of *N.J.S.A.* 18A:12-24(b)." Moreover, "Because a member of the public hearing [Respondent's] comments could reasonably believe that [Respondent] intended his statements to influence the election in favor of other candidates," ALJ Stokes ***concludes*** a preponderance of the evidence exists that Respondent violated *N.J.S.A.* 18A:12-24(b), and moreover, the fact that Mr. Dani secured a Board seat in the election is immaterial as the Commission only needed to find the school official attempted to secure unwarranted privileges for another.

In finding a violation of *N.J.S.A.* 18A:12-24(c), ALJ Stokes properly concluded that Respondent should have recused himself from the Executive Session discussions on May 7, 2020 and May 18, 2020, and because Respondent had, at minimum, an "indirect personal interest" in the outcome of the litigation. ALJ Stokes further notes the OPRA lawsuit involved Respondent's email and devices and, therefore, ALJ Stokes further ***concludes*** that a member of the public could justifiably believe that Respondent's objectivity was impaired when discussing the litigation, a resolution of the lawsuit, or the Board's "next steps" concerning the case."

In finding a violation of *N.J.S.A.* 18A:12-24.1(g), ALJ Stokes properly concluded that Respondent's misleading public comments regarding the proposed settlement offer, which should have been discussed in Executive Session and not in public despite Respondent's preface that his statements were his opinion.

V. Decision

The Commission adopts ALJ Stokes' *Initial Decision* finding that Respondent violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24.1(g).

VI. Penalty

For the reasons set forth by ALJ Stokes in her *Initial Decision*, the Commission **adopts** the recommended penalty of **censure.**

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (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 brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: February 25, 2022

Resolution Adopting Decision in Connection with C68-20

Whereas, by correspondence dated April 27, 2021, the School Ethics Commission (Commission) transmitted the above-referenced matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, at the OAL, both Respondent and Complainant filed Motions for Summary Decision; and

Whereas, the Honorable Nanci G. Stokes, Administrative Law Judge (ALJ Stokes) issued an *Initial Decision* dated December 1, 2021; and

Whereas, in the *Initial Decision*, ALJ Stokes ordered the Complaint filed by Complainant against Respondent be affirmed to the extent of the violations of *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24.1(g); and

Whereas, on December 14, 2021, Respondent filed Exceptions to the *Initial Decision*; and

Whereas, on January 5, 2022, Complainant filed a reply to Respondent's Exceptions; and

Whereas, at its meeting on January 25, 2022, the Commission reviewed and discussed the record, including ALJ Stokes' *Initial Decision*, the filed Exceptions, and the filed reply; and

Whereas, at its meeting on January 25, 2022, the Commission discussed adopting the findings of fact from the *Initial Decision*, adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24.1(g), and adopting the recommended penalty of censure; and

Whereas, at a special meeting on February 25, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on January 25, 2022; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at a special meeting on February 25, 2022.

Kathryn A. Whalen, Esq.
Director, School Ethics Commission
(For Submission Only)

79-22SEC
SEC Dkt No. C71-20
OAL Dkt. No. EEC 04006-21
Agency Dkt. No. 66-2/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Sheila Brogan, Ridgewood Board of Education, Bergen County.

The Commissioner has reviewed the record of this matter and the February 25, 2022 decision of the School Ethics Commission (Commission). The Commission found that respondent, a member of the Ridgewood Board of Education, violated *N.J.S.A.* 18A:12-24(c) in connection with her attendance in an executive session discussing litigation in which she had a personal involvement. The Commission recommended a penalty of censure for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's actions.

Accordingly, respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 14, 2022
Date of Mailing: April 14, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-04006-21
SEC Docket No.: C71-20
Final Decision

I/M/O Sheila Brogan,
Ridgewood Board of Education, Bergen County

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on October 30, 2020, by Laurie Weber (Complainant), alleging that Sheila Brogan (Respondent), a member of the Ridgewood Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq*. More specifically, the Complaint alleged that Respondent violated *N.J.S.A.* 18A:12-24(c) in Count 1, *N.J.S.A.* 18A:12-24(b) in Count 2, and *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(g) in Count 3.[1]

At its meeting on February 23, 2021, and after considering Respondent's Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and Complainant's response thereto, the School Ethics Commission (Commission) adopted a decision granting the Motion to Dismiss as to the allegations in Count 2 and Count 3, denying the Motion to Dismiss as to the allegations in Count 1, and directing Respondent to file an Answer to Complaint (Answer) to Count 1. On March 2, 2021, Respondent filed an Answer as directed.

Following receipt and review of Respondent's Answer, the Commission adopted a decision at its meeting on April 27, 2021, finding probable cause for the alleged violation of *N.J.S.A.* 18A:12-24(c) in Count 1. Based on its finding of probable cause, the Commission transmitted the within matter to the Office of Administrative Law (OAL) for a plenary hearing and, pursuant to *N.J.A.C.* 6A:28-10.7(b), the attorney for the Commission (Petitioner) was charged with prosecuting the allegations in the Complaint for which the Commission found probable cause to credit.

At the OAL, the contested matter was assigned to the Honorable Kimberly A. Moss, Administrative Law Judge (ALJ Moss). *Initial Decision* at 1. ALJ Moss conducted a hearing on September 23, 2021, and the parties filed closing briefs on December 6, 2021; immediately thereafter, the record was closed. *Id.*

On December 14, 2021, ALJ Moss issued an *Initial Decision* detailing her findings of fact and legal conclusions, and the Commission acknowledged receipt of same; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was January 28, 2022. Prior to January 28, 2022, the Commission requested a forty-five (45) day extension of

[1] The Complaint initially cited a violation of *N.J.S.A.* 18A:12-24(g) in Count 3, but was later amended to accurately reflect what was intended, namely a violation of *N.J.S.A.* 18A:12-24.1(g).

time to issue its final decision. Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until March 14, 2022.

On January 14, 2022, Petitioner filed Exceptions to the *Initial Decision*, and Respondent filed her reply to Complainant's Exceptions on January 18, 2022.

At a special meeting on February 4, 2022, the Commission considered the full record in this matter. Subsequently, and at a special meeting on February 25, 2022, and for the reasons more fully detailed below, the Commission voted to adopt ALJ Moss's findings of fact, but to reject the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c). Based on its finding of a violation, the Commission also voted to recommend a penalty of censure.

II. Remaining Allegations in the Complaint

In Count 1, Complainant states that, on May 7, 2020, the Board "met for the sole purpose of going into closed executive session with no public business on the meeting agenda." The topics to be discussed during executive session included "a legal matter and an [harassment, intimidation and bullying (HIB)] appeal." This special meeting took place "just three days after" the Board's regularly scheduled public meeting. Although the validity of calling the May 7, 2020, meeting was questioned in other matters filed with the Commission, Complainant takes exception to Respondent's involvement in the executive session discussion of "the legal matter." More specifically, the "legal matter" involved an "[Open Public Records Act (OPRA)] violation case" filed on behalf of Saurabh Dani (Mr. Dani), and relating to Respondent's and James Morgan's (Board Vice President) (Mr. Morgan) use of their personal email accounts to conduct Board business. As named parties in "the legal matter," Complainant argues that Respondent and Mr. Morgan "would have been required to recuse themselves from all discussions," yet the minutes and meeting video demonstrate that neither recused themself from executive session. As such, Complainant argues that, "by failing to recuse herself from the executive session discussion of a legal matter to which she was a named party," Respondent "acted in her official capacity in a matter where she had a personal involvement and [a] clear interest in the outcome" in violation of *N.J.S.A.* 18A:12-24(c).

III. Initial Decision

After summarizing the testimony offered by Mr. Dani and Respondent at the hearing, ALJ Moss issued **findings of fact**. *Initial Decision*. at 2-3. More specifically, ALJ Moss found that Mr. Dani filed an OPRA lawsuit in Superior Court against the Board prior to the May 7, 2020, Board meeting. *Id.* at 4. Respondent was not a named party in Mr. Dani's lawsuit. *Id.* Respondent was required to provide a screenshot from her iPad and cell phone and a certification regarding the lawsuit, which she provided in March 2020. *Id.* Mr. Dani filed a "motion to enforce litigants," and a hearing scheduled for May 8, 2020, was adjourned until May 14, 2020. *Id.* Mr. Dani's motion would require, among other things, Respondent to provide additional screenshots from her iPad and cell phone. *Id.*

Mr. Dani was present at the May 7, 2020, Board meeting but, at that time, was not a Board member. *Id.* During the public session, Mr. Morgan (Board Vice President) stated that the "settlement of an OPRA lawsuit by a candidate ([Mr.] Dani) for the Board would be discussed," and Respondent "stated the matter should be discussed in executive session." *Id.*

During executive session, the Board "received an update" regarding the OPRA litigation filed by Mr. Dani. *Id.* According to ALJ Moss, the Board was advised there was a pending court date of May 14, 2020, and that, "based on what determination was made at the Superior Court hearing[,] if [Mr.] Dani was the prevailing party in the lawsuit, the Board would have to pay attorney fees." *Id.* Respondent was present for the executive session discussion. *Id.* Despite what Mr. Morgan stated publicly, i.e., "that settlement of [Mr.] Dani['s] lawsuit would be discussed," "there was no discussion of the settlement of [Mr.] Dani['s] lawsuit at the May 7, 2020, Board meeting." *Id.* In addition, Respondent "did not discuss or vote on [Mr.] Dani['s] lawsuit at the May 7, 2020, Board meeting." *Id.*

ALJ Moss additionally found that, "[w]hen there are settlement negotiations[,] the Board is made aware of them." *Id.* Further, the Board officers "may have more information regarding items than" the other Board members. *Id.* Respondent was not aware of the nature of the settlement negotiations in the lawsuit filed by Mr. Dani. *Id.*

Finally, at the May 18, 2020, and June 1, 2020, Board meetings, there were settlement discussions related to Mr. Dani's litigation and, at both meetings, Respondent recused herself from those discussions. *Id.* at 5.

As stated by ALJ Moss, the issue in this matter "is whether [Respondent] being present in the executive session of May 7, 2020, violated *N.J.S.A.* 18A:12-24(c). *Id.* at 6. Referring to *Friends Retirement Concepts v. Bd. of Educ. of the Borough of Somerville* (356 N.J. Super. 203, 214 (Law Div. 2002)), a matter which "addresses members who vote on a matter," ALJ Moss found:

> At [the May 7, 2020, executive] session, the Board members received an update on [Mr.] Dani['s] litigation by the Board's attorney. The Board was informed of the hearing date of May 14, 2020. The Board was also informed by the attorney that they would have to pay attorney fees. There was no testimony that there was any discussion of [Mr.] Dani['s] lawsuit other tha[n] the update by the attorney. There was no testimony that [Brogan] spoke to anyone during the executive session regarding [Mr.] Dani['s] litigation. There was no action taken by the Board regarding [Mr.] Dani['s] litigation during the May 7, 2020, executive session. There was no vote taken regarding [Mr.] Dani['s] litigation at the May 7, 2020, meeting.

Based on the foregoing, ALJ Moss **concluded** that Respondent did not violate *N.J.S.A.* 18A:12-24(c) because she did not vote, there was no discussion of Mr. Dani's litigation, and there was no action taken regarding Mr. Dani's litigation. *Id.* at 6. As such, ALJ Moss ordered that the remaining Count of the Complaint (Count 1) be **dismissed**. *Id.*

IV. Exceptions

Petitioner's Exceptions

Petitioner takes "exception to the ALJ's ultimate conclusion" that Respondent's conduct did not violate *N.J.S.A.* 18A:12-24(c). According to Petitioner, ALJ Moss "could not conclude

based on the evidence in the record that no other discussions of the lawsuit took place during that private Board meeting." Instead, Petitioner argues that, "[t]he record clearly establishes that during the May 7, 2020[,] executive session, the Board discussed options, other than settlement, in responding to any judgment that granted [Mr.] Dani's remaining motions in the OPRA lawsuit." Moreover, the executive session meeting minutes indicate, "another option that was undoubtedly deliberated over by the Board" was the Board's "option of appealing the judge's decision." Further, Petitioner argues Respondent testified that she "precluded herself from discussion about how the Board should respond to settlement offers," but "never testified that she excluded herself from all discussions pertaining to how the [B]oard should respond to a judge's decision in the OPRA matter." Per Petitioner, "when counsel for the Commission pointed this distinction out, the ALJ dismissed it because Respondent 'is not an attorney.'" However, Petitioner argues counsel "was only holding Respondent to the standards expected of a board member, rather than that of an attorney."

Citing *I/M/O Anne Pirillo* (Washington Township Board of Education, Gloucester County (C12-04)), Petitioner maintains that the Commission has "explicitly found that a board member is precluded from being present and/or participating in discussions which deliberate actions relating to matters that they are indirectly involved in." Petitioner asserts the record "clearly establishes that Respondent participated in executive session deliberations over the Board's option of appealing a judge's pending decision in an OPRA lawsuit that would require only Respondent and [Mr.] Morgan to disclose personal information about her email and devices." Therefore, Petitioner asserts "there exists a preponderance of evidence that Respondent had an indirect personal interest in the outcome of the OPRA litigation, a public member could justifiably believe that her objectivity would be impaired during executive session discussions over the Board's option of appealing a decision in that matter, or at least present a situation in which Respondent would be highly tempted to pursue her personal interests over those of the Board." As such, and because Respondent failed to recuse herself from the discussion, Petitioner maintains that Respondent violated *N.J.S.A.* 18A:12-24(c).

As to the penalty, Petitioner argues that Respondent "engaged in conduct which could reasonably be seen as an attempt to gain a personal benefit in a pending litigation matter which she was personally involved in." Further, Respondent was "fully aware of her ethical and statutory obligations as seen by the fact that she recused herself from the Board's executive session discussion concerning the Board's option of settling the same matter at the very next meeting." According to Petitioner, Respondent "was not new to the job or unfamiliar with the process," and since her "actions constitute a serious violation of the public trust," and are most aligned to those in *I/M/O Rodriguez* (C09-15), "a penalty of no less than a censure is called for."

Reply to Petitioner's Exceptions

Despite Petitioner's Exceptions, Respondent maintains that the Commission should "adopt [ALJ] Moss's Decision as the Final Decision in the matter and thereby dismiss the Complaint." Respondent asserts Petitioner's attempt to "see if any settlement offers or terms may have been discussed" during the May 7, 2020, executive session, is "contrary to Respondent's answers" and shows Petitioner's "misrepresentation" of Respondent's testimony. According to Respondent, she "repeatedly testified that settlement offers, terms, and how to proceed with the OPRA litigation were <u>not</u> discussed on May 7, 2020." Moreover, Respondent asserts, "any discussions about settling the OPRA litigation took place on <u>May 18th,</u> not <u>May 7th.</u>"

Respondent contends the ALJ's decision and findings "were based on the testimony of [Respondent] and the record did not lack any support for Judge Moss's legal conclusions" and, therefore, "no violation of the Act can be established."

Respondent maintains her "careful actions highlight[] her intent to avoid the appearance of impropriety, and no reasonable member of the public would believe that their trust was violated by [Respondent's] refusal and recusal to speak on the OPRA litigation in three consecutive executive sessions." Respondent further argues she did not violate the Act because she did not engage in any conduct during the May 7, 2020, May 18, 2020, and/or June 1, 2020, executive session meetings other than simply being present in the room on May 7, 2020, when the Board "received a legal update." Respondent asserts she did not "speak or vote" during the May 7, 2020, executive session, and she "recused herself when there would be Board discussions and/or vote as to how the underlying OPRA litigation would progress." Therefore, Respondent maintains that the Commission should adopt ALJ Moss's *Initial Decision* dismissing the matter.

V. Analysis

Upon a careful and independent review of the facts and evidence set forth in the record, the Commission **adopts** ALJ Moss's findings of fact, but **rejects** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c).

Pursuant to *N.J.S.A.* 18A:12-24(c):

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

According to the factual record, *as a direct result of a lawsuit filed by Mr. Dani against the Board*, Respondent "was required to provide a screenshot from her [personal] iPad and cellphone and a certification regarding the lawsuit." *Id.* at 4. In addition, depending on the court's ruling on a motion filed by Mr. Dani in that lawsuit, which was *pending* at the time of the Board's meeting on May 7, 2021, Respondent would be required "to provide additional screenshots from her [personal] iPad and cellphone." *Id.* (emphasis added).

Based on the foregoing facts, it is beyond dispute that because Respondent was required to provide screenshots from her personal iPad and cellphone and, depending on the ruling of a pending motion, *might* have to provide additional screenshots from her personal iPad and cellphone, Respondent had a personal interest and involvement in the lawsuit filed by Mr. Dani against the Board. The only remaining question is whether, given her personal interest and involvement in the lawsuit filed by Mr. Dani, Respondent violated *N.J.S.A.* 18A:12-24(c) by being present in executive session on May 7, 2021.

As to this question, based on case precedent, the Commission answers yes. In *IMO Michael Kilmurray*, the Commission specifically stated, "[w]hen 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." Lacey Township Board of Education, Docket No. C12-94, at 3. The Commission continued:

> In the present case, the public may believe that the respondent is actively participating in the discussion behind closed doors, that the board member will tell his relative what was said, or at the least, that the other board members will be inhibited in their discussion of the matter because of his presence. ... The board member's rights are not circumscribed by leaving the private session only while that particular item is being discussed. This is consistent with the Commission's public advisory opinion A33-95. *This opinion advised that a board member who has a conflict prohibiting him from negotiating would be in violation of the Act if he sat on the board's closed session strategy discussions.* This advisory followed the Superior Court-Appellate Division's ruling in *Scotch Plains v. Syversten*, 251 *N.J.* 566 (App. Div. 1991) (*School board member who had litigation pending against the district could not attend executive sessions of the board discussing that litigation*). ...
>
> *Id.* (emphasis added).

In addition, in *IMO Anne Pirillo*, the Commission found that, because Respondent Pirillo was present and participated in an executive session discussion concerning a matter (bids from commercial vendors) that her spouse had a financial interest, she too violated *N.J.S.A.* 18A:12-24(c). Washington Township Board of Education, Docket No. C12-04.

In addition, the Commission notes that, during the public portion of the Board meeting on May 7, 2021, which immediately preceded adjournment to executive session, Mr. Morgan publicly "stated that *the settlement* of an OPRA lawsuit by a candidate ([Mr.] Dani) for the Board *would be discussed.*" *Id.* at 4 (emphasis added). Furthermore, immediately following *the substance* of Mr. Morgan's public statement, Respondent acknowledged that the matter, namely "settlement of an OPRA lawsuit," "*should be discussed in executive session.*" *Id.* (emphasis added). In this way, regardless of whether a settlement was actually discussed, Respondent was under the belief that a settlement of a lawsuit in which she had a personal interest and involved would be discussed.

With the above in mind, the Commission must reiterate that when, as here, a school official has a conflict of interest regarding a matter, recusal from any and all discussions and Board action is **absolute**. *See Advisory Opinion A24-16* ("...a conflict would present itself requiring *absolute recusal* from that matter and abstaining from all votes" (emphasis added))." Because recusal must be absolute, receiving an update or information of any kind regarding a matter in which a school official has a conflict of interest (in this case, a personal interest and involvement in a pending lawsuit), especially when it was publicly stated that a "settlement" regarding the matter would be discussed, is **strictly prohibited**. The fact that the Board "only" received information about the next hearing date; was informed that the Board would have to pay attorney's fees; Respondent did not speak to anyone; and the Board did not take action or vote on the litigation after executive session is of no moment, and does not preclude the Commission from finding a violation of *N.J.S.A.* 18A:12-24(c). *Id.* at 4. Contrary to Respondent's argument,

recusal is absolute, and cannot be selectively practiced. Selectively choosing when to recuse subverts the purpose of a recusal.

Moreover, when Mr. Morgan ***publicly*** stated that "settlement of [Mr.] Dani['s] lawsuit would be discussed" by the Board in executive session, that should have cued Respondent to immediately recognize that, due to her conflict of interest (her personal interest and involvement in Mr. Dani's lawsuit), she had to recuse herself from that discussion and, therefore, **not** be in executive session (at least for the discussion of Mr. Dani's litigation). By merely being physically present in executive session, Respondent directly impacted, whether deliberately or otherwise, the ability of the non-conflicted Board members and Board counsel to engage in a candid conversation about the litigation. Although it was fortunate that substantive settlement negotiations did not occur, a fact which could have been directly attributable to Respondent's physical presence in executive session, Respondent's "luck" does not mean that she did not violate the Act by being present for a discussion concerning a matter in which she has a conflict of interest.

Furthermore, the fact that even this limited conversation took place in executive session and not in public only underscores the confidential nature of the information that was discussed – if the public was not able to hear the information, a fact that Respondent undoubtedly recognized because she publicly stated that the matter should be discussed in executive session, it necessarily follows that conflicted members of the Board (Respondent) must not hear it either.

Although it can be a challenge for a Board member to recuse herself from a matter when it is being discussed in public, it is simple for her to do so when a matter is discussed in executive session. Having been advised, in public, that a settlement regarding Mr. Dani's lawsuit would be discussed in executive session, Respondent's decision to attend executive session, regardless of what was actually discussed during executive session, violates *N.J.S.A.* 18A:12-24(c).

VI. Decision

For the reasons more fully detailed above, the Commission **adopts** ALJ Moss's findings of fact, but **rejects** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c).

VII. Penalty

Having found that Respondent violated *N.J.S.A.* 18A:12-24(c), and following its review of the facts and evidence set forth in the record, the Commission recommends a penalty of **censure**. In recommending a penalty of censure, the Commission finds *I/M/O Michael Kilmurray* and *I/M/O Anne Pirillo* to be most instructive.

In both *I/M/O Michael Kilmurray* and *I/M/O Anne Pirillo*, cases which are factually analogous – although not identical – to the within matter, the Commission recommended censure for the violations of the Act. Although, in this case, there is no evidence that Respondent actively participated in the executive session discussion that ensued, the Commission finds that censure is appropriate because Respondent was undoubtedly on notice that a settlement would be discussed (even if it did not actually occur); publicly acknowledged and overtly stated that the conversation regarding the lawsuit should occur in executive session; and then she seconded the motion to

adjourn to executive session. R-1. In short, Respondent publicly commented on a matter in which she had a conflict of interest (noting its confidentiality); she seconded the motion to adjourn to executive session to discuss a matter in which she had a conflict of interest; and then attended executive session knowing that a matter in which she had a conflict of interest would be discussed. Based on all these facts, and because Respondent could have easily recused herself from the discussion concerning Mr. Dani's lawsuit, the Commission does not see Respondent's actions as "mere attendance" in executive session, but rather deliberate disregard of her clear conflict of interest.

For all the aforementioned reasons, the Commission recommends that Respondent be **censured** for having violated *N.J.S.A.* 18A:12-24(c).

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education (Commissioner) for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to ControversiesDisputesFilings@doe.nj.gov. A copy of any comments filed must be sent to the Commission (schoolethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (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 brief on appeal.

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: February 25, 2022

Resolution Adopting Decision in Connection with C71-20

Whereas, at its meeting on April 27, 2021, the School Ethics Commission (Commission) voted to find probable cause to credit the allegation that Respondent violated *N.J.S.A.* 18A:12-24(c), and voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, at the OAL, the attorney for the Commission (Petitioner) was responsible for prosecuting the allegations for which it found probable cause; and

Whereas, following a hearing and the submission of closing briefs, the Honorable Kimberly A. Moss, Administrative Law Judge (ALJ Moss) issued an *Initial Decision* dated December 14, 2021; and

Whereas, in her *Initial Decision*, ALJ Moss found that Respondent did not violate *N.J.S.A.* 18A:12-24(c), and dismissed the above-captioned matter; and

Whereas, on January 14, 2022, Petitioner filed Exceptions to ALJ Moss's *Initial Decision*, and Respondent filed a reply to Petitioner's Exceptions on January 18, 2022; and

Whereas, at a special meeting on February 4, 2022, the Commission reviewed and discussed the full record in the above-captioned matter; and

Whereas, at a special meeting on February 4, 2022, the Commission discussed adopting the findings of facts; rejecting the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c); and recommending a penalty of censure; and

Whereas, at a special meeting on February 25, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its special meeting on February 4, 2022; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at a special meeting on February 25, 2022.

Kathryn A Whalen

Kathryn A. Whalen, Esq.
Director, School Ethics Commission

NEW JERSEY DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

IN THE MATTER OF THE TENURE HEARING OF:

SCHOOL DISTRICT OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY

Petitioner

AND

ALBERTO LOPEZ AND WILLIAM JOHNS

Respondents

OPINION AND AWARD

AGENCY DOCKET NOS. 125-8/21 and 126-8/21

Before
Felice Busto
Arbitrator

Appearances:

For the Petitioner:
Ari D. Schneider, Esq.
The Busch Law Group, LLC

For Respondent William Johns:
Nicholas Poberezhsky, Esq.
Caruso Smith Picini, PC

For Respondent Alberto Lopez:
Ben Weathers, Esq.
Caruso Smith Picini, PC

Procedural History

This proceeding arises from two sets of tenure charges filed by the School District of the Township of Belleville [the "Petitioner" or "Board"] against Alberto Lopez and William Johns ["Respondents" "Lopez" or "Johns"], tenured employees of the Board. The tenure charges alleging misbehavior, neglect and other offenses were filed on July 29, 2021. Jt. Exs. 1 & 2. Respondent Johns and Lopez filed their respective Answers to the Charges on August 29 and August 31, 2021. Jt. Exs. 4 & 6. On September 3, 2021, in accordance with N.J.S.A. 18A:6-16, I was appointed by the Bureau of Disputes and Controversies to hear and decide these consolidated tenure cases.

A pre-hearing telephone conference was held on September 16, 2021. At that time a briefing schedule was established for Respondent Lopez' Partial Motion to Dismiss Charge VI which was submitted on October 8, 2021. The Board filed its Opposition to the Partial Motion to Dismiss on October 14, 2021. On October 21, 2021, I denied Respondent Lopez' Motion for Partial Dismissal.

Arbitration hearings were held on December 1-2, 2021 at the offices of the New Jersey State Board of Mediation in Newark, New Jersey and on January 10 and 18, 2022 by videoconference pursuant to the agreement of the parties. A stenographic record was made of all proceedings.[1] At the hearings, each party argued orally, presented and cross-examined witnesses and submitted documentary evidence into the record. Testimony was received from the Board's witnesses, Dr. Richard Tomko, Superintendent Belleville Public Schools District,

[1] References to the Transcripts will be denominated as follows: December 1, 2021 (T. 1); December 2, 2021 (T. 2), January 11, 2022 (T.3) and January 18, 2022 (T.4).

Richard Henry, Director of Facilities, and Alessandro "Alex" Percio, Head Custodian Belleville Middle School.

Diane Bruno, Middle School Secretary, Anne Hemsley, Middle School Secretary, Peter Rossi, former Middle School Custodian, and Respondents William Johns and Alberto Lopez testified for Respondents. Time extensions and requests to hear and decide this matter were timely requested and granted.

The Board and Respondents submitted post-hearing briefs and authorities on or about March 14, 2022 whereupon the record was closed.

BOARD POLICIES

4281 – INAPPROPRIATE STAFF CONDUCT

> The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within the school district...the Board of Education holds all school staff to the highest level of professional responsibility.
>
> ...
>
> School staff's conduct in completing their professional responsibilities shall be appropriate at all times.
>
> ...
>
> ... A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.

P. Ex. 25.

4211 – SUPPORT STAFF ATTENDANCE

A. Reporting and Absence

A support staff member who anticipates absence from work will call their immediate supervisor before the intended absence, whenever possible.

P. Ex. 26.

4211 – ATTENDANCE

Employee attendance is an important factor in the successful operation of any school district and in the maintenance of the continuity of the educational program.

P. Ex. 27.

SPECIFICATION OF CHARGES[2]

All of the allegations and facts set forth in the Background Information, the accompanying Sworn Statement of Evidence and the exhibits annexed thereto and referenced therein are incorporated by reference as if fully set forth herein, in addition to the following facts.

Beginning on March 8, 2021, Mr. Lopez/Johns has engaged in a series of acts which violate both District policy and procedures and are also contravene to its expectations of how staff is expected to behave. Mr. Lopez/Johns inappropriately proceeded to leave his position approximately an hour and fifteen minutes early each evening.

Mr. Lopez/Johns was scheduled to work from 3:00 p.m. to 11:30 p.m. each day. Mr. Lopez/Johns was scheduled to work the following dates in 2021: March 8th, March 9th, March 10th, March 11th, March 12th, March 15th, March 16th, March 17th, March 18th, March 19th, March 22nd, March 23rd, March 24th, March 25th, March 26th, March 29th, March 30th, March 31st and April 1st. Other than the 4 hours of Personal Leave Mr. Lopez used on March 16th he did not put in for any time off for sick, personal, vacation, etc. for any of the above noted dates. On the above dates, Mr. Lopez/Johns proceeded to leave the District premises around approximately 10:15 p.m. each

[2] The charges against Respondent Johns and Lopez are nearly identical. For brevity, the charges are jointly summarized.

evening, an hour and fifteen minutes before the end of his shift at 11:30 p.m. Notwithstanding the foregoing, he collected his full pay for all of the days and to date has made no offer or effort to refund the money.

Note: The parenthetical subheadings used in each charge are intended to aid the reader and not necessarily to represent the actual, statutory charge.

CHARGE I

MISBEHAVIOR, NEGLECT AND OTHER OFFENSE

(Failure to Follow Procedures)

The Board incorporates by reference all of the factual allegations set forth and referred to above as if fully set forth herein. Mr. Lopez/Mr. Johns knowingly or negligently failed to follow procedures by not notifying his immediate supervisor of his absences and/or early departures as set forth above.

CHARGE II

MISBEHAVIOR, NEGLECT AND OTHER OFFENSE

(Theft by Deception)

The Board incorporates by reference all of the factual allegations set forth and referred to above as if fully set forth herein. Mr. Lopez's/Mr. John's acceptance of payment for days at issue on which he knew that he did not properly and fully render the services he was required to provide constitutes theft of public monies by deception.

CHARGE III

MISBEHAVIOR, NEGLECT AND OTHER OFFENSE

(Unjust Enrichment)

The Board incorporates by reference all of the factual allegations set forth and referred to above as if fully set forth herein. Mr. Lopez's/Mr. Johns acceptance of payment for days at issue on which he knew that he did not properly and fully render the services he was required to provide, constitutes unjust enrichment.

CHARGE IV

MISBEHAVIOR, NEGLECT AND OTHER OFFENSE

(Breach of Contract)

The Board incorporates by reference all of the factual allegations set forth and referred to above as if fully set forth herein. Mr. Lopez's/Mr. Johns' failure to fulfill his contractual obligations by inappropriately abandoning his assigned duties approximately an hour early each evening constitutes breach of contract.

CHARGE V

MISBEHAVIOR, NEGLECT AND OTHER OFFENSE

(Endangerment)

The Board incorporates by reference all of the factual allegations set and referred to above as if fully set forth herein. On the dates on which Mr. Lopez/Mr. Johns left early, he did so in concert with the other three custodians assigned to his shift. In addition to the above noted problems emanating from Mr. Lopez's/Mr. Johns' unauthorized early departures, proper cleaning and sanitation protocols required to protect against COVID-19 infection were not regularly completed, resulting in complaints by numerous staff and the BEA. This action by Mr. Lopez/Mr. Johns, in violation of the Board's State-required and approved Plan, exposed the staff and students to a potentially dangerous situation, and exacerbated fears and anxiety among them regarding the safety of the School.

CHARGE VI

MISBEHAVIOR, NEGLECT AND OTHER OFFENSE

(Pattern of Misbehavior)

The Board incorporates by reference all of the factual allegations set forth and referred to above as if fully set forth herein. Mr. Lopez/Mr. Johns has been engaged in a protracted series of events which constitute a clear pattern of misbehavior, neglect and/or other offenses. This inappropriate course of action manifests a series of intentional, calculated actions intended to deceive the District.

BACKGROUND

Many of the relevant facts in these consolidated cases are not in dispute. Respondents Johns and Lopez have been employed by the Board for 7 and 15 years respectively. Respondent Johns has been assigned to the Belleville Middle School ("Middle School") since 2017. Respondent Lopez has been assigned to the Middle School since 2020.

The Middle School is an older building comprised of five floors and forty classrooms. With the advent of the COVID-19 pandemic, the schedules of in school learning were changed as well as the schedules of the custodians. Although the testimony in this case addressed various time periods since 2019, the period at issue for the tenure charges involves the month of March 2021.

In March 2021, four assistant custodians were assigned to the Middle School—Respondents, Pete Rossi and new hire Edgar Lopez. The scheduled working hours for the custodians are 3:00 to 11:30 pm with an hour lunch between 6:30 and 7:30 p.m. During March 2021, the school had returned to "hybrid" instruction during which students reported to school on alternate days (Tuesday/Thursday and Monday/Wednesday) for half day instruction between 9:00 a.m. and 1:00 p.m. On Fridays, when students were not present in the building the custodians conducted a deep cleaning of the building during the day.

The duties of assistant custodians include cleaning classrooms and lockers, disinfecting bathrooms, vacuuming, floor scrubbing, trash removal and other duties. P. Ex. 2. Richard Henry, Director of Facilities, testified that the custodians

are assigned to specific areas in the school and that there is a sheet hung in the break room which contains those assignments.

Alex Percio is the Head Custodian at the Middle School. The Head Custodian is a bargaining unit member who has no authority to hire, fire or discipline the custodians. As Head Custodian, which is a stipend position, Percio's shift is from 6:00 a.m. to 3:30 pm. Percio reports to Richard Henry.

According to the testimony of Henry, Percio, Rossi and Respondents, the Head Custodian is responsible to instruct the assistant custodians if they are needed to perform special cleaning in addition to their regular duties. Henry testified that Head Custodian Percio is not a supervisor but that "he [Percio] just directs the school for me." T. I, 72.

Henry testified further that he is the immediate supervisor of Respondents and the other night custodians. He testified that in order to be absent or to leave work early Respondents were required to contact him by email or phone. He testified further testified that Percio had no authority to change the schedules of the custodians or to permit them to leave their work before 11:30 p.m. at the end of their shift.

During the pandemic, the custodians' duties were expanded to comply with new cleaning protocols designed to ameliorate the spread of the virus pursuant to the Board's Restart and Recovery Plan to Reopen School. P. Ex. 28. Henry testified that he conducted a training during the summer of 2020 during which custodians, including Respondents, were instructed on the use of a backpack sprayer. This backpack utilized a thyme-based chemical which had been found to

be effective in counteracting the aerosol spread of COVID-19 virus. The spray also resulted in the curling of teachers' papers when used. The Middle School had one backpack which was shared by the custodians for use in their respective sections.

Henry also testified that in February 2021, the building's electrician, also a bargaining unit member, complained to him about the cleanliness of the building including dirty floors, dusty lockers and chalk and marker boards not cleaned. Henry did a walk through of the building and observed that "these things weren't being done." T. I, 32. Henry also was provided with a photograph that had been sent to Superintendent Richard Tomko of a stain, at which point he directed Percio, the day custodian, to take care of it.

As complaints persisted, Henry was directed by the Superintendent to conduct further investigation and he pulled the available video from the school's cameras. When he reviewed the video for March 2021 it revealed that between March 9 and April 1, 2021 all four custodians were leaving the building as a group anywhere from 15 minutes to an hour and 15 minutes before the end of their shift. P. Ex. 1.[3]

After retrieving the video, Henry held individual meetings with all four custodians during which he questioned whether Respondents were taking their lunch and break and working their assigned hours, i.e., 3:00-11:30 pm. During these meetings Respondent Johns denied leaving early but Respondent Lopez admitted that he was leaving work prior to 11:30 p.m.

[3] Henry testified that the camera's video is retained for 28 days.

Thereafter, all four custodians were suspended in April 2021 and the tenure charges ensued against Respondents Johns and Lopez. Rossi resigned from his position but new hire Edgar Lopez continued to be employed.[4]

Superintendent Richard Tomko testified that during school year 2020-2021, he held a series of stakeholders meetings which included teachers, principals, union representatives and others. He stated that he began to receive complaints from teachers regarding cleanliness in the building in the summer of 2020 which continued after the Middle School reopened in October 2020. He testified that, as these meetings became more contentious, he asked Henry to investigate further. Dr. Tomko testified that a teacher reported a coffee stain that was not cleaned up and another teacher reported that her papers were not curled, meaning that she was concerned the backpack sprayers were not being deployed.

Dr. Tomko also testified that Respondents' conduct was the most "egregious" conduct he had encountered in his tenure as Superintendent. He emphasized that this was especially due to the unprecedented COVID-19 pandemic. He testified that he felt like an "idiot" because he had been "running interference" and "sticking up" for the custodians when there were complaints about the cleanliness of the building. Dr. Tomko testified that he later reported Respondents' conduct to the Belleville Police Department; however no criminal charges ensued.

[4] Superintendent Tomko testified that he believed Edgar Lopez' conduct to be less serious in nature because he did not have his boiler's license and was not permitted to remain in the building without another custodian present.

Respondent Johns testified that he was assigned to clean the third floor, teacher's lounge, kitchen and stairwells. Johns testified that the custodians' schedules were in a state of flux during the pandemic. During the summer, the custodians worked days when school was not in session. He testified that Head Custodian Percio told the four custodians that they should "leave when you're done" upon completion of their daily assignments due to the pandemic. T. II, 153. Johns also testified that because Percio issued work assignments and other cleaning duties, he considered Percio to be his direct supervisor and believed that he could be subject to discipline if he failed to follow his instructions. He also testified that since 2018 he had notified Percio when he would be late or out sick and that vacation days had to be approved by the school's principal.

Respondent Lopez testified that he was assigned to the Middle School in 2020 shortly before the pandemic. His area consisted of the second floor, basement, basement boys' bathroom and stairwells. Lopez testified that he reported to work early each day at approximately 2:00 or 2:15 p.m. Lopez testified that he became aware of a teacher's complaint about the cleanliness of Room 208 which was in his section. He testified that there was construction in the building consisting of opening the roof and walls that created dust.

Lopez testified that Percio told the custodians to go home early after they had completed their duties. He also testified that he considered Percio to be his direct supervisor and believed that he could be disciplined if he did not follow his instructions.

Lopez testified that he was able to complete his duties and still leave an hour early in March 2021 because each day teachers were in school for a half day and, as a result, half of the classrooms were not being used. Lopez testified that he was remorseful for his conduct and that he should have followed his own judgment about his work schedule instead of listening to others.

Lopez also testified with respect to personal and health issues he experienced during 2008-2009 and 2011-2014 when he received several letters of reprimand regarding attendance, sleeping on the job and other issues.

Former custodian Peter Rossi testified that Percio told the custodians to leave the building early in March 2021 and for some period prior to that time. Rossi testified:

> [W]e were told that once you got your work done, due to COVID – because basically there was nobody in the building-disinfecting, cleaning doing all our extras, when you got done with your work you can go home. And that is what we did…[Percio said that] "it wasn't fair for custodians to be in school when everybody else was home because they were -- they care about them…they don't care about you guys. Just do your job. When you get done, go home."
>
> T. II,141-142.

Rossi also testified that he believed Percio had authority to permit the custodians to leave work early. He further testified that he believed he could be subject to discipline if he failed to follow an order or instruction of Percio. He testified that by issuing work assignments he considered Percio to be "my regular school supervisor, and then the big guy was Richard Henry." T. II, 137.

Rossi testified that he and the other custodians reported to work early at 2:10 or 2:15 p.m. when teachers and students had departed the building to meet

with Percio for any special cleaning instructions toward the end of Percio's shift [which ended at 3:30 pm.]. Despite the pandemic, he testified that the custodians helped each other in the building and were able to complete their duties and leave an hour or more early daily.

Head Custodian Percio, testified on rebuttal, that he did not issue the custodians a directive to leave work prior to their 11:30 p.m. end of shift. He testified further that "[e]ven if I did told them, I'm not the manager they know that." T. IV, 23. Percio also testified that when he issues directives regarding cleaning or conveys instructions from Henry, the custodians are required to follow them.

Middle School secretaries Dianne Bruno and Anna Hemsley testified regarding Respondent Johns' work ethic, volunteer activities and his responsiveness to their cleaning requests.

POSITIONS OF THE PARTIES

The Board

The Board argues that it has established the Respondents are guilty of neglect, misbehavior, and/or other cause warranting their dismissal. With respect to each of the charges the Board argues as follows:

CHARGES I-IV

The Board relies upon arbitral cases under TEACHNJ in which arbitrators have dismissed tenured employees for engaging in inappropriate conduct which damage the reputation of both teachers and the Board. See *IMO the Tenure Hearing of David Clune, Black Horse Pike Regional School District, Camden County*, Agency Dkt. No. 47-2/14 (Mastriani 2014) (teacher dismissed for failing to

report an arrest, improperly using the District's network and engaging in inappropriate text messaging with former students); *IMO the Tenure Hearing of Mark C. Bringhurst, School District of the City of Vineland, Cumberland County*, Agency Dkt. No. 236-8/12 (Gifford 2012) (teacher dismissed for running naked on a dare through an apartment complex outside of school hours).

The Board contends that Respondents knew (or should have known) that abandoning their shift early during a pandemic was, at worst, criminal and, at best, extremely poor judgment. The Board also references other cases in which custodians were dismissed for conduct unbecoming and/or neglect. See *IMO Marcelino Basulto, Sch Dist of West NY*, Superior Ct. NJ (App. Div.) Dkt. No. A-1493-09T11493-09T1 (2010) (custodian dismissed due to failure to properly clean classrooms and repeatedly leaving post without proper authorization); *IMO Tenure Hearing of Donald Dudley, Neptune Sch Dist*, Commissioner Decision No. 451-11 (October 24, 2011) (custodian terminated for frequently leaving early and sleeping on the job).

The Board submits that parents with children assigned to the Middle School have a right to expect that the custodial staff will do everything possible to keep the school clean and germ free, thereby limiting the spread of COVID-19. Respondents' dereliction of their duties reflects poor judgment and a disregard for the safety and wellbeing of staff and students. As a result, the Board submits that Respondents are unfit to continue as employees in the public school system. By leaving their posts one hour early on a daily basis while getting paid for their full hours, the Board contends that Respondents violated the public trust.

The Board argues that Respondents failed to follow proper procedures in departing work at least one hour early on a daily basis in March 2021. The Board emphasizes that it is uncontroverted that Respondents never sought or received permission from Superintendent Henry to leave work early every day.

Further, the Board argues that Respondents failed to establish their affirmative defense that they were directed to leave early by Head Custodian Percio. According to the Board, Percio's testimony refuted Respondents' defense which was raised for the first time at the hearing and not in their prior statements or answers.

Moreover, the Board contends that despite leaving at least one hour early ever day in March 2021, Respondents deceptively collected 8.5 hours of pay which constitutes theft of time and/or unjust enrichment.

The Board maintains that this conduct also constitutes a breach of contract because Respondents failed to work their contractually-required 8 ½ hours.

CHARGE V

The Board argues that by cutting their contractual workday short on a daily basis, Respondents were unable to complete all of their required cleaning tasks. The Board contends that the amount of cleaning increased as a result of the pandemic and Respondents needed to spend more time accomplishing their tasks and not less. The Board emphasizes that the Respondents' dereliction of duty led to several complaints of uncleanliness in the building and that their conduct endangered staff and students at the Middle School.

CHARGE VI

The Board submits that Respondents engaged in a pattern of misbehavior by leaving early every day during March 2021. This premeditated pattern of misconduct only ended when it was discovered by the administration. The Board asserts that it is likely Respondents left early for months if not the entire 2020-2021 school year.

PENALTY

The Board argues that Respondents should be dismissed from their positions due to the egregious nature of their misconduct. The Board argues that aggravating factors outweigh any mitigating factors. *See e.g.*, *In Re Fulcomer*, 93 NJ Super. 404, 421 (App. Div. 1967) (factors to be considered in assessing the penalty include the nature and gravity of the offense under all circumstances; mitigating or aggravating factors, impact of the penalty of the employee's career; and any harm which the teacher's conduct may have had on the maintenance of discipline and proper administration of the school).

The Board maintains that Respondents have exhibited no remorse for their conduct. The Board argues that during a global pandemic when their role was paramount to ensuring the cleanliness of their building, Respondents have established no legitimate reason to mitigate their penalty. Respondents' conduct jeopardized the safety of the staff and school and the Board has no reason to believe that Respondents would not engage in similar misconduct in the future. The Board submits that Respondents' transgressions were not isolated lapses in

judgement but were plainly calculated and repetitious. According to the Board, these factors weigh heavily in favor of dismissal.

With respect to Respondent Lopez, the Board contends that he has a long record of misconduct and was repeatedly warned about poor performance including cleaning, excessive absenteeism, falling asleep on the job and appearing to be under the influence while at work. The Board emphasizes that Respondent Lopez has been given ample opportunity in the context of progressive discipline to improve his performance but has been unwilling or unable to do so.

Respondents

Respondents argue that the Board has failed to establish that they have engaged in conduct unbecoming and urge that the charges be dismissed. Respondents emphasize that the Board is not permitted to rely on hearsay evidence in support of the charges. In addition, Respondents argue as follows:

CHARGES I-V[5]

Respondents contend that the Board created the appearance that Percio had supervisory authority over the night custodians. The evidence established that Percio issued the night custodians their assignments and other tasks and that they were required to comply with his directions. Respondents also contend that Percio's denial that he authorized them to leave work early was not credible in light of the testimony by Respondents and former custodian Rossi. Respondents submit that Percio should be found to have supervisory authority over the

[5] Respondents Johns and Lopez filed individual briefs in support of their respective positions. However, because there is substantial overlap in Respondents' arguments with respect to Charges I-V their positions are summarized here jointly.

custodians and that he authorized them to leave work early once their assignments for the night had been completed.

Respondents maintain that the Board cannot genuinely argue that Percio was merely a coworker or liaison between the administration and Respondents but also argue that they were expected to comply with his instructions. Respondents maintain that the confusion created by the Board's use of Percio should negate any finding that Respondents acted willfully to defraud the Board.

Respondents also argue that by reporting to work early each day, the record established that Respondents effectively worked the 7.5 hour shifts that they were paid for and that therefore there was no theft of time or unjust enrichment. *See also In the matter of the Arbitration of the Tenure Charges Between Belvedere Board of Education and Daniel Dempsey and Andrew Poyer*, DOE Dkt. Nos. 52-3/19; 56-3/19 (January 13, 2020) (although teachers/coaches had exercised poor judgment in fundraiser solicitations, arbitrator did not find that funds were raised as a result of fraud).

Moreover, Respondents argue that the Board's charges of failure to follow procedures, theft of time, breach of conduct and unjust enrichment should be dismissed due to the affirmative defenses of waiver and consent. Respondents rely upon the decision in *IMO the Tenure Hearing of Michael Coe, School District of the City of Trenton, Mercer County*, Agency Dkt. No. 43-3/17 (November 10, 2017) (arbitrator rejected charges that Respondent had deliberately falsified his timesheets by "rounding up" because he had calculated his time in a substantially similar manner over a protracted period of time without notification by

administration that his methodology was inconsistent). Respondents argue that here, like in *Coe*, Respondents engaged in a practice of reporting for work early, completing their assignments and then leaving prior to 11:30 p.m. but were never advised that this conduct was inconsistent with the Board's policies and expectations.

CHARGE V

Respondents argue that the Board has also failed to meet its burden with respect to Charge V that their behavior or neglect created a "endangerment." Although this charge provides that Respondents' early departures resulted in cleaning that was not regularly completed and exposed staff and students to "a potentially dangerous situation and exacerbated fears and anxiety among them regarding the safety of the school," the Board has failed to identify a single task or assignment which Respondents failed to complete. The Board contends that because Respondents left work early the Board suspects that they failed to properly clean their designated areas but argues that such speculation cannot satisfy its burden of proof.

Moreover, Respondents submit that even if the Middle School was untidy on occasion, it was not clear who caused the mess, when it was caused or which, if any, night shift custodian was responsible. Nor was there evidence that Respondents failed to do anything that put anyone in a dangerous situation. Respondents maintain that the testimony and evidence presented by the Board is purely speculative and based on uncorroborated hearsay. Respondents credibly

testified that they completed all of their tasks and assignments prior to leaving for the evening and that they utilized the backpack sprayer as instructed.

CHARGE VI

Respondents argue that the Board has failed to meet its burden of establishing a "pattern of misbehavior." Respondent Johns argues that he cannot be found guilty of a pattern of misbehavior because he has no disciplinary history. Respondent Johns also contends that Charge VI is vague and ambiguous and lacks any factual predicate to support it.

Respondent Lopez argues that Charge VI is ambiguous as to whether the alleged pattern of misbehavior refers to March 2021 or a pattern of misbehavior dating back to the years 2008-2014. Respondent Lopez submits that that his previous letters of reprimand are relevant only for purposes of progressive discipline which should not be applicable because the Board has failed to meet its burden with respect to the March 2021 conduct.

PENALTY

Respondent Johns argues that even if one or more of the charges are sustained, a penalty less than termination is warranted. Respondent Johns emphasizes that he had no disciplinary history in his career. There was also testimony regarding his volunteer activities at the school. In addition, Respondent points to the two school secretaries who testified regarding the quality of Johns' work performance and attitude. Moreover, Respondent Johns expressed remorse for his actions after he learned that Director Henry and Superintendent Tomko did

not approve of his early departures and testified that he would comply with his contractually designated hours in the future.

Respondent Lopez argues that the Board failed to establish that he would be unable to continue work as a custodian. Respondent Lopez emphasizes that he has been employed by the Board for nearly 17 years. Moreover, based on the totality of circumstances, Respondent Lopez contends that the Board cannot reasonably argue that his actions were premeditated or malicious. Respondent Lopez submits that at worst he used poor judgment to assume he could leave early upon finishing his work for the evening. However, Respondent Lopez maintains that the judgment of the custodians was clouded by the false impression created by the Board that Percio was their direct supervisor and that they should follow his instructions. In addition, Respondent Lopez contends that the fluctuation of work schedules in response to the COVID-19 pandemic added to the confusion. Thus, Respondent Lopez submits that these extenuating circumstances weigh against the penalty of termination.

In addition, while Respondent Lopez concedes that he has received prior letters of reprimand, he insists that for the past 7 years he has been an exemplary employee. With respect to the letters of reprimand that were issued between 2008 and 2014, Respondent Lopez had personal stress as a result of his divorce and child custody issues. He also testified that during 2010 to 2014 he had several injuries which required additional time off and that this contributed to complaints about his attendance during those years. Respondent Lopez maintains that given

the passage of time and the lack of any direct evidence regarding his prior discipline, these letters should be afforded limited weight.

Finally, Respondent Lopez submits that there is no reason to believe that he would engage in similar conduct in the future if he is reinstated to his position. Respondent Lopez testified that he was remorseful and committed to honor his contractual work schedules.

DISCUSSION

N.J.S.A 18A:6-10 provides that no tenured employees of the public school system "shall be dismissed or reduced in compensation…except for inefficiency, incapacity, unbecoming conduct, or other just cause issue. The Board bears the burden to establish that it has met this standard by a preponderance of evidence. Although conduct unbecoming a public employee has not been defined by statute, the courts have held that it is conduct "which has a tendency to destroy public respect for government employees" and "incompetence in the operation of [public] services." *In Re Emmons*, 63 N.J. Super. 136, 140 (App. Div. 1960); *Karins v. City of Atlantic City*, 153 N.J. 532, 553 (1998).

CHARGE I
(Failure to Follow Procedures)

The Board's attendance Policy #4221 provides that "[a] support staff member who anticipates absence from work will call their immediate supervisor before the intended absence, whenever possible." P. Ex. 26. Respondents admitted that they left the school approximately an hour or more early on multiple days during March 2021.

The evidence established that in order to leave early, arrive late or call out sick, the Board's procedure is for Respondents to contact their direct supervisor, Richard Henry. I credit Respondents' testimony that Percio allowed them to leave early. Contrary to Respondents' assertions, however, the evidence does not support the conclusion that Percio was a supervisor. Percio is a member of the same bargaining unit as Respondents and receives a stipend for his additional duties as Head Custodian. Percio has no authority to hire, fire or discipline the assistant custodians. Percio acts as a liaison between Henry and the custodians and instructs them with respect to cleaning and other duties as needed.

Certainly the record reflects that Percio was delegated considerable authority to assign work to Respondents and the other custodians because he was in the Middle School daily and overlapped with them briefly at the end of his day shift. Although there was some blurring of the lines of Percio's authority, Respondents should have known that Henry, and not Percio, had the authority to change or alter their schedules.

Even assuming, as discussed in more detail with respect to Charge II below, that Respondents believed they had to follow instructions from Percio, granting permission to leave early is different than issuing instructions pertaining to custodial duties. Respondents, as custodians with many years of service, should have known that Percio's authority to issue instructions regarding cleaning duties did not extend to unilaterally changing their working hours in this manner.

Respondent Johns, in an effort to bolster his position that Percio is a supervisor, testified that he had been contacting Percio regarding absences since

2018 because Henry had not responded to his emails or text messages. Johns' testimony was not refuted and it may be that this process was acceptable for an occasional absence or lateness or in circumstances when Henry was unavailable. However, there is a clear distinction between contacting Percio regarding one lateness or early departure and a change of schedule consisting of daily one hour (or longer) early departures over a month long period.[6] Respondents used poor judgment and were negligent by failing to follow procedures and not making a request to Henry to leave their shifts early in March 2021.

Respondents argue further that the Board has waived its right to discipline Respondents for their early departures because it failed to put them on notice regarding their "practice" of leaving work early. This argument, that Respondents' conduct was somehow approved by the Board, is not persuasive. Supervisor Henry did not learn of Respondents' early departures until he pulled the video footage in April 2021. At that time he informed Superintendent Tomko regarding Respondents' conduct. Dr. Tomko immediately reviewed the video footage after which Respondents were interviewed and suspended.

Accordingly, there is no basis on which to conclude that the Board had notice of Respondents conduct and/or acquiesced to it in any way.[7] The Board did not waive its right to discipline Respondents in these circumstances.

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[6] The Board also argues that it is "likely" that Respondents left their shifts early for months during the 2020-2021 school year. However, the tenure charges are based on Respondents' conduct in March 2021 and this argument regarding uncharged conduct must be rejected.

[7] The facts in this case are not analogous to those in *IMO the Tenure Hearing of Michael Coe, School District of the City of Trenton, Mercer County*, Agency Dkt. No. 43-3/17 (November 10, 2017), a case upon which Respondents heavily rely. In *Coe*, the arbitrator dismissed tenure charges against a teacher who had engaged in a longstanding practice of rounding up his timesheets for years; however, the administration failed to notify him that his methodology was improper.

Respondents engaged in conduct unbecoming by failing to follow established procedures for attendance and absences. Charge I is sustained.

CHARGE II

(Theft by Deception)

This charge alleges that Respondents' "acceptance of payment for days at issue on which [they] knew that [they]did not properly and fully render the services [they were] required to provide constitutes theft of public monies by deception." By its express terms, this charge necessitates a finding that Respondents engaged in intentional conduct to steal time or defraud the Board.

The determination of this issue turns on the credibility of Respondents, who testified that Head Custodian Percio instructed them to leave early upon completion of their duties and the credibility of Percio's denial of issuing the directive. It is significant that Respondents' testimony was corroborated by former assistant custodian Rossi who resigned from his position as a result of a settlement with the Board.[8] Although Respondents have a motivation to be untruthful with their jobs on the line, Rossi is no longer employed by the Board. Rossi testified that "we were told that once you get your work done, due to COVID -because basically there was nobody in the building-disinfecting, cleaning, doing all our extras when you got done with your work you can go home." T. II, 141.

[8] Rossi had previously held the position of Head Custodian in another school.

I found the testimony of former custodian Rossi to be straightforward and highly credible. Percio, on the other hand, was defensive throughout his testimony. The testimony of Respondents and Rossi lead me to conclude that Percio told the custodians that they could leave the building prior to 11:30 p.m. upon completion of their duties in order to limit their exposure to the virus.

The Board's assertion that Respondents' testimony regarding Percio is not credible because this defense was not raised until the hearing is contradicted by the record. Both Respondents referenced their reliance on the instructions by Percio in their Answers to the tenure charges which were submitted shortly after the tenure charges were filed. See P. Exs. 4 & 6.

Respondents and Rossi also testified that they believed that they were expected to follow the instructions of Percio. Henry also testified that the custodians were expected to comply with the directions of Percio. After all, unlike Henry, Percio as the Head Custodian, was the person that they interacted with on a daily basis in the building during the 3-3:30 p.m. period when Percio's shift ended and the night custodians' shifts began.

Moreover, Respondents reported to work approximately 45 minutes early when the building was empty in order to overlap with Percio and receive any special cleaning assignments. Respondents' willingness to do so is not consistent with the Board's contention that they were stealing time or attempting to deceive the Board. At the same time it is consistent with the testimony that the custodians' 8 ½ hour shifts put them at more risk for exposure to the virus than other employees who were working half day schedules in the building.

As previously discussed, Respondents should have known that Percio lacked the authority to alter their work schedules. However, the evidence falls short of establishing that Respondents engaged in theft of services. The Board has not met its burden to establish Charge II and it is dismissed.

CHARGE III
Unjust Enrichment)

The discussion in Charges I-II is incorporated by reference here. Respondents received pay for hours that were not worked during March 2021.[9] Although there were extenuating circumstances regarding interactions and instructions by Percio as described above, the fact remains that Respondents received their full pay despite working less than 8 ½ hours in March 2021.

Respondents' argument, that there should be an "offset" with respect to their pay because they reported to work 45 minutes early and therefore worked equivalent hours, is lacking in merit. Respondents were not required to report to work early and they were not free to make their own schedules without approval by Henry. While reporting early for work demonstrates a commitment to carrying out the duties of their positions, it does not qualify as an offset for the pay that they received for their scheduled 8 and 1/2 hours that were not worked.

Charge III is sustained.

[9] Both Respondents offered to refund monies to the Board for the time at issue. However, their offers were rejected by the Board.

CHARGE IV

(Breach of Contract)

The discussion in Charges I-III is incorporated by reference here. Respondents emphasize that the Board did not proffer the contract setting forth the hours of the custodians. Nonetheless, it was not disputed that Respondents' contractual hours were from 3:00 p.m. until 11:30 p.m., including an hour for lunch.

There was evidence that the Board did not enforce Respondents' contractual schedules during the pandemic. Respondent Johns testified that the custodians' work schedules were changed a dozen times between March 2020 - March 2021. His testimony was not rebutted by Dr. Tomko, Henry or Percio. In the summer, Respondents worked during the day. There were also periods when Respondents worked three days on and two days off.

In March 2021, Respondents worked evenings Monday through Thursday. Henry testified that on Fridays, when students were not present, the custodians worked during the day to perform a deep cleaning in the school. Further, Respondents credibly testified that they did not leave the building until they completed their duties each day in March 2021. The Board's charge that Respondents "failed to fulfill their obligations by abandoning their assigned duties" is not supported by the record.

Charge IV is dismissed.

CHARGE V

(Endangerment)

The Charge that Respondents' conduct endangered staff and/or students at the Middle School is not supported by the record. The fact that there were complaints by teachers regarding conditions in the Middle School cannot suffice to support this allegation. Although hearsay is admissible in arbitration, it cannot serve as the evidentiary basis for this charge.

Moreover, the charge that Respondents "exposed staff and students to a "potentially dangerous situation, and exacerbated fears and anxiety" regarding safety in the school is vague and ambiguous. This Charge is based on the speculation that because Respondents left their shift approximately one hour early that they 1) did not complete their duties and 2) created a danger to the welfare of the staff and students. Such an inference cannot be supplied. The Board has not established one act or omission by Respondents that created a "potentially dangerous situation."

The only direct testimony regarding cleanliness was that Henry, on one day, observed dust on lockers and marker boards not being cleaned. Dr. Tomko testified that he observed a coffee spill after receiving a teacher's complaint. Both Henry and Dr. Tomko were in the school during the day when teachers, students and others were also present in the building. There was no evidence to establish when these uncleaned or messy items were observed or which of the four custodians would have been responsible for the area.

Nor has the Board established, as set forth in this Charge, that "proper cleaning and sanitation protocols to protect against COVID-19 infection were

regularly not completed." Respondents credibly testified that they completed their duties on a daily basis including using the backpack antiviral sprayer.

Finally, the Board also argues that because there was more antiviral spray on hand in the Middle School than in other buildings that they were not fulfilling their cleaning responsibilities. This argument is speculative, at best, and cannot be sustained. Charge V is dismissed.

CHARGE VI

(Pattern of Misbehavior)

The conduct that Respondents engaged in during the month of March 2021 does not establish a "pattern of misbehavior." Although Respondents left their shifts early during March 2021, I do not find that this establishes a pattern of misbehavior. A series of early departures is not tantamount to a pattern of misbehavior. There is no other misbehavior at issue besides the March 2021 early departures. This charge appears to be an "add on" and relies on the same facts that underlie Charges I-IV.

Further, Respondent Johns had no discipline prior to the events in March 2021 and the Board has not established that he engaged in a pattern of misbehavior.

Although the Board argues, with respect to Respondent Lopez, that there is a pattern of misbehavior due to his prior disciplinary record during 2008-2014, I do not find that the charge of a pattern of misbehavior can be sustained against him. The discipline of Respondent Lopez, which included letters of reprimand regarding attendance and other issues, dates back 7 to 13 years. There was no disciplinary action against Respondent Lopez since 2014 and, to the extent there was a pattern

it has been interrupted. Given the fact that Respondent Lopez has had no discipline for the past 7 years, the Board has not established that he engaged in a pattern of misbehavior. Charge VI is dismissed.

PENALTY

For the foregoing reasons, the Board has established that Respondents engaged in conduct unbecoming and other just cause as set forth in Charges I and III. I turn now to the issue of the penalty.

It is well-established that factors to be taken into account with respect to the penalty include the nature and circumstances of the incidents or charges, the teacher's prior record, the effect of such conduct on the maintenance of discipline among students and staff, and the likelihood of such behavior recurring. *In Re Fulcomer*, 93 N.J. Super 404 (App. Div. 1967). Upon consideration of all of the evidence, arguments and authorities, I have concluded that the dismissal of Respondents Johns and Lopez is not for just cause.

I note that many of the cases that the Board relies upon in support of termination involve abhorrent and inappropriate sexual conduct against students. Clearly, the transgressions of Respondents are not in the same category of misconduct.[10]

[10] Even the cases relied upon by the Board in which arbitrators terminated the employment of custodians involved employees with prior discipline engaged in multiple acts of misconduct including chronic absenteeism and performance-related misconduct. See *IMO Tenure Hearing of Christopher Luskey, Carteret Board of Education*, Agency Dkt. No. 169-7/17 (Zirkel 2017); (*IMO Marcelino Basulto, Sch Dist of West NY*, Superior Ct. NJ (App. Div.) Dkt. No. A-1493-09T11493-09T1 (2010); *IMO Tenure Hearing of Donald Dudley, Neptune Sch Dist*, Commissioner Decision No. 451-11 (October 24, 2011). *See also IMO Tenure Hearing of Martin Davis*, Asbury Park School District, Dkt. No. 22-1/14 (Symonette 2014)(custodian terminated after inappropriate touching of student).

As Respondents have argued, termination would be inconsistent with the penalties imposed in cases involving custodians where more serious conduct was established. (citations omitted). As discussed above, there are extenuating factors present such as Respondents' genuine but erroneous belief that they were authorized to leave work early upon completion of their duties to avoid prolonged exposure to the virus.

It was also established that the custodians' schedules fluctuated during the pandemic as the school reopened. Respondents' schedules required them to be present in the building for a full shift of 8 1/2 hours and the reason for their early departures was to reduce their own exposure to the virus. There is simply no basis on which to conclude that Respondents were motivated by greed or dishonesty and likewise no reason to conclude that they would engage in misconduct if reinstated. Respondents also committed to abiding by their work schedules and fulfilling their custodial duties in the future.

Moreover, prior to March 2021, Respondent Johns had no discipline of record. Even though the same cannot be said for Respondent Lopez, he has 17 years of service with the Board and received no discipline in the past 7 years. He also expressed remorse for not using better judgment. Thus, given the nature of the offenses and the totality of circumstances, I find that mitigating circumstances outweigh aggravating circumstances and the penalty of termination of Respondents is excessive and harsh.

Nonetheless, both Respondents demonstrated a lack of judgment by leaving early in contravention of the Board's policies regarding attendance and absences. The Superintendent was receiving a number of complaints about the cleanliness of the building in the spring of 2021 and due to the nature of the pandemic Respondents' duties to clean and disinfect the building were expanded. As a result, Respondents' early departures not only violated the Board's policies but were also inconsistent with the Board's mandate in the Restart and Recovery Plan and its responsibilities for the safety of students in the face of this unprecedented pandemic. Although termination of their employment is unduly harsh, Respondents misbehavior was sufficiently serious to warrant a lengthy unpaid suspension.

AWARD

1. Charges I and III are sustained.

2. Charges II, IV, V and VI are dismissed.

3. The Board has established that Respondent Johns and Lopez's engaged in conduct unbecoming and other just cause. The Board has not established that Respondents misbehavior warrants their dismissal from their positions and their termination was not for just cause.

4. The Board is ordered to reinstate Respondents within a reasonable period of time without backpay. The Board shall convert Respondents' terminations to unpaid suspensions.

Dated: April 18, 2022
Ocean Grove, New Jersey

Felice Busto

State of New Jersey }
County of Monmouth } ss:

On this 18th day of April, 2022, before me personally came and appeared Felice Busto to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Gretchen L Boone
Notary Public
New Jersey
My Commission Expires 8-24-2022
No. 50066778

83-22

New Jersey Commissioner of Education
Final Decision

Board of Education of the Freehold Regional High School District, Monmouth County,

Petitioner,

v.

Board of Education of the Township of Barnegat, Ocean County,

Respondent.

Synopsis

The petitioner, Board of Education of the Township of Freehold Regional High School District (Freehold), sought an order declaring that respondent, Board of Education of the Township of Barnegat (Barnegat), is responsible for the cost of minor child T.M.'s out of district placement and all other related educational and residential expenses for the 2020-2021 school year and going forward. T.M. resides year-round at the American School for the Deaf and splits his time equally between his parents during school breaks; his mother lives in Barnegat, his father lives within the Freehold Regional High School District. Barnegat filed a motion for summary decision, which was opposed by Freehold.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; the question of which district was responsible for T.M.'s educational expenses during the 2019-2020 school year was the subject of a previous case, *Board of Education of the Township of Barnegat, Ocean County v. Board of Education of the Freehold Regional High School District, Monmouth County*, Commissioner's Decision No. 214-20, decided October 6, 2020, in which the Commissioner concluded that Barnegat and Freehold were equally responsible for T.M.'s educational costs, including the out-of-district placement; Freehold was ordered to reimburse Barnegat for the 2019-2020 school year and to share equally in the cost of T.M.'s education going forward; in the instant matter, the circumstances have not changed since the Commissioner's 2020 decision; there is no court order or written agreement between the parties designating the school district of attendance, pursuant to *N.J.A.C.* 6A22-3.1(a)(1)(ii); as such, the ALJ concluded that Barnegat and Freehold must share equally in the cost of T.M.'s out-of-district placement going forward.

Upon review, the Commissioner, *inter alia,* adopted the Initial Decision of the OAL in part, as it pertains to the matter of T.M.'s out-of-district placement from the start of the 2020-21 school year to October 23, 2020, and from February 1, 2021 through the end of the 2020-21 school year. For that period, the Commissioner directed Freehold to reimburse Barnegat for one-half of the cost of T.M.'s out-of-district placement, and to share equally in the future costs of T.M.'s placement at the American School for the Deaf, so long as the present circumstances remain the same. The Commissioner remanded the matter to the OAL for further fact finding around the circumstances of an agreement that was entered into by T.M.'s parents on October 23, 2020, but rescinded on February 1, 2021, designating Barnegat as the school district of attendance for T.M.

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

83-22

OAL Dkt. No. EDU 04819-21
Agency Dkt. No. 72-5/21

New Jersey Commissioner of Education
Final Decision

Board of Education of the Freehold Regional High School District, Monmouth County,

Petitioner,

v.

Board of Education of the Township of Barnegat, Ocean County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by petitioner Freehold Regional High School District Board of Education (Freehold) pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto submitted by respondent Barnegat Township Board of Education (Barnegat).[1]

In this matter, Freehold seeks an order finding that Barnegat is responsible for the cost of T.M.'s education at an out-of-district residential placement for the 2020-21 school year and going forward. T.M. is an 18-year-old who resides year-round at the American School for the Deaf and splits his time equally between his parents during holidays and school recesses. His mother lives in Barnegat, while his father lives in Marlboro Township, which is part of the Freehold Regional High School District.

The issue of responsibility for T.M.'s education costs for the 2019-20 school year was addressed by the Commissioner in *Board of Education of the Township of Barnegat, Ocean County*

[1] Freehold filed supplemental exceptions that were not considered by the Commissioner because supplemental exceptions are not contemplated by *N.J.A.C.* 1:1-18.4.

v. Board of Education of the Freehold Regional High School District, Monmouth County, Commissioner's Decision No. 214-20, decided October 6, 2020, affirmed by the Appellate Division April 1, 2022. In that matter, the Commissioner analyzed *N.J.A.C.* 6A:22-3.1 and found that, as T.M.'s residence for the 2019-20 school year could not be determined, an equitable determination of shared responsibility for the cost of the placement is permitted. The Commissioner found that T.M.'s parents were domiciled in different school districts and there was no court order or written agreement designating the school district of attendance. Additionally, T.M. did not reside with either parent for the majority of the school year as he was in an out-of-state housing placement year-round. The regulation then looks to where T.M. resided on the last school day prior to October 16, but the Commissioner noted that he resided at his out-of-state placement. Accordingly, T.M.'s residence could not be determined according to the analysis, and the Commissioner found that an equitable determination of shared responsibility in accordance with *N.J.A.C.* 6A:22-3.1(a)(1)(ii)(2) was warranted. Accordingly, the Commissioner directed that Freehold reimburse Barnegat for one-half of the cost of T.M.'s out-of-district placement for the 2019-20 school year and to share equally in the future costs of T.M.'s placement at the American School for the Deaf, so long as the present circumstances remain the same.[2]

Thereafter, on October 23, 2020, the parents executed a Written Agreement for School Attendance indicating that the school district where the mother resides, presently Barnegat, shall be the school district of attendance for T.M. On February 1, 2021, the parents executed a stipulation of settlement with Barnegat regarding T.M.'s educational program. The agreement also

[2] It appears that Freehold may not have paid Barnegat for half of T.M.'s education costs, and Barnegat has filed an action in Superior Court seeking payment. As this matter concerns the 2020-21 school year, the Commissioner will not address the 2019-20 school year further.

indicated that the written agreement designating Barnegat as the district of attendance is rescinded:

> Upon information and belief, the Parents affirm and agree that there is no court order or written agreement between them designating the school district of attendance. The statement signed by P.M. on October 23, 2020 and "H.M." on October 21, 2020 designating Barnegat [as] the "district of attendance" is hereby specifically and intentionally rescinded and revoked. The Parents further affirm and agree that they were requested to sign said statement by Freehold schools, in light of the COVID-19 pandemic. The Parents state they did not intend to legally designate a district of attendance and thought the affidavit referred to physical attendance only.

The settlement agreement, as well as emails between the attorneys, indicate that Freehold was invited to participate in the discussions regarding T.M.'s placement, but that Freehold refused to participate. Freehold then filed the instant petition of appeal, challenging the validity of the settlement and seeking an order finding that Barnegat is responsible for the costs of T.M.'s placement, as the designated district of attendance.

In deciding Barnegat's motion for summary decision, the Administrative Law Judge (ALJ) found that the circumstances had not changed since the Commissioner's 2020 decision. The ALJ found there was no court order or written agreement between the parties designating the school district of attendance, pursuant to *N.J.A.C.* 6A22-3.1(a)(1)(ii). The ALJ also found that Freehold refused to participate in the IEP process, despite multiple invitations, so their argument that the agreement is invalid because they were not a party to the settlement is meritless. As such, the ALJ found that Barnegat and Freehold should share in the cost of T.M.'s out-of-district placement.

In its exceptions, Freehold argues that the ALJ failed to address that the Final Judgment of Divorce establishes that the mother, as parent of primary residence, is also the parent that should be considered for school attendance. Freehold also argues that that the ALJ incorrectly found that there have been no changes to T.M.'s circumstances since the Commissioner's 2020 decision

because she fails to consider the Written Agreement for School Attendance and whether the stipulation of settlement was the result of undue influence. Freehold maintains that the stipulation of settlement was signed three days prior to T.M.'s scheduled IEP meeting, so a meeting never took place, contrary to the ALJ's factual finding. Additionally, Freehold argues that the parties did not have the opportunity to conduct discovery on whether the Covid-19 pandemic influenced T.M.'s living arrangement.

Freehold contends that the ALJ misapplied the summary decision standard by failing to view the facts in the light most favorable to Freehold. Specifically, Freehold argues that the parents were represented by counsel when they signed the written designation of school attendance, despite what the ALJ found. Freehold further argues that the ALJ conflated residence and domicile, failing to consider the Written Agreement for School Attendance and failing to find that T.M.'s domicile is in Barnegat with his mother, the custodial parent. As such, Freehold urges the Commissioner to reject the Initial Decision and allow discovery to move forward on the issue of domicile, the efficacy of the Written Agreement for School Attendance, and the validity of the February 1, 2021 stipulation of settlement.

In reply, Barnegat argues that Freehold's exceptions are unsupported by the record or are irrelevant to this matter. Specifically, Barnegat contends that the issues regarding the Final Judgment of Divorce have already been raised and rejected. Barnegat points out that the ALJ considered the Written Agreement for School Attendance but found that it did not influence her determination, as it was rescinded, and whether it was obtained with counsel is immaterial. Barnegat maintains that whether the stipulation of settlement was signed prior to the IEP meeting is irrelevant, and Freehold refused to participate in any part of the process. Barnegat also argues that there is no evidence in the record that T.M.'s living situation was altered due to the Covid-19

pandemic. Finally, Barnegat contends that Freehold's argument regarding the difference between domicile and residence is misguided as *N.J.A.C.* 6A:22-3.2(a)(1) is the controlling regulation. As such, Barnegat urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner finds that Freehold and Barnegat must share in the cost of T.M.'s out-of-district placement from the start of the 2020-21 school year to October 23, 2020 (the date of the Written Agreement for School Attendance), and from February 1, 2021 (the date of the stipulation of settlement) through the end of the 2020-21 school year and going forward. With respect to the period between October 23, 2020 and February 1, 2021, further fact finding is necessary to determine the intent of the parents in signing the Written Agreement of School Attendance.

N.J.A.C. 6A:22-3.1(a)(1) provides:

> (a) A student is eligible to attend a school district if he or she is domiciled within the school district.
>
> 1. A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district.
>
> i. When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody.
>
> ii. When a student's physical custody is shared on an equal-time, alternating week/month or other similar basis so the student is not living with one parent or guardian for a majority of the school year and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the present domicile of the parent or guardian with whom the student resided on

> the last school day prior to the October 16 preceding the application date.
>
> (1) When a student resided with both parents or guardians, or with neither parent or guardian, on the last school day prior to the preceding October 16, the student's domicile is that of the parent or guardian with whom the parents or guardians indicate the student will be residing on the last school day prior to the ensuing October 16. When the parents or guardians do not designate or cannot agree upon the student's likely residence as of that date, or if on that date the student is not residing with the parent or guardian previously indicated, the student shall attend school in the school district of domicile of the parent or guardian with whom the student actually lives as of the last school day prior to October 16.
>
> (2) When the domicile of a student with disabilities as defined in *N.J.A.C.* 6A:14, Special Education, cannot be determined pursuant to this section, nothing in this section shall preclude an equitable determination of shared responsibility for the cost of the student's out-of-district placement.

As the Commissioner found in 2020, T.M.'s parents are domiciled in different school districts. At the time, no "court order or written agreement between the parties designating the school district of attendance" existed to determine T.M.'s domicile. *Barnegat, supra,* at 6. The Commissioner found that the regulation's requirement for a written agreement is explicit, and a custody arrangement or parenting time decree as part of a divorce decree is not the equivalent of a designation of school attendance. *Ibid.* In this matter, an agreement designating Barnegat as the school district of attendance was entered into by the parents on October 23, 2020. As of that date, an agreement did exist designating the school district of attendance. However, the Written

Agreement for School Attendance was rescinded by the parents on February 1, 2021, and accordingly, no such agreement currently exists. For the period that the Written Agreement for School Attendance was in effect, October 23, 2020 to February 1, 2021, the Commissioner is constrained to remand this matter for further fact finding, given the language in the settlement agreement that indicates the parents thought the agreement only referred to physical attendance.

With respect to February 1, 2021 and beyond, the Commissioner agrees with the ALJ that the circumstances remain the same. As in 2020, T.M. resides with neither parent for the majority of the school year as he is in an out-of-state housing placement year-round, and the parents share time equally when T.M. is on a school recess or holiday. Further, T.M. resided at his out-of-district placement on the last school day prior to the preceding October 16. As such, and as the Commissioner previously found in 2020, since T.M.'s residence cannot be determined under any of the above steps, an equitable determination of shared responsibility is permitted under *N.J.A.C.* 6A:22-3.1(a)(1)(ii)(2).

The Commissioner is not persuaded by Freehold's exceptions. The Final Judgment of Divorce does not establish the designated school district of attendance. Regarding the stipulation of settlement, Freehold indicated that it did not want to participate in the IEP process; accordingly, whether the settlement was signed prior to a scheduled IEP meeting did not affect Freehold's involvement. Additionally, there is no evidence that the Covid-19 pandemic impacted T.M.'s placement, and even if it did, the parents split time evenly when T.M. is on a recess from school. Finally, the ALJ did not conflate residence and domicile, and instead applied the standards set forth in *N.J.A.C.* 6A:22-3.1(a)(1).

Accordingly, the Initial Decision of the OAL is adopted in part and remanded in part. Freehold is directed to reimburse Barnegat for one-half of the cost of T.M.'s out-of-district

placement from the start of the 2020-21 school year to October 23, 2020, and from February 1, 2021 through the end of the 2020-21 school year, and to share equally in the future costs of T.M.'s placement at the American School for the Deaf, so long as the present circumstances remain the same. This matter is remanded to the OAL for further fact finding and supplementation of the record as warranted with respect to the period between October 23, 2020 and February 1, 2021.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 26, 2022
Date of Mailing: April 26, 2022

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

84-22

State Board of Examiners Dkt No. 1819-201
OAL Dkt. No. EDE 02315-20
Agency Dkt. No. 10-12/21A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Revocation of the Certificates of Jayson V. LaVorne, State Board of Examiners, New Jersey Department of Education.

Order of Revocation by the State Board of Examiners, November 3, 2021

For the Respondent-Appellant, Michael J. DeMarco, Esq.

For the Petitioner-Respondent State Board of Examiners, Erin Herlihy, Deputy Attorney General (Matthew J. Platkin, Acting Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Jayson LaVorne's appeal of the Order of the State Board of Examiners, dated November 3, 2021, revoking his Teacher of Health and Physical Education Certificate of Eligibility and Teacher of Health and Physical Education Certificate. Following the issuance of an Order to Show Cause by the Board and a hearing at the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) found that appellant engaged in conduct unbecoming a teacher when he exposed his genitals to an Uber driver and grabbed the driver's hand in an attempt to have the driver touch appellant's genitals. Appellant was indicted for criminal sexual contact as a result of this conduct and entered into pre-trial intervention. The ALJ recommended that appellant's certificates be suspended for a period of three years, noting that the conduct did

not occur at school or during a school function, and that appellant received good evaluations during his employment. Thereafter, the Board adopted the Initial Decision of the ALJ and increased the penalty to revocation of appellant's teaching certificates, finding that appellant's conduct demonstrated a serious lapse of judgement and that revocation was supported by past precedent in matters involving sexually aggressive or suggestive conduct.

On appeal, appellant argues that the Board acted in an arbitrary, capricious, and unreasonable manner when it modified the three-year suspension recommended by the ALJ to a penalty of revocation. Appellant contends that the Board failed to consider evidence of mitigation provided by appellant at the OAL, including the fact that his conduct was the result of alcohol abuse and that he completed an outpatient alcohol rehabilitation program, continues to attend Alcoholics Anonymous (AA) meetings, and has been sober since the incident at issue. According to appellant, these factors were the most important in the ALJ's decision to suspend, rather than revoke, his certificates, and the Board's lack of consideration of these factors renders its decision arbitrary, capricious, and unreasonable. Appellant distinguishes cases relied on by the Board, which involved multiple offenses by the teachers involved, while his conduct was an isolated incident, and he has no prior or subsequent criminal history. Appellant also emphasizes that his conduct occurred outside the scope of his employment as a teacher. Appellant urges the Commissioner to reinstate the three-year suspension imposed by the ALJ.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her 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. 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). With regard to reviewing a sanction imposed by the Board, the Appellate Division has defined the standard as determining whether the "punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *In re Certificates of Benjamin Norton*, 2016 *N.J. Super. Unpub. LEXIS* 2291, *6-7 (internal citations and quotations omitted).

The Commissioner first notes that the Board's decision does not modify any findings of fact or legal conclusions of the Initial Decision. Additionally, appellant does not contest those findings or conclusions on appeal, and, in fact, urges the Commissioner to adopt the Initial Decision. Accordingly, the Commissioner accepts the findings and conclusions reached by the ALJ in the Initial Decision, and further finds that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct.

The question of the appropriate penalty is the only area in which the Board differed from the ALJ, and the only one that appellant seeks to overturn on appeal. Upon review, the Commissioner concludes that the Board's decision to revoke appellant's certifications was not arbitrary, capricious, or unreasonable, nor is the penalty of revocation so disproportionate to the offense as to shock one's sense of fairness.

Although appellant argues that the Board did not consider his evidence of mitigation, the Order of Revocation expressly refers to appellant's argument that the corrective action he has taken demonstrates that he deserves a second chance. Moreover, while appellant contends that evidence of his alcohol rehabilitation weighed heavily in the ALJ's decision to suspend his certificates, there is no evidence of that in the Initial Decision. The ALJ's summary of the testimony indicates that appellant testified that he entered into rehab, attends AA

meetings, and remains sober. However, the ALJ found that appellant's testimony was not credible. Pursuant to *N.J.S.A.* 52:14B-10(c), an agency "may not reject or modify any findings of fact as to issues of credibility of lay witnesses unless it is first determined from a review of the record that those findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." Additionally, neither the ALJ's findings of fact nor his legal analysis and conclusion refer to the mitigation evidence. In assessing the penalty, the ALJ only noted that appellant's behavior was outside the scope of his employment as a teacher, and that appellant had received continuous good evaluations during the course of his employment. The Board also considered these factors, but nonetheless determined that revocation was warranted, consistent with past cases involving similar conduct outside the scope of a teacher's employment.

The Board has previously revoked the certificates of teachers who publicly masturbated or exposed their genitals. *In re Certificates of Kevin Jordan*, 2009 *N.J. Super.* Unpub. LEXIS 2439 (App. Div. Oct. 5, 2009); *In re Certificates of John P. McCabe*, Dkt. No. 1617-240 (Board of Examiners, December 17, 2018); *In re Certificates of Scott D. Petry*, Dkt. No. 1314-230 (Board of Examiners, March 12, 2015). While appellant correctly points out that the teachers in those matters engaged in the conduct on more than one occasion, the Commissioner does not find that distinction persuasive, as the Board's decisions did not solely rely on the repetitive nature of the conduct. Moreover, appellant's conduct escalated beyond exposing his genitals when he grabbed the Uber driver's hand in an attempt to get him to touch appellant's genitals, while no element of physical contact was present in *Jordan, McCabe,* or *Petry*.

Accordingly, the decision of the State Board of Examiners is affirmed. Appellant's Teacher of Health and Physical Education Certificate of Eligibility and Teacher of Health and Physical Education Certificate are hereby revoked.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 26, 2022
Date of Mailing: April 26, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

85-22E

OAL Dkt. No. EDU 02248-22
Agency Dkt. No. 52-3/22

New Jersey Commissioner of Education

Order on Emergent Relief

S.U., on behalf of minor child, L.U.,

Petitioner,

v.

Board of Education of the Lenape Regional High School District, Burlington County,

Respondent.

The record of this emergent matter 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 the standards enunciated in *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 stated 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.

Justin Allen McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 26, 2022
Date of Mailing: April 26, 2022

88-22

OAL Dkt. No. EDU 07399-21
Agency Dkt. No. 113-7/21

New Jersey Commissioner of Education

Final Decision

Summit Education Association, on behalf of Members, Allison Ahearn, Samantha Barrows, Cherylin DeCarlo, and Laura Madden,

Petitioner,

v.

Board of Education of the City of Summit, Union County,

Respondent.

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

Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 29, 2022
Date of Mailing: April 29, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07399-21
AGENCY DKT. NO. 113-7/21

SUMMIT EDUCATION ASSOCIATION, ON BEHALF OF ITS MEMBERS, ALLISON AHEARN, SAMANTHA BARROWS, CHERYLIN DECARLO, AND LAURA MADDEN,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,
Respondent.

Randi Doner April, Esq., (Oxfeld Cohen, attorneys) for petitioners

Anthony P. Sciarrillo, Esq., (Sciarrillo, Cornell, Merlino, McKeever & Osborne, attorneys) for respondent.

Record Closed: March 16, 2022 Decided: March 21, 2022

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

On September 1, 2021 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 Settlement Agreement via email on February 17, 2022. The Board's resolution was received on March 16, 2022 via e-mail.

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.

March 21, 2022

Ernest M. Bongiovanni

DATE

ERNEST M. BONGIOVANNI., ALJ

Date Received at Agency: 3-21-22

Date Mailed to Parties: 3-21-22

id

SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
ATTORNEYS AT LAW

Email: edlawgroup@sciarrillolaw.com

February 17, 2022

Sent via Electronic Mail
Honorable Ernest Bongiovanni, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

RE: SUMMIT BOARD OF EDUCATION (Board/District)
Summit Education Association o/b/o Allison Ahern, Samantha Barrows, Cherylin DeCarlo and Laura Madden v. Summit Board of Education
OAL Docket No. EDU 7399-21
Agency Dkt. No. 113-7/21
Memorandum of Agreement

Dear Judge Bongiovanni:

Enclosed please find a copy of the Memorandum of Agreement executed by the parties resolving the above matter.

The parties and counsel thank the Court for its assistance in bringing this matter to an amicable resolution.

Respectfully yours,
SCIARRILLO, CORNELL, MERLINO, McKEEVER & OSBORNE, LLC

Anthony P. Sciarrillo
APS:mc
Enclosure

cc: Randi Doner April, Esq. (via electronic mail)

MEMORANDUM OF AGREEMENT (Agreement)
BETWEEN
SUMMIT BOARD OF EDUCATION (Board/District)
AND
SUMMIT EDUCATION ASSOCIATION (Association)

THIS AGREEMENT is made this _____ day of January 2022, between the SUMMIT BOARD OF EDUATION ("Board") and the SUMMIT EDUCATION ASSOCIATION ("Association").

WHEREAS, the Board and Association are parties to a Collective Bargaining Agreement ("CBA") covering the period of September 1, 2017, to August 31, 2020; and

WHEREAS, the Board and Association were parties to a Memorandum of Agreement ("MOA") covering the period of August 1, 2020, to August 31, 2021; and

WHEREAS, the Board and Association are parties to an MOA covering the period of September 1, 2021, to August 31, 2023; and

WHEREAS, the Association filed a Level 1 Grievance on or about March 9, 2021, on behalf of all potentially affected members of the Association; and

WHEREAS, the Board denied the Level 1 grievance on or about March 16, 2021; and

WHEREAS, the Association provided the District with its Level 2 grievance on or about March 17, 2021; and

WHEREAS, the Board denied the Level 2 grievance on or about March 25, 2021; and

WHEREAS, the Association informed the District it would be proceeding to Level 3 on or about March 29, 2021; and

WHEREAS, the Board denied the Level 3 grievance on or about April 5, 2021; and

WHEREAS, the Association filed a Petition of Appeal, Docket No. EDU-7399-21 on July 23, 2021,; and

WHEREAS, the Association filed an Unfair Practice Charge, Docket No. CO-2022-012 on August 6, 2021; and

WHEREAS, the parties took part in a telephone conference on November 23, 2021 to discuss the Petition of Appeal and Unfair Practice Charge, Docket Nos. EDU-7399-21 and CO-2022-012; and

WHEREAS, the parties have continued to engage in discussions regarding the resolution of such grievance.

NOW, THEREFORE, the Board and Association, in consideration of mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged, agree as follows:

1. The parties agree that Allison Ahearn, who was previously docked three days of pay from April 5, 2021, through April 7, 2021, will be allowed to use one and one-half (1.5) sick days for the three days referenced in this Paragraph. As a result, Ms. Ahearn will be compensated for one and one-half days, by using one and one-half sick days.

2. The parties agree that Samantha Barrows, who was previously docked five days of pay from April 5, 2021, through April 9, 2021, will be allowed to use two and one-half (2.5) sick days for the five days referenced in this Paragraph. As a result, Ms. Barrows will be compensated for two and one-half days, by using two and one-half sick days.

3. The parties agree that Cherylin DeCarlo, who was previously docked five days of pay from April 5, 2021, through April 9, 2021, will be allowed to use two and one-half (2.5) sick days for the five days referenced in this Paragraph. As a result, Ms. DeCarlo will be compensated for two and one-half days, by using two and one-half sick days.

4. The parties agree that Laura Madden, who was previously docked one-half day of pay on April 5, 2021, will be allowed to use one-half (0.5) sick day for the one half-day referenced in this Paragraph. As a result, Ms. Madden will be compensated for one-half day, by using one-half of a sick day.

5. The parties agree that this Agreement resolves both the Petition of Appeal (EDU-7399-21) and Unfair Practice Charge (CO-2022-012) previously filed by the Association.

6. The parties agree that all other terms and conditions included in the CBA and not specifically referenced herein shall remain in full force and effect and that no past practice shall be created by this Agreement.

7. This Agreement contains the entire Agreement and understanding between the parties.

8. This Agreement shall not be construed to establish past practice in the District.

9. If a specific clause of this 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 shall be bound by the terms and conditions of this Agreement.

11. The provisions of this Agreement are subject to and contingent upon ratification by the parties represented by the signatories herein to the contract.

12. The parties have entered into this Agreement freely and voluntarily.

FOR THE ASSOCIATION

2/9/22

DATE:

Allison Ahearn

DATE: 2-10-2022

Samantha Barrows

Samantha Barrows

DATE: 2/10/22

Cheryl DeCarlo

Cheryl DeCarlo

DATE: 2/10/22

Laura Madden

DATE: 2/10/22

FOR THE BOARD

2/10/22

DATE:

SCIARRILLO CORNELL
MERLINO, MCKEEVER & OSBORNE, LLC
ATTORNEYS AT LAW

Email: edlawgroup@sciarrillolaw.com

March 16, 2022

Sent via Electronic Mail
Honorable Ernest Bongiovanni, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

RE: SUMMIT BOARD OF EDUCATION (Board/District)
Summit Education Association o/b/o Allison Ahern, Samantha Barrows, Cherylin DeCarlo and Laura Madden v. Summit Board of Education
OAL Docket No. EDU 7399-21
Agency Docket No. 113-7/21
Resolution Approving the Memorandum of Agreement

Dear Judge Bongiovanni:

Enclosed please find the Resolution of the Summit Board of Education approving the attached Memorandum of Agreement between the Board and the Association resolving the above matter.

Based upon the Board's approval, we ask that you close the file on this matter.

A copy of this letter has been forwarded to Randi Doner April, Esq., attorney for the Petitioners. Thank you.

Respectfully yours,
SCIARRILLO, CORNELL, MERLINO, McKEEVER & OSBORNE, LLC

Anthony P. Sciarrillo
APS:tmc
Enclosure

cc: Randi Doner April, Esq. (via electronic mail)

SUMMIT PUBLIC SCHOOLS

Board of Education • 14 Beekman Terrace • Summit New Jersey 07901-1702 • 908-273-3025

Derek J. Jess, RSBA, School Business Administrator/Board Secretary

March 14, 2022

The Board of Education of Summit in the County of Union, New Jersey convened a Meeting on Thursday, March 10, 2022 at 7:00 PM in the Summit High School Library/Media Center.

The following Board members were present: Mr. Bonner, presiding, Mr. Cho, Ms. Cohn, Mr. Colón, Ms. Justice, Ms. Miller, and Ms. Primack. Also present were Mr. Hough, Superintendent of Schools, Mr. Jess, School Business Administrator/Board Secretary, Ms. Babis, Director of Special Education Services, Mr. Gardella, ~~Director of Human~~ Resources, Ms. McCann, Director of Education, Ms. Marr, Director of Pupil Personnel Services, and Mr. Torres, Assistant Business Administrator.

PERSONNEL

J. RESOLVED, the Board of Education, upon the recommendation of the Superintendent, approves the Memorandum of Agreement between the Board and the Association in the matter of OAL Docket No. EDU 7399-21/Agency Docket No. 113-7/21

Motion by Ms. Miller, seconded by Mr. Cho
Roll Call 7-0
Motion Carried

I, Derek J. Jess, RSBA, School Business Administrator/Board Secretary of the City of Summit, in the County of Union, 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 March 10, 2022 has been compared by me with the original minutes of said City of Summit Board of Education and is a true and complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of the said board of education.

Derek J. Jess, RSBA
School Business Administrator/Board Secretary

Dhabliwala, Ila [OAL]

From: Dhabliwala, Ila [OAL]
Sent: Wednesday, March 16, 2022 1:38 PM
To: edlawgroup@sciarrillolaw.com
Subject: FW: SUMMIT BOE | SUMMIT EA O/B/O ALLISON AHERN, SAMANTHA BARROWS, CHERYLIN DECARLO, AND LAURA MADDEN V. SUMMIT BOE | OAL DOCKET NO. EDU-7399-21 | AGENCY DOCKET NO. 113-7/21 | RESOLUTION APPROVING THE MOA
Attachments: summit.pdf

Thank you so much.
Bcc: Judge Bongiovanni

Ila Dhabliwala, Judicial Assistant to:
Gail M.Cookson, ALJ 973-648-6018
Jude-Anthony Tiscornia, ALJ 973-648-6033
Ernest M. Bongiovanni, ALJ 973-648-6036

Fax: 973-648-6124 / 973-648-2358

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From: Edlawgroup <edlawgroup@sciarrillolaw.com>
Sent: Wednesday, March 16, 2022 1:32 PM
To: Dhabliwala, Ila [OAL] <Ila.Dhabliwala@oal.nj.gov>
Cc: 'Randi Doner April, Esq. (RApril@oxfeldcohen.com)' <RApril@oxfeldcohen.com>
Subject: [EXTERNAL] SUMMIT BOE | SUMMIT EA O/B/O ALLISON AHERN, SAMANTHA BARROWS, CHERYLIN DECARLO, AND LAURA MADDEN V. SUMMIT BOE | OAL DOCKET NO. EDU-7399-21 | AGENCY DOCKET NO. 113-7/21 | RESOLUTION APPROVING THE MOA

Dear Judge Bongiovanni,

Please see attached correspondence in regard to the above-referenced matter.

Thank you,

Anthony P. Sciarrillo, Esq.
Julie Frank on behalf of Anthony P. Sciarrillo, Esq.

Julie Frank | Legal Assistant
Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC
238 St. Paul Street | Westfield, NJ 07090
(P) 908.481-5000 (F) 908.264.2045

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89-22E
OAL Dkt. No. EDU 03109-22
Agency Dkt. No. 79-4/22

New Jersey Commissioner of Education

Order on Emergent Relief

A.M.G., on behalf of minor child, A.G.,

Petitioner,

v.

Board of Education of the Eastern Camden County Regional School District, Camden County, Dr. Robert M. Tull, Jr., and Steven Picot,

Respondents.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner[1] concurs with the ALJ – for the reasons thoroughly set forth in the recommended order – that petitioner has demonstrated entitlement to emergent relief pursuant to the standards enunciated in *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, granting petitioner's application for emergent relief, is adopted. A.G. is immediately eligible to apply for and play on his high school tennis team. This case shall continue at the OAL on with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.



ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: April 29, 2022
Date of Mailing: April 29, 2022

[1] Pursuant to *N.J.S.A.* 18A.4-33, this matter has been delegated to Assistant Commissioner Kevin Dehmer.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 03109-22
AGENCY DKT. NO. 79-4/22

A.M.G.[1] **ON BEHALF OF MINOR CHILD M.G.,**

Petitioner,

v.

BOARD OF EDUCATION OF THE EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY, DR. ROBERT M. TULL, JR., AND STEVEN PICOT,

Respondents.

Joseph W. Montgomery, Esq., for petitioner (Montgomery Law, LLC, attorneys)

Anthony I. Padovani, Esq., for respondents (Sahli and Padovani, attorneys)

BEFORE **SARAH H. SURGENT, ALJ**

---

[1] A.M.G. clarified on the record that her initials are A.M.J.-G. For the sake of simplicity and clarity, and in keeping with the OAL docketed case-caption, I refer to her as A.M.G.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this emergent education matter, petitioner A.M.G., on behalf of her minor child, M.G., appeals from the above-named respondents' determination that M.G., a homeschooled student, may not join the Eastern Camden County Regional High School's boys tennis team for the spring 2022 season. The Department of Education (DOE) transmitted this matter to the Office of Administrative Law (OAL) on April 19, 2022, and it was filed on that date at the OAL to be heard as an emergent contested matter, pursuant to N.J.S.A. 52:14B-1 et seq., N.J.S.A. 52:14F-1 et seq., and N.J.A.C. 1:1-12.6. The emergent hearing was held remotely via videoconference on April 25, 2022, due to the ongoing COVID-19 pandemic (pandemic).

Petitioner maintains that respondents misinterpreted the school district's newly-implemented fall-2021 district policy 2431, the athletic competition policy (policy) for homeschooled children, by imposing a condition that does not comport with the policy as it is written. Petitioner also maintains that civil fees, damages, attorneys fees and costs should be imposed. However, it is well settled that "[t]he specialized remedy of counsel fees is not one within the statutory authority of the Commissioner" of Education, and it is therefore not within my authority to determine. Balsley v. N. Hunterdon Reg'l Sch. Sidt. Bd. Of Educ., 117 N.J. 434, 447, 1990. Therefore, there are no other issues to be determined by the Commissioner.

Respondents maintain that their newly-founded policy is clear, has not been updated or revised, and that it does not need to be. They also maintain that they are entitled to attorneys' fees and costs, which also will not be addressed in this order, as fees and costs are not within my jurisdiction to decide.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, as well as the opportunity to hear the witnesses and assess their credibility, I **FIND** the following as **FACT**:

M.G. is an eleventh-grade student who resides within the school district's boundaries. M.G. attended the school in person during his tenth-grade year and the fall of his eleventh-grade year, except for those periods when students were taught remotely due to the pandemic. During M.G.'s entire ninth-grade year, M.G. resided in another school district and attended a charter school as a homeschooled student.

On January 27, 2022, A.M.G. began the process of withdrawing M.G. from the school district for homeschooling. By February 3, 2022, M.G. was formally withdrawn. On that date, A.M.G. was then informed by Steven Picot (Picot), the Vice Principal of Athletics and Student Activities, that M.G. would not be eligible to participate in the spring 2022 tennis season because he was not homeschooled for a three-month period immediately preceding his proposed participation on the school's tennis team. A.M.G. therefore did not register M.G. for the tennis team while she was seeking clarification of the school's policy as it applied to M.G.

Picot's position was that if a homeschooled student did not homeschool in the three summer months immediately preceding the fall sports season, that student would be barred from participating in the fall sports season. However, he then reversed his position, stating that if the student had been homeschooled for three months in the prior academic spring, they would be eligible to play fall sports. He also stated that he provided A.M.G. with a link to the policy and registration page and instructed her that she must send a letter to the District Principal, Dr. Robert Tull (Tull), advising him of M.G.'s intent to play in the spring 2022 season, which A.M.G. denies.

School district policy number 2431, which was drafted in the fall of 2021, with the assistance of Tull, addresses the athletic competition of homeschooled children, and provides, in relevant part:

> Homeschooled children are eligible to participate in the high school interscholastic athletic program only if the school district, the parent, and the homeschooled child comply with the Guidelines, Constitution, Bylaws, Rules, and Regulations of NJSIAA, and the policies and regulations of the Board of Education, and the child must be homeschooled for at least three months prior to participating in any athletic activity.
>
> [C-1 (emphasis added).]

Tull's testimony was not credible or consistent within itself or in keeping with the above policy. He has been the high school's principal since October 2006. Tull construed the policy to mean that a child must be homeschooled for at least three months immediately prior to participating in any athletic activity. Therefore, to qualify for a fall sport, a homeschooled child would have to be homeschooled in June, July, and August, even when the brick-and-mortar school is not in session. Tull then changed his testimony and stated that if a student was homeschooled in the last three months of an academic year, and took a normal summer break, they would be eligible to participate in fall sports, as an exception to the policy would apply. Tull agreed that there is "wiggle room" in the policy, and that the school district would not suffer any harm if M.G. were allowed to play tennis. There was no testimony about the purpose of the policy.

According to George Kemery (Kemery), the school's head coach for the boys and girls tennis teams, whose testimony was straightforward and credible, M.G. is still a welcome member of the tennis team, which Kemery refers to as a "family." M.G. was the number one varsity singles player on the team, and his team members fervently want him back. The team is "overflowed," such that not all team members play all the time, but Kemery makes sure to rotate players in, so that everyone gets a chance to play. The last match of the season is scheduled for May 16, 2022, but two matches had

to be rescheduled, so the season will be extended. As of the hearing date, seven out of sixteen matches have been played so far.

In order to qualify for the New Jersey State Interscholastic Athletic Association (NJSIAA) tournament, where college scouts will be watching for scholarship candidates, M.G. must register for the team, have participated in six practices, have brief physical and "impact" examinations, to rule out concussions, and win 60 percent of all the matches that he plays up to and including May 14, 2022. Kemery also indicated that, in the event M.G. is belatedly admitted to the tennis team, Kemery could seek a waiver of the 60 percent requirement from the NJSIAA. At last year's NJSIAA tournament, M.G. was the District's number one player, and won his first singles match, but was defeated in his second match. Having M.G. on the team would be a tremendous benefit because the team will win more matches. Kemery also submitted an affidavit to that effect. (P-2).

According to A.M.G., M.G.'s mother, M.G.'s participation on the team is "crucial," not only because of the NJSIAA tournament and the chance to win a scholarship to college, but also to M.G.'s mental health and social well-being. He misses his team "family." He currently practices tennis at two private tennis clubs, but the experience is not the same, and no college scouts will be watching at those clubs for scholarship candidates. A.M.G. did not register M.G. for the spring 2022 tennis season, as she was awaiting clarification on policy 2431 and why M.G. was disqualified from registering in light of the fact that he had been homeschooled for the entirety of his ninth-grade year in another school district. A.M.G. was in constant contact with Kemery about trying to get M.G. on the team, and he was very encouraging. (P-1 at 6, 17-24). On February 3, 2022, A.M.G. sent Picot an email expressing M.G.'s interest in playing for the spring 2022 tennis season notwithstanding his homeschooling status, and Picot responded by merely sending A.M.G. a link to the school district's Athletic Eligibility website. (P-1 at 4.) On that same date, A.M.G. personally spoke with Picot, who informed her that policy 2431 required that M.G. be homeschooled for three months prior to participating on the tennis team. (P-1 at 5.)

The deadline for registering for the team was February 27, 2022, but it was extended to March 17, 2022. According to A.M.G., Picot was "very dismissive" during their conversation and, in essence, told A.M.G. not to bother registering M.G. for the season, because he was ineligible to play due to the policy. A.M.G. then researched the policy and began looking for an education attorney and securing resources to pay the attorney. On March 30, 2022, Tull sent A.M.G. an email in response to her March 28, 2022, submission of a homeschool student participation in athletics form, stating for the first time, that M.G. was ineligible to play tennis not only under policy 2431, but also because M.G. had not registered for the season. (P-1 at 7, 14). A.M.G. explained that she did not understand the registration process for homeschooled students, and that she received no information about the process until she conferred with her attorney.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.A.C. 6A:4-4.1 provides, in relevant part:

> (b) In determining motions for stay or emergency relief, the Commissioner shall apply the following standards, pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The moving party will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the moving party's claim is settled;
>
> 3. The moving party 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 moving party will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:4-4.1(b).]

In order to prevail on an emergent appeal from the respondents' decision, the moving party must demonstrate each of the above four elements "clearly and convincingly." Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Irreparable Harm

Irreparable harm is a "substantial injury to a material degree coupled with the inadequacy of money damages." Judice's Sunshine Pontiac v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976). An injunctive relief award requires a "clear showing of irreparable injury" or a "presently existing actual threat." Cont'l Grp. v. Amoco Chems. Corp., 614 F.2d 351, 359 (D.N.J. 1980) (internal quotation marks and citations omitted). "[M]ore than a risk of irreparable harm must be demonstrated." Ibid. "In order to demonstrate irreparable harm, the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." Waterfront Comm'n of New York Harbor v. Philip Murphy, in his official capacity as Governor of New Jersey, et al., 2018 AMC 2222, 2242 (D.N.J. June 1, 2018).

Here, M.G. has a protected right to participate in school athletics programs and was precluded from doing so because of the arbitrary manner in which Picot and Tull construed policy 2431. I **CONCLUDE** that M.G. has demonstrated by clear and convincing evidence that he will suffer irreparable harm which cannot be redressed by a legal or equitable remedy following a trial. The spring 2022 tennis season is currently in progress and will end in May of 2022. If M.G. is not immediately permitted to join the tennis team, he will not be able to participate in the NJSIAA tournament with the chance to win a scholarship to college, and he will not have the opportunity to practice and play with his teammates, his "family," which will substantially negatively impact M.G.'s mental health and social well-being.

Right to the Underlying Claim Must be Settled

As stated above, M.G. has a right to participate in school athletic activities, as demonstrated by a plain reading of policy 2431. During high school, M.G. has been a homeschooled student for almost one year, which by far exceeds the policy's three-month mandate. Picot and Tull had difficulty interpreting the policy and demonstrated that it has "wiggle room." First, they stated that the word "immediately" should be read into the policy, and then contradicted themselves. I **CONCLUDE** that the policy should be construed exactly as it is written, and that M.G. has proved by clear and convincing evidence that he meets the policy's requirements.

Likelihood of Prevailing on the Merits

For the same reasons, I **CONCLUDE** that M.G. has proved by clear and convincing evidence that there is a great likelihood that he will prevail on the merits of his underlying claim.

Balancing of the Equities

Finally, in balancing the equities and interests of the parties, I **CONCLUDE** that M.G. has clearly and convincingly demonstrated that he will "suffer greater harm than the respondent will suffer if the requested relief is not granted." N.J.A.C. 6A:4-4.1(b)4. He has done so, and respondents have offered no proof that any harm will come to the school district if M.G. is permitted to join the tennis team. To the contrary, the evidence shows that M.G. will be a welcome addition to the team, help them win more games, and bring more luster to the team's reputation.

Based on the foregoing, I **CONCLUDE** that M.G. has clearly and convincingly established all of the Crowe factors required by N.J.A.C. 6A:4-4.1(b) to obtain emergent relief. I therefore **CONCLUDE** that M.G.'s petition for emergent relief as to the construction of policy 2431 should be granted.

ORDER

It is therefore **ORDERED** that M.G.'s request for emergent relief as to the construction of policy 2431 be and is hereby **GRANTED**; and it is further

ORDERED that as of the date of this order, M.G. is now immediately eligible to apply for and play on the school district's boys tennis team.

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

April 28, 2022
DATE

Sarah H. Surgent
SARAH H. SURGENT, ALJ

SHS/dw

APPENDIX

Witnesses

For petitioner:

A.M.G.
George Kemery

For respondents:

Steven Picot
Dr. Robert Tull

Exhibits

For the Judge:

C-1 District Policy 2431 – ATHLETIC COMPETITION

For petitioner:

P-1 Petitioner's twenty-four-page motion with attached exhibits (undated)
P-2 Affidavit of George Kemery, dated April 24, 2022

For espondents:

R-1 Respondents' opposition to petitioner's motion, dated April 25, 2022

92-22

New Jersey Commissioner of Education

Final Decision

E.P., on behalf of minor children, J.B. and L.P.,

Petitioner,

v.

Board of Education of the City of Burlington, Burlington County,

Respondent.

Synopsis

Pro se petitioner challenged the respondent Board's decision to assign her minor children, J.B. and L.P., to the Captain James Lawrence Elementary School (Lawrence) following her move to a new address in Burlington that falls within the district's attendance area serviced by the Lawrence school. E.P. maintained that J.B. should remain at his previous school, the Samuel Smith Elementary School (Smith), because she asserted that J.B.'s 504 Plan and disability cannot be accommodated at the Lawrence school. Petitioner contended that the transfer has been detrimental to J.B.'s academic and emotional progress, and that the Board's decision was arbitrary, capricious, and unreasonable. Petitioner also challenged L.P.'s reassignment from Smith to the Lawrence school. The Board filed a motion for summary decision, which was opposed by petitioner without any supporting affidavits.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; a school board has discretionary power to determine which school students will attend within its district, so long as the decision is not contrary to law; in this case, the Board presented ample evidence supporting its reasons for reassigning J.B. and L.P. to the Lawrence school based on the relocation of E.P.'s family to a new sending area within the district, and on Board policy; the Board has further shown that J.B.'s disability can be accommodated at the Lawrence school; E.P.'s assertion that an exception should also be made for L.P. is without merit; further, L.P. no longer attends either district elementary school, as she is now a student at the Watts Intermediate School. The ALJ concluded that the Board's decision to transfer petitioner's children to a different elementary school within the district following petitioner's change of residence was not arbitrary, capricious, or unreasonable. Accordingly, summary decision was granted in favor of the Board, and the petition was dismissed.

Upon review of the record, the Commissioner concurred with the ALJ's conclusion that the Board did not act in an arbitrary, capricious or unreasonable manner in assigning petitioner's children to the Lawrence school based on their residency in the school's sending district. Accordingly, summary decision was granted in favor of the Board, and the petition was dismissed.

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

92-22

OAL Dkt. No. EDU 00721-21
Agency Dkt. No. 258-12/20

New Jersey Commissioner of Education

Final Decision

E.P. on behalf of minor children,
J.B. and L.P.,

Petitioner,

v.

Board of Education of the City of Burlington,
Burlington County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board's decision to transfer petitioner's children to a different elementary school within the district following petitioner's change of residence was not arbitrary, capricious, or unreasonable. Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 3, 0222
Date of Mailing: May 4, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00721-21
AGENCY DKT. NO. 258-11/20

E.P., ON BEHALF OF MINOR CHILDREN, J.B. and L.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,
Respondent.

E.P., petitioner, pro se

Jeffrey R. Caccese, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: February 18, 2022 Decided: March 24, 2022

BEFORE **CARL V. BUCK III, ALJ**:

STATEMENT OF THE CASE

Petitioner E.P., on behalf of her minor child, J.B., challenges the decision of the Burlington City Board of Education, Burlington County (Board) to assign J.B. to attend the Captain James Lawrence Elementary School (Lawrence) due to parent moving to a location in the district serviced by the Lawrence school. Before the move, J.P. had

attended Samuel Smith Elementary School (Smith) school. E.P. maintains that J.B. should remain at Smith to accommodate J.B.'s special needs because J.B.'s 504 Plan and J. B.'s disability cannot be accommodated at Lawrence. Petitioner states that this transfer has been detrimental to J.B.'s academic and emotional progress, and the Board's decision was arbitrary, capricious, and unreasonable.[1] Petitioner, on behalf of her minor child, L.P., challenges the decision of the Board to assign L.P. to attend the Lawrence School due to parent moving to a location in the district serviced by the Lawrence school. Before the move, L.P. had attended Smith School.

PROCEDURAL HISTORY

The pro se petition of appeal was filed with the Commissioner of Education (Commissioner) on or about December 23, 2020. It was transmitted to the Office of Administrative Law (OAL) on January 19, 2021, to be heard as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On August 3, 2021, the Board filed a motion for summary decision, pursuant to N.J.A.C. 1:1-12.5. On September 1, 2021, E.P. filed opposition to the motion, with no responding affidavits, contrary to N.J.A.C. 1:1-12.5(b). Respondent's response was filed on September 13, 2021. Petitioner filed additional information on September 28, 2021, to which respondent objected as submitted out of time. A number of other documents were submitted and Oral argument on the motion was scheduled for December 15, 2021. Petitioner did not appear on that date, but the Tribunal allowed the parties to submit final documents until December 27, 2021. Additional documents were filed, and the record closed on February 18, 2022.

FACTUAL DISCUSSION AND FINDINGS

From the documentary evidence provided by the parties and information gleaned at the oral argument, I **FIND** the following as **FACT**:

[1] E.P. has also brought a complaint against the Board with the Office of Civil Rights at the U.S. Department of Education alleging the Board has failed to accommodate J.B.'s disability.

1. The City of Burlington Public School District (District) is comprised of four schools, Burlington City High School, which serves students in grades 7-12, Wilbur Watts Intermediate School, which serves students in grades 3-6, Samuel Smith Elementary School and Captain James Lawrence Elementary school, which both serve students up through second grade.

2. All students in grades 3-6 attend Wilbur Watts Intermediate School (Watts) and all students grades 7-12 attend Burlington City High School (BCHS) regardless of where they reside within the District.

3. Students in second grade and younger attend either Samuel Smith Elementary School (Smith) or Captain James Lawrence Elementary School (Lawrence) depending on where they reside within the territorial boundaries of the District.

4. The Board maintains an Elementary Zoning Map identifying the attendance areas of the elementary schools.

5. Petitioner is the mother of three children attending school in the District, J.B., L.P. and C.A.

6. On or about October 14, 2020, a school social worker from Watts who was involved with C.A. was informed that Petitioner may have relocated. That information was referred to the Board's residency officer, James Barnes.

7. After receiving the referral, Mr. Barnes investigated and determined that Petitioner was residing at 2-- C---- Street, which is in the Lawrence sending area. Petitioner previously lived at 9-- S--- Avenue, which is in the Samuel Smith sending area.

8. On October 29, 2020, Mr. Barnes advised the school secretaries at Watts and at Smith of the address change since petitioner had children at each of those schools at that time. That information was passed on to the Administration, who determined that J.B. and L.P. would be transferred to Lawrence due to petitioner's change in residency and in accordance with Board policy.

9. Petitioner was informed through correspondence from Superintendent, John Russell, Ed.D., dated November 30, 2020, that L.P. and J.B. would be transferred to

Lawrence effective January 4, 2021. Dr. Russell's letter explained that petitioner's new address is zoned for Lawrence, rather than Smith, and referred her to Board Policy 5120, which gives the Board the discretion to assign students to schools and affirms that students shall attend school based on the attendance area of their residence.

10. During the 2020-2021 school year, petitioner opted for J.B. and L.P. to attend school all virtually, which was a choice offered to all students due to the COVID-19 pandemic. As such, the transfer from Smith to Lawrence did not require either J.B. or L.P. to physically change buildings.

11. Although mid-year, in District transfers are not tracked by the Administration on a year-to-year basis.

12. C.A. was a fourth-grade student at Watts at the time this appeal was filed. C.A.'s school of attendance was not impacted by the petitioner's change of residence and will not be impacted going forward.

13. L.P. was a second grader at the time this appeal was filed. By virtue of petitioner's change of residence, on January 4, 2021, L.P. was transferred from Smith to Lawrence. However, during the 2021-2022 school year, she will attend Watts, and her school of attendance will no longer be impacted by petitioner's residence.

14. J.B. was a first-grade student at the time this appeal was filed. By virtue of petitioner's change of residence, on January 4, 2021, J.B. was transferred from Smith to Lawrence. During the 2021-2022 school year he will attend Lawrence instead of Smith. Beginning in the 2022-2023 school year he will attend Watts.

15. On December 5, 2020, petitioner wrote a letter expressing her disagreement with J.B. and L.P. being transferred to Lawrence expressing her belief that it was not in J.B.'s best interest to be transferred focusing on her dissatisfaction with the implementation of J.B.'s 504 Plan, rather than any dispute about her residency.

16. Petitioner met with Dr. Russell on December 23, 2020, to discuss additional supports the Board was offering to J.B. in response to petitioner's concerns about the

implementation of the 504 Plan. At the meeting Dr. Russell advised that the transfer would become effective on January 4, 2021, after the winter break.

17. Petitioner filed this appeal on December 23, 2020.

18. Petitioner filed a simultaneous complaint against the Board with the Office for Civil Rights within the U.S. Department of Education alleging the Board has failed to accommodate J.B.'s disability by improperly implementing his 504 Plan. That matter remains pending.

19. The petition lists 2-- C------ Street as petitioner's address, which is in the Lawrence attendance area.

20. Petitioner provided a note from J.B.'s doctor with her petition wherein his doctor opined that a transfer was not in J.B.'s best interest.

21. J.B. was absent for nineteen (19) days prior to the implementation of the transfer, during the first seventy (70) days of school. J.B. missed another ten (10) days after the transfer and did not begin attending school at Lawrence until after she was advised of the Board's obligation to notify DCP&P of his truancy.

22. Subsequent to the filing of this appeal, in a letter written to the Court, petitioner expressed her concern that J.B.'s visual impairment would make it physically challenging for him to switch buildings from Samuel Smith to Captain James Lawrence, as he would have to learn a new building layout.

23. J.B. has not been physically in school since March of 2020, at which time he was in kindergarten.

24. The Board initiated an Orientation and Mobility referral for J.B. through the New Jersey Commission for the Blind and Visually Impaired (Commission) which has provided assistive technology and services.

LEGAL ANALYSIS AND CONCLUSIONS

Summary Decision Standard

A 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). That rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules. See R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> "[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'"
>
> [Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).]

In evaluating the merits of the motion, "[a]ll inferences of doubt are drawn against the movant and in favor of the opponent of the motion." Judson, 17 N.J. at 75. "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." N.J.A.C. 1:1-12.5(b) (emphasis added). "If the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, he[/she] will not be heard to complain if the court grants summary judgment." Judson, 17 N.J. at 75 (internal quotation marks and citations omitted). 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, 477 U.S. at 252.

Having reviewed the parties' submissions, I **CONCLUDE** that no genuine issues of material fact exist which require an evidentiary hearing, and that this matter is therefore ripe for summary decision.

SUMMARY DECISION

It is long and well established that a school board has discretionary power to determine which school a student will attend within its district, so long as the decision is not contrary to law. State ex rel. Pierce v. Union Dist. School, 46 N.J.L. 76, 77-78 (1884). The law requires that school boards shall "[m]ake, amend and repeal rules, not inconsistent with . . . title [18:A] or with the rules of the state board, for . . . the government and management of the public schools and public school property of the district." N.J.S.A. 18A:11-1c. "Each school district shall provide, for all children who reside in the district . . . suitable educational facilities including proper school buildings and furniture and equipment, [and] convenience of access thereto." N.J.S.A. 18A:33-1.

"Convenience of access" has been construed to be a matter of distance between a student's residence and assigned school, rather than the parents' convenience for personal reasons. See, e.g., Van Note v. Branchburg Bd. of Educ., 2001 N.J. AGEN LEXIS 201 (April 16, 2001) (citing N.J.S.A. 18A:39-1 and concluding that board's decision to limit transportation of child of divorced parents with joint physical custody to the residence of one parent only was not arbitrary, capricious, or unreasonable). It is indisputable that by moving within the district, petitioner's new home places her family in the perimeter of the sending area for the Lawrence school. The contention is that J.B. should remain in the Smith school, which is not only not in the sending area.

An "'action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives.'" Parsippany-Troy Hills Educ. Ass'n v. Bd. of Educ., 188 N.J. Super. 161, 167 (1983) (quoting Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div.1960)). The Board's discretionary decision to assign J.B. to Lawrence "'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.'" Ibid. (quoting Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div.1965)).

The arbitrary, capricious, or unreasonable standard of review "is narrow in its scope and consequently imposes a heavy burden on those who challenge actions of boards of education." Piccoli v. Bd. of Educ. of the Ramapo-Indian Hills Reg'l High Sch. Dist., 1999 N.J. AGEN LEXIS 1314 at 11-12 (Mar. 10, 1999).

> In the law, "arbitrary" and "capricious" means having no rational basis. . . . Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. 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.
>
> [Id. at 12 (quoting Bayshore Sewerage Co. v. Dept. of Envtl. Prot., 122 N.J. Super. 184, 199-200 (Ch. Div. 1973) (internal citations omitted), aff'd o.b., 131 N.J. Super . 37 (App . Div. 1974)).]

In order to defeat the Board's summary decision motion, E.P. must therefore "demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. v. Bd. of Educ. of Franklin Lakes, 2014 N.J. AGEN LEXIS 19 (Feb. 24, 2014). There has been no such showing. Indeed, to the contrary, there is no evidence of bad faith, petitioner has assented to the arrangements and accommodations made for J.B. at the Lawrence school.

The Commissioner routinely adopts initial decisions dismissing petitions of appeal when parents object to their child's involuntary assignment to a different school to reduce or equalize class sizes and resources. See, e.g., C.F. v. Bd. of Educ. of Twp. of Pequannock, 2018 N.J. AGEN LEXIS 996 (Sept. 26, 2018), adopted Comm'r, 2018 N.J. AGEN LEXIS 996 (Nov. 2, 2018) (dismissing appeal of kindergartener's school assignment and concluding that school board's approval of students' school assignment

plan to address decreasing enrollment and need to balance class sizes was not arbitrary, unreasonable, or made in bad faith); J.P. v. Bd. of Educ. of S. Brunswick, 2002 N.J. AGEN LEXIS 952 (Dec. 17, 2002), adopted Comm'r, 2003 N.J. AGEN LEXIS 1013 (Feb. 3, 2003) (dismissing appeal of grade schoolers' new school assignment and concluding that redistricting grade schools due to overcrowding, population growth, and acquisition of new elementary school was not arbitrary, capricious, or unreasonable, even if it was not the best of all proposed redistricting plans considered by the board); Piccoli, 1999 N.J. AGEN LEXIS 20 (Jan. 12, 1999), adopted Comm'r, 1999 N.J. AGEN LEXIS 1314 (Mar. 10, 1999) (dismissing appeal of amended high school assignment policy and concluding that school board's amendment of policy was not arbitrary, capricious, or unreasonable, and was a product of issues of overcrowding at one school, under-enrollment at another, and future use of the district's capital resources and further educational programs); G.M. v. Roselle Park Borough Bd. of Educ., 1994 N.J. AGEN LEXIS 1008 (Dec. 15, 1993), adopted Comm'r, (Jan. 26, 1994) (dismissing appeal of school board's change of geographic boundaries for kindergartners and concluding that board's goal of evenly distributing students within the district schools was reasonable exercise of authority, not arbitrary, capricious, or unreasonable, and did not result in child being treated differently than other similarly situated students. "[T]he school board may not look at each individual child and decide whose personal reasons are more compelling for attendance at one school than another. Absent some form of actual impediment to attendance or extraordinary circumstance boards must act in a manner that treats all students equally."); Fullen v. Middletown Twp. Bd. of Educ., 1986 S.L.D. 582, 598, 601 (Jan. 27, 1986), adopted Comm'r, 1986 S.L.D. 603 (dismissing challenge to school redistricting plan to alleviate enrollment imbalances, underutilization of some facilities, and overutilization of other facilities, and concluding that "[a] policy or rule of a board of education is reasonable if it is designed to achieve a legitimate goal. . . . While pupils have a constitutional right to receive a thorough and efficient program of education, there is no corollary right to receive such education in a specific schoolhouse in the district."); Marcewicz v. Bd. of Educ. of Pascack Valley Reg'l High Sch. Dist., 1972 S.L.D 619, 625-26 (Nov. 28, 1972) (dismissing challenge to school redistricting plan to relieve overcrowding of high school and concluding "the Board acted in a reasonable, deliberate and thorough manner to examine the enrollment projections over a period of weeks prior to the time of its final action," as "[i]t is the Board alone which is empowered by N.J.S.A. 18A:11-1 to make rules for its

own 'government' and the 'government' of the public schools entrusted to its supervision"); Rutherford v. Bd. of Educ. of Maywood, 1963 S.L.D. 129, 130 (May 24, 1963) ("Petitioner's claim of personal hardship, however sincere, does not raise a sufficient consideration to outweigh the educational values which respondent considers will emerge from classes limited in size and equalized with respect to the teachers' skills and experience.").

In this case, the Board indisputably has the management prerogative to adopt policies addressing the assignment of students within the District, "which cannot be usurped or assumed by the Commissioner . . . absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis." C.F., 2018 N.J. AGEN 996 at 15-16. The Board has presented ample evidence supporting its reasons for the establishment of new attendance within the new sending area and has also shown that J.B.'s disability can be accommodated at the --- school.

E.P. in addition to concerns expressed for J.B. also asserts that an exception should be made for L.P. when both children are in the appropriate area for the Lawrence school.

Under these circumstances, I **CONCLUDE** that the Board has met its burden to prove by a preponderance of the credible evidence that its decision to transfer J.B. was not arbitrary, capricious, or unreasonable, and that J.B.'s education, taking into consideration his established disabilities, can be accommodated at the Lawrence school and therefor the Board's motion for summary decision as to J.B. should therefore be **GRANTED** as a matter of law.

Further, I **CONCLUDE** that the Board has met its burden to prove by a preponderance of the credible evidence that its decision to transfer L.P. was not arbitrary, capricious, or unreasonable, and that L.P. as residing in the Lawrence school area is appropriately designated to attend the Lawrence school and therefor the Board's motion for summary decision as to L.P. should therefore be **GRANTED** as a matter of law.

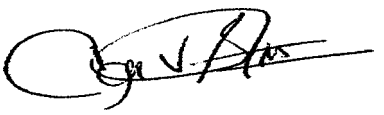
ORDER

It is therefore **ORDERED** that the Board's motion for summary decision is hereby **GRANTED**, and the petition of 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.



March 24, 2022
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: March 24, 2022

Date Mailed to Parties: March 24, 2022

CVB/lam

APPENDIX

EXHIBITS

For Petitioner:

Documentary Submissions

For Respondent:

Motion for Summary Decision and Order dated August 3, 2021

Additional Documentary Submissions

93-22
OAL Dkt. No. EDU 00192-22
Agency Dkt. No. 230-12/21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Jennifer Adona, Board of Education of the Caldwell-West Caldwell School District, Essex County.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter.

Accordingly, pursuant to *N.J.S.A.* 18A:26-10, the respondent's teaching certificate is suspended retroactively from November 10, 2021 through June 30, 2022, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 3, 2022
Date of Mailing: May 4, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00192-22
AGENCY DKT. NO. 230-12/21

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JENNIFER ADONA, BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,

Douglas Silvestro, for petitioner (The Busch Law Group, LLC, attorneys)

Jennifer Adona, respondent, pro se

Record Closed: March 24, 2022 Decided: March 24, 2022

BEFORE, **WILLIAM J. COURTNEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The above matter was scheduled for a hearing on February 15, 2022 but was adjourned because the parties agreed to settle the matter. A signed settlement agreement and Board Resolution indicating the terms of settlement was forwarded to the undersigned on March 24, 2022 and is attached hereto.

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

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

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

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

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. 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 shall become a final decision in accordance with N.J.S.A. 52:14B-10.

William J. Courtney

March 24, 2022
DATE

WILLIAM J. COURTNEY, ALJ

Date Received at Agency: March 24, 2022

Date Mailed to Parties: March 25, 2022
sej

THE BUSCH LAW GROUP LLC
450 Main Street
Metuchen, New Jersey 08840
P: (732) 243-9588; F: (732) 243-9590
Attorneys for Caldwell-West Caldwell
Board of Education

In The Matter of the Suspension of the Teaching Certificate(s) of Jennifer Adona / Caldwell-West Caldwell School District Board of Education, Essex County.	BEFORE THE STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 192-2022 N AGENCY REF NO.: 230-12/21 **SETTLEMENT AGREEMENT**

WHEREAS, Jennifer Adona ("Ms. Adona") was a tenured school psychologist employed by the Caldwell-West Caldwell Board of Education (the "Board") (collectively the "Parties"); and

WHEREAS, Ms. Adona notified the Board on September 13, 2021 via written correspondence that she intended to resign effective September 24, 2021; and

WHEREAS, Ms. Adona relinquished her position on September 24, 2021; and

WHEREAS, on or about November 10, 2021 the Board filed with the Acting Commissioner of the New Jersey Department of Education an Order to Show Cause compelling Ms. Adona to explain why the Commissioner should not suspend her educational services personnel / school psychologist certificate for resignation without sufficient notice pursuant to N.J.S.A. 18A:26-10 and N.J.A.C. 6A:9-17.9; and

WHEREAS, in order to avoid the costs, expenses, delays, and uncertainties of the hearing process and/or civil litigation, the Parties hereto wish to fully and finally settle and resolve the Order to Show Cause pending before the Commission of the New Jersey Department of Education and the Office of Administrative Law;

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties incorporate the above recitals and agree as follows:

1. **Suspension.** The Parties agree to support a suspension of Ms. Adona's educational services personnel/school psychologist certificate retroactive from November 10, 2022 through June 30, 2022, with Ms. Adona's certificate(s) being reinstated and removed from suspension effective July 1, 2022, without any further action being required by Ms. Adona. The Parties acknowledge that only the Commissioner of Education has the authority to issue a suspension of Ms. Adona's certificate(s), but the Parties agree to mutually request and support a suspension in accordance with these terms. Should the Commissioner reject this Agreement or otherwise seek to impose a suspension of more or less time than contemplated herein, either Party may revoke their consent to this Agreement, in which event both Parties reserve all rights to proceed with this matter as permitted by law.

2. **Approval of Settlement.** Upon full execution of this Agreement, the Parties shall mutually request that the terms of the Agreement are incorporated into an Initial Decision to be issued by the Office of Administrative Law.

3. **Compromise/No Admission of Liability.** The Parties understand, represent, and warrant that this Agreement is not an admission of wrongdoing or liability by or on the part of any Party.

4. **Release.** Ms. Adona hereby irrevocably and unconditionally waives, releases and forever discharges any and all claims or rights, whether known or unknown, which she has or may have against the Board, in any venue, as well as any of its members, officers, agents, attorneys, administrators, employees or representatives, related in any way to her employment with the Board or resignation therefrom, and in respect of, any and all charges, promises, actions, causes of action, covenants, contracts, controversies, agreements, complaints, claims, counterclaims, liabilities, obligations, suits, demands, grievances, arbitrations, costs, losses, sums of money, accounts, bills, judgment, executions, damages, debts and expenses, including attorneys' fees and costs, of any nature or description whatsoever, in law or in equity, asserted or unasserted, express or implied, foreseen or unforeseen, real or imaginary, suspected or unsuspected, known or unknown, liquidated or non-liquidated, of any kind or nature or description whatsoever, arising from the beginning of the world to the effective date of this Agreement, including but not limited to any claim under State or Federal law for discrimination based on age, race, gender, disability or any other actual or perceived characteristic. To the extent that Ms. Adona is

authorized by law to file a claim or complaint with the U.S. Equal Employment Opportunity Commission or any other such institution, Ms. Adona additionally and specifically waives any right to receive monetary damages as a result of such claim or complaint. With respect to her waiver of any and all potential age discrimination or similar claims hereunder, Ms. Adona understands that she has twenty-one (21) days to consider this Agreement and shall have seven (7) days after signing the agreement to reconsider and revoke her signature, though such revocation shall relieve the Board of any duty to abide by its obligations herein.

5. **Enforceability and Severability.** The Parties agree and acknowledge that each of the provisions of this Agreement are reasonable and should be fully enforceable, and the Parties waive any right to argue, assert or allege any claim to the contrary. However, if any provision of this Agreement is determined by a Court of competent jurisdiction to be unenforceable because it is overbroad or unreasonable, the Parties agree that such provision(s) shall be modified and enforced to the maximum extent permissible. If any provision of this Agreement is held to be invalid and cannot be modified so as to make it enforceable, then such provision shall be deemed to be severed from the Agreement and the remaining provisions shall remain in full force and effect.

6. **Entire Agreement.** This Agreement constitutes the sole and complete agreement among the Parties with respect to the subject matters hereof.

7. **Drafting and Negotiation by Counsel.** The drafting and negotiating of this Agreement has been participated in by each of the Parties and their respective counsel and/or representatives and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the Parties. The Parties hereby acknowledge that they have been represented by counsel, or any other representative of their choice, throughout the Action, throughout the negotiation of this Agreement, and at the execution of this Agreement, and have read and consulted with counsel, or their chosen representative, regarding this Agreement. To the extent any party chose not to consult with counsel and/or a representative, such a decision was made knowingly and voluntarily and said party expressly agrees that they were given ample opportunity to confer with counsel and/or a representative, but chose not to, and therefore waives their right to argue, at a later date, that they did not understand the terms of this Agreement because they did not confer with counsel and/or a representative.

8. **Governing Law.** This Agreement shall be construed under, subject to, and governed by the laws of the State of New Jersey.

9.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth below.

CALDWELL-WEST CALDWELL BOARD OF EDUCATION

Dan Cipoletti, Bd. President

DATED: 3/22/2022

WITNESS:

Brian McCarthy, Bd. Sec./Bus. Admin.

DATED: 3/22/22

JENNIFER ADONA

DATED: 3/3/2022

WITNESS

DATED: 3/3/2022

BOARD OF EDUCATION CALDWELL-WEST CALDWELL

HARRISON SCHOOL BUILDING
Gray Street, West Caldwell, New Jersey 07006

Brian P. McCarthy
Business Administrator/Board Secretary Telephone 973-228-3360

RESOLUTION

BOARD OF EDUCATION CALDWELL-WEST CALDWELL
REGULAR PUBLIC MONTHLY MEETING ON MARCH 21, 2022 AT 7:00 PM
HARRISON CONFERENCE ROOM, GRAY ST. WEST CALDWELL and VIA LIVESTREAM

Mrs. Getty moved; Mr. D'Ambola seconded, a motion to approve the following Resolution:

Settlement Agreement
BE IT RESOLVED, that the Settlement Agreement in the matter of Employee #1165, under Office of Administrative Law Docket No. EDU 192-2022 N and Agency Ref. #230 12/21, is hereby approved and accepted by the Board of Education,

IT IS FURTHER RESOLVED, that the Board President and Business Administrator are hereby authorized to sign the Settlement Agreement on behalf of the Board of Education.

ROLL CALL VOTE: Ayes – Messrs. D'Ambola, Elko, Mmes. Getty, Grosso, Mr. Cipoletti

Nays – None

Motion carried.

2022 MAR 24 A 10:01

CERTIFIED TO BE A TRUE COPY OF THE MINUTES OF THE REGULAR PUBLIC MONTHLY MEETING OF THE BOARD OF EDUCATION HELD AT THE DATE, TIME AND PLACE ABOVE WRITTEN

Brian P. McCarthy
Business Administrator/Board Secretary

/Resolu

Pursuant to Referral by the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

The Tenure Hearing of Alix Gillespie	:
and	: **Docket No. 241-12/21**
Gloucester County Special School District and Vocational School District, Gloucester County	:

Decision and Award

Appearances:

On behalf of Alix Gillespie:
Keith Waldman, Esquire
Hop T. Wechsler, Esquire
Selikoff & Cohen, PA
700 East Gate Drive, Suite 502
Mt. Laural, NJ 08054

On behalf of Gloucester County Special School District and Vocational School District, Gloucester County:
Michael J. DiPiero, Esquire
Brown & Connery LLP
360 Haddon Ave.
Westmont, NJ 08108

Introduction

This matter arises from tenure charges of unbecoming conduct and other just cause sufficient to warrant dismissal against **Alix Gillespie**, (Respondent) certified by the **Gloucester County Special School District Board of Education**, (the District) and a January 4, 2022

referral of the tenure charges to the undersigned by the New Jersey Department of Education, Office of Controversies and Disputes pursuant to *N.J.S.A. 18A:6-16.* A hearing in the matter was conducted in-person on February 17, 24 and 15, 2022 in Sewell, New Jersey and via the Zoom virtual platform on March 11, 2022. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Alix Gillespie was present for the entire hearing and testified on her own behalf. By agreement of the parties, the hearing was not transcribed. At the close of the hearing on March 11, 2022, the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on April 11, 2022, the matter was deemed submitted.

This Decision and Award is made following my careful consideration of the entire record in the matter, including the undersigned's observations of the demeanor of all witnesses.

Issues

The issues presented in this matter may be accurately stated as follows:

> Has the District met its burden of establishing the truth of its tenure charges against Respondent, and if so, what is the appropriate discipline, if any?

The Tenure Charges

The tenure charges in this matter were filed by the District's Assistant Superintendent for Business/ Board Secretary Amy Capriotte, on December 17, 2021. The Statement of Charges filed by the Board, (without included references to attached evidence) provide:

I, Amy Capriotti, Assistant Superintendent for Business/Board Secretary, do hereby charge that Ms. Alix Gillespie Tyson[1] (hereinafter Tyson), employed by the Board of Education of the Special Services and the Vocational School District of the County of Gloucester (hereinafter "District") as a tenured Teacher of Students with Disabilities, is guilty of (1) conduct unbecoming a teaching staff member; and (2) other just cause, so as to require her employment with the District be terminated.

More particularly, it is charged that:

Charge 1: Conduct Unbecoming a Teaching Staff Member

Tyson is a tenured Teacher of Students with Disabilities. She has been employed with the District since 2012.

On or about March 8, 2021, Tyson was assigned to provide homebound instruction through the District's CRESS program. The CRESS program contracts with local school districts to provide their students with home bound and other related special needs instructional services.

Tyson was assigned to teach algebra to a homebound student with the initials A.T. starting in Spring 2021. A.T. was a minor, eleventh grade student from Kingsway School District ("Kingsway"). Which is one of the largest school districts in Gloucester County and a longstanding client of the CRESS program.

On or about October 25, 2021, CRESS program received an email complaint that was sent to Kingsway by A.T. after she was notified that Tyson was going to be assigned to be her instructor for the 2021-2022 school year. A.T. reported in her email complaint that Tyson was not providing her instruction, was unprofessional, failed to actually visit the student during scheduled instruction time; used text messaging in lieu of face-to-face instruction and falsified time records, including forging her parent's signature on CRESS time sheets.

The District investigated the complaint by reviewing the text messages between A.T. and Tyson and the timesheets that were submitted to CRESS. The texts corroborated some of the complaints about lack of instruction offered by Tyson. Those coupled with the timesheets and the falsified parental forms confirmed that Tyson was giving herself credit for performing instruction in A.T.'s home, even though she was not actually

[1] By the time of the referral of this matter to the arbitrator, Respondent had changed her name to Alix Gillespie.

present. Kingsway was charged for in-person instruction based on Tyson's falsified timesheets.

The District interviewed Tyson and advised her of A.T.'s complaint. Tyson did not deny that she performed her in-person services remotely and claimed that A.T., who Tyson indicated was "awful" at math, was fine working on her own in algebra.

During the interview, Tyson indicated that at one point during Spring 2021 she became aware that A.T. had threatened to actually run away out of state with a boyfriend. Tyson failed to notify anyone that she was aware of this from the student, which is a violation of Board Policy 3281- Inappropriate Staff Conduct and 3280 – Liability for Pupil Welfare. Tyson also indicated that she did "virtual" instruction during this time in an effort to avoid getting A.T. "in trouble with school."

It was also discovered during the investigation that Tyson was using her personal cellular phone to communicate with A.T. which is a violation of CRESS program rules and District Policy 3281.1 Staff and Communication with Students and 3283 – Electronic Communication between Teaching Staff Members and Students. All CRESS teachers and professionals are equipped to communicate with students through the District approved messaging platform.

Tyson received and accepted pay for home instruction for A.T. that she was not entitled to receive. As a result of her fraud, the CRESS program was forced to refund all of the fees paid by Kingsway for A.T.'s instruction in 2021. Her actions tarnished the excellent client relationship CRESS and the District has with Kingsway.

For all these reasons, the District is justified in seeking the permanent dismissal of Tyson's employment with the District.

Charge 2: Other Just Cause

The above described conduct amounts to neglect of duty, fraud, and theft by deception which constitutes other just cause warranting Tyson's permanent dismissal from employment.

The District asserts that Respondent's conduct amounts to unbecoming conduct and warrants her dismissal according to N.J.S.A. 18A:6-10.

N.J.S.A. 18A:6-10 provides in relevant part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, ...
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided...

Summary of Relevant Testimony[2] and Evidence

Kathleen Monti

District Director of CRESS testified that she has worked for the District for 13 years. The District through CRESS provides related services to sending districts; including "home-bound instruction." The District contracts with sending districts for home-bound instruction services for individual students of sending districts. The Homebound Services program director assigns the instruction of particular students to teachers in the Homebound Services program and those teachers are then responsible for complying with the requirements of the program's contract with the sending districts. Home bound instructors are paid a stipend above what the instructor's salary may be, if the instructor is a teacher in the District. Payment is based upon time sheets submitted by teachers and time records signed by parent/guardians of participating students.

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[2] I have not summarized witnesses presented by Respondent relating to her character and/or teaching ability, effectiveness and/or style.

Monti testified that every employee who begins teaching for the CRESS Homebound program is subject to an onboarding process by the Program Director[3] that includes an on-boarding packet, including the Homebound Services Employee manual, and told to contact the program director should they have any questions.

Monti first learned of the student involved in this matter, A.T.[4], in October 2021[5] when the head of counseling at sending-school-district Kingsway School District (Kingsway) communicated to the District concerns about the services provided by CRESS to A.T. The concerns arose as a result of an email from A.T. to her Kingsway guidance counselor John Cappolina objecting to the assignment of Respondent to provide A.T. home-bound services beginning in October for the 2021-2022 school year. The email provides, in relevant part:

> Hi, so I just found out that I have Alix Gillespie as my home instructor again for environmental science, animal science, forensic science and P.E. If possible I would really like to request a different home instructor. Mt reasoning for that request being:
>
> -She did not teach me a single thing last year.
>
> -She did not help me with math once. When I say I taught myself the entire year last year on my own I genuinely mean that. Not only was that a lot of stress on me but also made it difficult since it was all new material for me that I had never learned prior.
>
> -She was unprofessional and would "log hours" with me even though a lot of those "hours" were me doing my math myself without her help or instruction whatsoever. She made it seem as if she was at my house teaching me on paper. When in reality she was just texting me or reminding me to do my math on my own.

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[3] At all times relevant herein, the Homebound Program director was Emilie Seibert. Seibert was not called to testify by the District.
[4] Students are referenced herein by initials.
[5] All dates hereinafter are 2021 unless otherwise indicated.

> -When she was at my house "teaching me" she would waste a lot of time. By that I mean she'd just hover over one worksheet or she'd more so discuss what needed to be done next. Never actually work with me on what needed to be done on that given day. Because of this, or I suppose her "teaching methods," I literally learned absolutely nothing last year aside from math (solely because I taught it to myself), And I definitely was more behind that I should have been last year.
>
> -She would pretty much lie and "log hours" for home instruction when I was just doing homework. Like on my own without her presence or her help or her instructing me at all.
>
> -The last reason being I suppose is that she also doesn't physically come to houses anymore this year and I just don't do well with virtual learning, I never have and especially with science classes where they're quite involved classes and I actually need a teacher. Not someone to just SAY they are teaching me.
>
> I just strongly do not want Ms. Gillespie as my "teacher" this year again. If you don't believe or trust any of the above reasons either. She was also forging my moms signature to log those "Hours with me" because she wasn't actually here…I apologize for such a long email but if I have her as my teacher" again, its simply not right. I do not get taught, and as I am a student, I would appreciate someone who can properly teach me the curriculum I need to progress and succeed this year.
> I will await your response-
> Thanks

According to Monti, Kingsway also provided copies of screen shots of a number of text messages between Respondent and A.T. supporting the claims of A.T. According to Monti, upon receiving the communication from Kingsway, the District initiated an investigation. Monti thereafter called a meeting with Respondent, Monti's supervisor Dana Lamonica and the Union's president to discuss the matter. That meeting occurred on October 28, 2021. According to Monti, the A.T. allegations were presented to

Respondent, who seemed caught off-guard by the matter. The District managers showed Respondent the text messages provided by A.T. and the time sheets Respondent had submitted relating to her instruction of A.T. According to Monti, during the meeting Respondent "indicated she had written/scribbled the mom's signature," stated that mom was "sometimes hard to reach or also not present." According to Monti, Respondent stated she was just trying to help A.T. pass her courses and catch up. The managers stated that the District had a contract with Kingsway and had to be honest about the services it provided, and had to comply with District policy. Monti testified that during the meeting Respondent stated that there was a time during her period with A.T. when the student said she was going to "run away," and, according to Monti, Respondent's failure to report such a statement by the student to the District so the district could notify Kingsway was a violation of District policy; as was Respondent's use of a cell phone to communicate with A.T. and use of texts for communicating with a student.

Monti explained that according to policy, a parent has to be home for home-bound instruction so that there is no inappropriate conduct by the teacher and so the parent can know that instruction is taking place. As for texting, Monti testified that the policy against texting "is basic," texting is an unprofessional means of communication and the District policy is that teachers do not communicate with students through text messaging or the use of cell phones. The District has, Monti explained, other means to get messages to the parents of student and students. An on-going, back-and-forth, text messaging between a teacher and student is against policy.

If a parent is not home for home-instruction, Monti testified, the teacher is to contact the program manager and leave the student's premises. If a teacher is having

trouble contacting a parent or student, the teacher is supposed to discuss the matter with the program manager. During the October 28 meeting, it also became apparent to Monti that Respondent and the District managers had a different idea of what "virtual" learning was; with Respondent including text messages in her view and the District meaning, simply and only virtual classes. Respondent, according to Monti's review of text message screen shots, would have the student take pictures of her work and text them to Respondent. Also, Monti continued, Respondent provided A.T. the address for the Slader.com website where the student could input her textbook number and find answers to problems. Going through the messages, Monti explained, you can see Respondent texting the student the problems the student was to do and instructions to send Respondent pictures of her work when she was done. Right there, Monti explained, was a red flag that Respondent was not giving instruction in person.

CRESS Homebound program has had to deal with situations where a teacher is not comfortable with going into a home for a variety of legitimate reasons and in such cases CRESS will discuss the situation with the sending district and try to work out an alternative location for instruction or, if such cannot be done, inform the sending district the contract cannot be continued. As far as Monti knows, Respondent did not communicate any such problems relating to A.T.

According to Monti, the time sheets provide by CRESS to Respondent are intended to provide a record for the amount of time the teacher spends giving in-home instruction or preparing for such. Nothing on the time sheets completed by Respondent indicate that the instruction was not performed in A.T.'s home. Monti testified the District also provides time-sheets for parent verification of instruction time. The

verification forms provide spaces for parents, or another District representative if present, to sign their names verifying that instruction occurred. There is also a portion of the form to document cancellations and the reasons therefor. Time forms are submitted to the CRESS office and a clerical employee processes the forms.

There are a number of places on Respondent's time sheets where "virtual" instruction is indicated. Monti testified that, in a perfect world, that would mean that the teacher spent the time indicated being present with the student virtually and actively teaching for the time indicated. Texting a student, Monti testified, is not such instruction. If something needed to be adjusted relating to the manner in which instruction is to occur, Monti testified that such issues would be handled by the CRESS program manager who would contact the sending district and work things out. To her knowledge, Monti testified, Respondent did not seek a modification of the manner of instruction relating to A.T.

Monti testified that Kingsway was paying CRESS for in-person, direct instruction. If such was not going to occur, Monti explained, Kingsway could have just live-streamed the student into the classes. Monti testified that Kingsway indicated in their initial emails on the issue that they were considering requesting refund of their contract payments relating to Respondent's work with A.T. (what Monti described as informal discussions on the subject), but that as of the hearing in the matter, the District has not refunded any money to Kingsway. If Kingsway makes such a request, Monti believes the District will not challenge such a refund. This incident affects the department's reputation for ethical, fair and honest service, Monti testified, and in this circumstance, it involved Kingsway, one of the District's largest customers.

Monti testified that a particular text exchange seemed to indicate there was an understanding between Respondent and A.T. that instruction would not be done in the proper manner and that time could be claimed that was not accurate. The text related to Mondi's testimony in this regard provides:

> [Respondent]
> Yeah I recorded your full amount of hours possible finally past two weeks only 2 cancels so yeah we met!
>
> Have you turned in any math work beyond last time
>
> > [A.T.]
> > No, I'll send it all tonight, I kept forgetting but while I do it later I'll send it, take pictures as I go
>
> [Respondent]
> OK please do because I need to know that it's it's all true hide I believe you but it helps to know and I wanna keep it going especially for guidance to say because they have to renew your contract so they wanna make sure that you're working! Super important

According to Monti, the District did shut down for COVID for a while, but CRESS continued. The program manager (Seibert) would have given instruction to teacher providers as to how to manage Covid.

Monti testified that she does not recall using the words "fraud" or "theft of service" on October 28. She testified that as of October 28, she did not know what was going to happen with the investigation. After October 28, she forwarded the matter to upper administration; the Assistant Superintendent and Superintendent. Mondi testified she does not know how A.T. did grade-wise during the 2020-2021 school years, and that she did not speak with A.T.'s mother and did not speak with any of A.T.'s teachers. As

for the Slader.com website, she testified that she went onto the website for reference, but that she could not testified that any of the District's textbooks are on Slader.

In regard to the CRESS Homebound Services employee manual, Monti testified that program manager Siebert provides the manual to home-bound instructors. She testified that home-bound instructors sign a verification of receipt of the manual. CRESS does not provide Home-bound instructors with phones. It is expected that teachers will use their own phones. If a session is cancelled with less than 24-hour notice, the teacher receives pay for the session. To her knowledge, no student has ever been dropped for excessive cancellations.

In regard to October 28, Monti testified that her notes of the October 28 meeting indicate that Respondent said that she scribbled "a" signature, because mom was unavailable. She testified that at the October 28 meeting, Respondent did not say that A.T.'s parent signed any verification forms. The only person Respondent identified as having signed time-sheets and verifications forms other than herself, was A.T.'s boyfriend. (Monti later learned that Respondent's assistant had also signed the forms.) Monti testified she does not know whether or not A.T.'s mother gave Respondent permission to contact A.T. directly.

Monti testified that if there were to be modifications to in-home instruction for any CRESS student, such would have to go through Monti's office. Respondent did not so pursue any modifications.

Danna Lamonica

Dana Lamonica is the Supervisor of CRESS. She testified that home-bound instructors are monitored by the program manager. Lamonica testified that she learned of

the A.T. issue with Respondent in October when A.T. made complaints about Respondent. Lamonica was present during the October 28 meeting with Respondent. According to Lamonica, Respondent was confronted with the allegations of A.T. and Respondent "admitted everything." Respondent, according to Lamonica, admitted that she did not always go to the house because the house was dirty, that mom was not always present, that she had to sign for mom, that the student was very good at math and that Respondent did not really understand her roll in math, that the student just handed in her work. During the October 28 meeting, Lamonica testified, Respondent said that at one point A.T. told her she was going to run away with her boyfriend, and that Respondent told the student she didn't want the student to miss the credits so Respondent wanted to provide her instruction virtually because she wanted the student to pass to her senior year.

The text messages did not show that instruction was actually going on, Lamonica testified. Instead, it was Respondent telling the student if she handed in her work, Respondent would give the student full credit for it. The back and forth of the texts seemed, Lamonica testified, more friendly than should be from a professional to a student. In one text, Lamonica noted, A.T. said she was feeling sick and Respondent said well, let's just jump on Zoom. Lamonica testified that texting is against all District policies. According to Lamonica, during the October 28 interview, Respondent said that sometimes mom was not at home and that sometimes the boyfriend was there. If a parent is not home, Lamonica testified, the instructor is required to leave the home immediately, and CRESS would contact the sending district. Lamonica testified that it is her understanding that at times when A.T.'s mom was not present, Respondent was motivated by a desire to help the student get through her year, pass her courses and go to

her senior year. But, Lamonica testified, if a parent is not home, you just cannot do that. That is in the employee handbook.

If Respondent had an issue with being in the home to instruct A.T., Respondent should have reported such to the program manager, the program manager would have discussed it with Monti and Lamonica, and the two managers would discuss the issues with Kingsway, and Kingsway would have made the decision. Kingsway is a "huge" customer of CRESS, Lamonica testified.

Lamonica testified that CRESS Homebound Services has an "onboarding" process. Program manager Siebert handles the onboarding. Onboarding can be in-person or virtual. Seibert provides a link to the new teachers for all of the materials. Teachers sign off on onboarding paperwork acknowledging that they have received and reviewed the materials.

In terms of Covid response, CRESS followed the lead of the District, Lamonica testified. When the District went virtual, CRESS went virtual. When the District went back to in-person, so did CRESS. Lamonica testified that CRESS staff was told that if instruction took place virtually, they were to just write "virtual" on the verification forms. According to Lamonica, communication about such would have been by Seibert.

Lamonica testified that she asked program director Seibert if she had any communication with Respondent about A.T. and that Seibert said she had. But, Lamonica does not know the details of such communications.

Michael Dicken

Superintendent Michael Dicken testified that he learned of the issue with A.T. from the supervisor of the CRESS program. He reviewed the investigation performed by

CRESS and he was saddened. The CRESS program is an enterprise program and the District's business model is to collect revenue and a lack of trust by other school districts could cost the District. He testified that all staff are trained in all programs annually. He helps design the training and works with HR to create policies that comply with the state Department of Education regulations. Part of the training program is to have employees sign acknowledgements of training when received. If such an acknowledgement is not in an employee's file it is possible that the employee did not receive the training.

A.T.

A.T. testified that she is now a senior in high school at Kingsway High School. She has had 10 or more home-bound instructors in five years. Respondent taught her bio, math, PE and History. Respondent began instructing her in March 2021. She testified that Respondent was "supposed to" teach her algebra. Respondent did not teach her math, A.T. did it on her own, she testified. Rather than teach her, Respondent would tell A.T. what to print, what was the next lesson, and tell her to do the lessons and quizzes on her own. According to A.T., this was not how other teachers had taught her in the home-bound program, the others would "actually teach."

A.T. testified that when Respondent started teaching A.T. in March 2021, Respondent came to her home. Respondent taught her bio in an active way, although A.T. had a hard time understanding what was going on because A.T. had never had bio before. But, at least Respondent seemed to be trying to teach her, A.T. testified. In contrast, when it came to math, Respondent would not actively teach her, but instead would tell her what lessons etc. to print off and then tell A.T. to do them. Respondent did not help A.T. do the lessons; she did not teach A.T. math, and when A.T. asked Respondent for help with

math, Respondent sent her to Slader.com. But that website did not help A.T. learn math and everything she learned about math, A.T. testified, she had to teach herself.

A.T. testified that whenever Respondent came to A.T.'s home to teach, A.T.'s mother would be home. A.T. testified that her mother would not usually be present in the room but would just pass by. She testified that her mother signed off on lessons when Respondent came over "maybe a handful of times." A.T. testified that on the March 31 Verification Form relating to Respondent's teaching, in the parent/adult signature column, the signatures for "HBI" on March 20, 24, and possibly 27 are her mother's. She testified the signature on March 21 for "HBI Virtual," and March 28 for "HBl" are not her mom's signatures. On the April 15 Verification Form, A.T. testified that the signatures on April 5 and 6 for "HIB" are not her mother's. For the form dated April 30, the signatures on the form are not her mother's, including the signatures for "HBl" on April 16, 17 and 18. On the form dated May 14, her mom's signature does not appear on any of the seven dates indicated, or on the dates indicated on the May 28 form; all of which on the May 28 form state "Alix.". (All of the activities on the form state either "HBI Prep" or "HBI Virtual.")

A.T. testified that she was not home from April 21 to June 1, as she was in Illinois and then Colorado for a few days. During the period she was gone, A.T. testified, she was in contact with Respondent. They would usually do Zooms or Respondent would call A.T. by phone. She doubts that Respondent spoke with her on April 22 as A.T. had travelled the day before and, she testified, she would "likely" have been very tired. At times when she was in Illinois, Respondent would talk with her for a full two hours, but not always, A.T. testified. As for how Respondent taught, it was the same deal; same for

subjects other than math, and for math, Respondent would just leave it to A.T. to teach herself. As for June 1, A.T. testified, "I guarantee I did not have a conversation with Respondent on that day," explaining she was on a plane to the Philadelphia airport and she would remember having a two-hour conversation with Respondent that day. She did not, she testified. A.T. further testified that she does not believe she had virtual instruction on all of the dates indicated for such on the June 15 or June 30 verification forms, and added that none of the signatures on the forms are her mother's. A.T. testified she does not recall meeting with Grievant at all in June.

A.T. testified that there was a time when she was thinking about running away from home. She told Respondent of her thoughts before she went to Illinois. She wanted to run away because her living situation was abusive and toxic, her mother was abusive to her and Respondent knew there was abuse going on as she told Respondent. A.T. also testified that her conversation with Respondent about running away had nothing to do with her going to Illinois to see her boyfriend, that the conversation would have been about getting away from her mother. When asked what she told Respondent, A.T. testified she "probably" told Respondent her mother is an addict, "probably" told Respondent that her mother was abusive, "probably" told Respondent her mother's boyfriend who lives with them was a drunk, had anger issues and put holes in walls, and "probably" told Respondent her mother was neglectful to an extent, and did not cook or buy groceries. A.T. does not recall Respondent's response, but recalled that Respondent told the student she also had a lot on her own plate, was going through a divorce and a lot of health issues and was incredibly stressed out. Respondent did not offer to help or get A.T. help, or get someone to talk to A.T. about running away.

A.T. testified that she passed her junior year. She is now in in-home-instruction because of chronic health issues and home issues. In March 2021, she had the option to live stream classes in addition to her home schooling. Before Respondent began with A.T. she had not been attending class. She testified she has always been good at math. A.T. testified that she did have questions about math and asked Respondent for help and that is when Respondent sent her to Slader.com. She testified she went to the website but did not use it. She recalled Respondent told her about a former student of hers who used Slader.com for math. When asked on cross that Respondent, "was not encouraging you" to use the website, was she? A.T. answered "She was, that is why she sent it to me."

A.T. testified that Respondent "probably" got her cell phone number from her mother. Her mom made A.T. the contact for scheduling purposes. A.T. testified that she worked at Acme and did not know her schedule far in advance, so Respondent had to be in contact with A.T. directly. Her mother worked from home and was home when Respondent was there. She testified that she "guesses" she told Respondent that A.T. only communicates by text. A.T. recalled that she and Respondent did try zoom. She also testified that there were quite a few times when A.T. would tell Respondent on the day of that she did not feel well and did not want to meet or zoom and would do math on her own. They could have been cancellations, but Respondent would claim two hours of teaching, A.T. testified.

A.T. testified that Respondent never once checked her math homework or quizzes, or any of her math work. A.T. testified that Respondent would check in on her to make sure she was doing the work. Respondent just cared that A.T. sent in evidence of her work.

There were times, A.T. testified that Respondent logged into Schoology at the same time A.T. did and followed along when A.T. did work. A.T. testified that she had many more texts than the ones she provided the District, and that the printed texts she provided the District were incomplete.

A.T. recalled that Respondent met A.T.'s boyfriend in A.T.'s home sometime before June 1. She testified that her mother and Respondent knew she was going to Illinois and Colorado and was in Illinois and Colorado, and that she told Respondent when she was away when she was going to return.

In regard to the 2021-2022 school year, A.T. recalls texting Respondent and learning that Respondent would only be teaching virtual that year. A.T. did not want to do virtual. A.T. testified that when she wrote her email to Cappolina, she thought Respondent would get in trouble, but, she added, Respondent is responsible for her own conduct.

A.T. testified that when she spoke to Respondent about running away, it had nothing to do with her boyfriend; it was because of her mom. The trip out of state with her boyfriend, A.T. testified, had nothing to do with her wanting to run away. She testified that she recalled texting Respondent and asking if she knew anything about child protective services because A.T. was thinking about reporting her mom at the time.[6]

Danielle Davis

GCSS Specialized Program Assistant Danielle Davis has worked for the District for 19 years. She is the local union president. She testified that she is familiar with the CRESS program from representing employees in the program and from working in the

[6] There is no such text in the record.

program, in home-bound instruction, for five to seven years; probably ten years ago. She is currently qualified in the program, but has no active cases. She did not receive any training when she first began working home-bound and recalled no on-boarding process. Her skill set was just matched by the program to a student. She testified that she has not previously seen the Homebound Service Employee Manual. She also testified that she does not know what the current training or onboard process for CRESS is.

Davis testified that she attended the October 28 meeting with Respondent called by Monti and Lamonica. Davis learned of the meeting on the day of the meeting. She was not told what the meeting was about in advance. Davis spoke to Respondent prior to the meeting starting and testified that Respondent also did not know the purpose of the meeting. Monti started the meeting saying they had received a complaint about one of Respondent's cases and then described what the complaint was about. Davis testified that at one point Respondent was asked if she had signed A.T.'s mother's name on any verification forms and responded no, that she had signed her own name. During the meeting, Davis testified, Respondent did not state that she ever signed the mother's name, or that she was ever at the home of the student without the student's mother being home. Davis testified that the meeting ended with the managers stating that it was an open investigation, they would be in contact with Kingsway, and there was no disciplinary action being taken at that time. Upon reviewing her notes of the October 28 meeting, Davis recalled that during the meeting Monti stated the issue involved "fraud, theft, forgery."

Davis testified that on the day after the meeting she was told by her building principal to contact Respondent and inform her that she was being put out on

administrative leave and was not to visit any school property. Davis testified she was never informed by the District that the investigation had been completed.

Respondent

Respondent testified that she is certified in K-12 biology and Students with Disability. She is a teacher of science in High School grades 9 through 12. She began in CRESS in 2018. Prior to this matter, she has had no discipline.

She testified that she became a homebound instructor by responding to an email from CRESS. She testified that she does not recall receiving any training from CRESS, nor ever receiving an employee manual from CRESS Homebound Services. During her time working for Homebound Services, her contact there was always, and only, Emily Seibert. Seibert assigned her cases and if Respondent had any questions she would direct them to Seibert.

Respondent testified that she works out schedules based upon her own schedule and that of her students. When teaching in a student's home, she testified, there absolutely has to be a parent or someone over 18 in the home if the parent has designated such a person to be there. Her initial contact with parents is usually by cell phone.

Homebound instruction is paid hourly based upon the hours designated in the contract document. She testified that she keeps track of her hours mostly "kinda in my head" because she is busy, and eventually she puts them on her time sheet. Sometimes she puts them directly on the time sheet if she remembers to have them with her at the time. The time sheets and verification forms have to match one another, she testified. Hours are submitted generally on the 15th and last day of the month by dropping them in a mailbox outside of the CRESS office. She testified that if a session needs to be

cancelled by a student, the student's parents are required to cancel with more than 24-hour notice, and if less than 24-hour notice is given, the teacher is paid for the session. If a student has many cancellations, it is up to the sending district to determine whether a contract should be discontinued. She has had students that have many cancellations, but no contract has been cancelled. There are spaces for three cancellations of the verification form and in her experience most students have one to three cancellation each reporting period.

When Covid first struck, no one at either school district knew what to do and everyone did what they could; everything had to be virtual, it was a learning process, "we had to learn as we went," Respondent testified. Respondent testified that for CRESS, everything had to be virtual. She testified that at that time, she called Emily Seibert and asked how she was to have the verification forms completed if everything was virtual and Seibert said Respondent should write "HBI virtual" and sign her own name on the verification form. Respondent testified that she and Seibert communicated primarily by phone; they "spoke often and always," she testified. Respondent testified that thereafter she would write HBI virtual and sign her own name for any virtual session she had. She testified that the rule was that for virtual classes a parent had to be in the home, but was not required to be on screen.

Respondent testified that she does not recall the CRESS Homebound program ever communicating that she was required to stop virtual instruction. However, she added, she must have known that in-person was permitted at some point as she gave A.T in home instruction. Respondent testified that no one from CRESS ever denied her payment for hours identified as "HBI virtual," and that she was always paid for hours

marked as HBI virtual. She testified that she knows her forms were reviewed because at some point she gave a student instruction during school hours, in the school during lunch, and that she was later told the time would not be paid since it took place during regular school hours.

In regard to A.T., Respondent testified, after she was assigned the student, Respondent spoke to A.T.'s counselor and teachers and then, after numerous unsuccessful attempts, reached A.T.'s mom by phone. Respondent testified that the mom initially requested that instruction occur during the day, but that after two calls during which Respondent explained that she was a full-time teacher and could not do instruction during the day, the mom told Respondent that the teacher would have to call A.T. directly, because A.T. worked and her scheduled changed. From that point, Respondent testified, A.T. became "in charge of everything."

In regard to communication with A.T., Respondent testified, it started with phone calls and then went to texts. A.T. can be very communicative and then be very non-communicative, Respondent explained. It would go back and forth, Respondent testified. Although Respondent preferred phone calls, it was clear to her that A.T. preferred texting and the two primarily relied on text messages. In terms of Zoom, Respondent testified, she did so once with A.T. and A.T. did not like it; the student did not like being on camera.

In regard to the texts submitted by A.T. to the District, Respondent testified that they are not all of the texts between A.T. and Respondent; that the texts submitted by A.T. "are lumped together" and there should be texts form March to October. And for example, she testified, in regard to the Slader.com text, she told A.T. a story of a former

student who used Slader. She told A.T. that it was a study tool; if Respondent can see the question, for example in a textbook and then is shown the answer, she can figure out how the equation is solved. Respondent testified that Slader did not provide answers to A.T.'s school problems. In this regard, Respondent testified, Slader is textbook based and A.T. did not have a textbook; her materials were supplied through Schoology. The texts provided by A.T. to the District are "cut and paste" presentations, Respondent testified, and do not represent the full exchanges between the two. They are "fabricated" as a result of omissions; the texts are not individually altered, she explained, but their meaning is affected by omissions.

Respondent testified that in preparation for the hearing she attempted to retrieve all of her texts with A.T. through Apple, including through subpoena, and that her efforts were unsuccessful. Respondent testified that she does not keep work related data on her phone because it takes up space, she is already paying Apple for storage and in the past, she mistakenly unintentionally sent a text to a parent and avoids the chance of doing so again by making a practice of immediately deleting school related texts.

Respondent testified that the homebound contract for A.T. states that instruction for the student should be in-home or by live stream. Respondent took the reference to "live stream" to mean virtual. (She later learned that Kingsway livestreamed classes when A.T.'s teachers notified Respondent that A.T. was not signing in to the classes.) Before she began instruction with A.T. Respondent spoke with Seibert and asked the supervisor if instruction had to be in home. According to Respondent, Seibert said that initially, instruction should be in-home, and thereafter the two (Respondent and A.T.) could work things out and determine what was best.

Respondent testified that A.T. has a lot of health issues and that very early in the process, A.T. asked if her instruction could occur virtually because A.T. often doesn't feel well. Respondent testified that she considers texting and phone calls, as well as zoom, to be virtual, and that in regard to virtual instruction, she kept both Seibert and Kingsway counselor Cappolina up to date on what was going on by phone and email.

When instruction of A.T. first began, the instruction was in the student's home and at all such times there was an adult at home, and usually more than one adult there, Respondent testified. She met with A.T. in the kitchen of the small, one story house and worked on the kitchen table. The mother worked in her office off of the kitchen or in her bedroom, Respondent recalled.

A.T.'s home was "filled with pets;" an Akita, a Pomeranian, four to five cats and rabbits. That did not bother her, Respondent testified, as she is trained in the care of animals and cares for the pets of others often. Respondent testified that only on one occasion did Respondent request that the two not meet at A.T.'s house because during a heatwave Respondent was experiencing an allergic reaction to cat hair in A.T.'s home. The two then met virtually instead.

A.T. cancelled sessions often, often three times in a reporting period. Sometime, Respondent explained, A.T. would contact Respondent on the day of their scheduled meeting and ask that Respondent not come and suggest that she would just do work and send it to Respondent. According to Respondent, A.T. was the one who on such occasions asked to be able to do the work so that she could stay on schedule. The fact is, Respondent testified, she would have been paid for cancellations on those days regardless of whether A.T. did the work or not. When asked why she was willing to allow A.T. to

call the shots, Respondent testified that A.T. had expressed that this was the first time she had been on track and wanted to stay on track to graduate on time. Respondent testified that it was in everyone's interest to keep A.T. on track; the student, Kingsway and herself. In regard to herself, Respondent explained that by keeping the student on track, the CRESS contract would be satisfied. According to Respondent; "no one made [A.T.] do math on her own; that was [A.T.'s] thing,"

According to Respondent, when instruction first began, A.T. said that her mother did not feed her right. But, Respondent testified, she observed plenty of food in the house and A.T. did not appear malnourished. The fact is, Respondent continued, A.T. was unhappy with her mother because her mother would not buy organic food from Trader Joe's. Respondent testified that on one occasion, A.T. asked her if she had any experience with DYFS, and Respondent said that she had. But A.T. never said she wanted to contact DYFS. Respondent testified that she has experience with NJ DYFS and has called on behalf of children in the past, and A.T.'s circumstances "did not at all" present a case for calling DYFS, Respondent testified. A.T. did not tell Respondent about her mom taking pills or about her mom's boyfriend punching holes in walls, Respondent testified. Again, she testified, she has no problem contacting DYFS and has contacted them in the past. But here, there was no reason to call DYFS and A.T. did not request such.

Respondent testified that A.T. told her she was the victim of "former sexual abuse" by someone close to her family and that mom had not taken it seriously. A.T.'s mother did not drive A.T. to work although she was home and had a car. Instead, A.T. had to Uber back and forth, to and from work. Respondent explained that A.T. was not happy with her mother because she blamed her mother for A.T.'s boyfriend moving

away. According to Respondent, A.T. talked a lot about her life; explaining that she wanted to live with her grandmother, but because her autistic brother already lived with her, A.T. could not move there. She also explained that her father lived out of state and had remarried and had other kids.

A.T. did not talk about "running away," Respondent testified. What she did talk about was "changing her life, she talked about wanting to move away," "let's be very clear about that," Respondent testified. A.T. had a therapist and meet with her therapist on a regular basis. After meeting with the therapist, sometime in late April or early May, A.T. left the state of New Jersey and went to Illinois to attempt to get her boyfriend back, Respondent testified.

A.T.'s Kingsway teachers and counselors absolutely knew A.T. was out of the state. She spoke to, and emailed, Kingsway counselor Cappolina about it, and communicated with A.T.'s teachers, one of whom contacted Respondent during that time wanting A.T. to meet her during office hours. Respondent testified she did not notify any CRESS supervisors that A.T. was out of town because Kingsway knew about it and it was their contract. If Kingsway had a problem they could say don't do it; stop. But they did not, Respondent explained.

A.T. did not have a good life, she had a hard life, Respondent testified. But, A.T. never told her she was going to "run away." A.T. did tell her a lot of stuff, and many times that she wanted "a better life." A.T. tugged on Respondent's heartstrings, Respondent testified, and; "that is probably why I made concessions and I did things…I bent the rules that I shouldn't have. I worked with her however I saw fit because I was

seeing results." When she first starting working with A.T., the student's grades were nonexistent; single digits in all but math.

Respondent testified that she and A.T. logged onto Schoology at the same times and Respondent would monitor A.T. At the beginning, Respondent and A.T.'s Kingsway math teacher spent time getting A.T. organized and once organized, A.T. was able to handle her assignments.

Respondent testified that she spoke with Seibert about getting A.T. a third tutor; one for purposes of math. When she brought up the idea to A.T., Respondent testified, A.T. "pleaded" with Respondent not to have a third tutor, complaining that she already had two tutors and a job and asserting that she didn't need a math tutor because she could already do everything.

In terms of time sheets, on cross examination, Respondent testified the times she used were mostly exact hours with her students. Her time when it came to A.T. were exact when done in person. For other times, her times based upon the virtual time she spent with A.T. or based upon Respondent's review of A.T.'s work and estimates of the time it would take. With math, A.T. never once asked Respondent one question.

In terms of prep work, and cancellations, Respondent testified that she signed the forms. When she met with A.T. at her home, she gave the verification forms to A.T. who took them to the other room and had her mother sign for single or multiple meetings. The only signatures on the verification forms containing her own initials, Respondent testified, are for cancellations and prep times. All HBI signatures are A.T.'s mothers with the exception of one June HBI signed by A.T.'s 20-year-old boyfriend who sat with them the entire four hours of instruction. Respondent initially explained that the only other

non-mom signatures on lines for HBI are on April 4 and 5. For those days, Respondent explained, because A.T. thereafter cancelled meetings on the bottom of the form (April 9 and 10), Respondent was not able to get the forms to the mom, so she called A.T.'s mom and asked for her permission to have someone else sign to verify the April 4 and 5 meetings, because the sheets were due. The mother gave permission for Respondent's assistant to sign for the mom. The assistant then signed the assistant's name – not A.T.'s mother's name. After giving this explanation, Respondent was asked to looked carefully at the form she had just testified about dated June 15 and state if the signatures for April 4 and 5 were those of her assistant. Respondent then corrected herself and testified that no, her assistant's signatures were on the next form dated April 30. When examining that later form, Respondent testified that the HBI dates of April 16, 17 and 18 were signed by her assistant with the student's mother's permission because by the time the forms had to be submitted, A.T. had left for Illinois.

According to Respondent, the remaining verifications through June 13 state "HBI virtual" and were signed by herself. The remaining "HBI" lines were all signed by A.T.'s mother with the exception of June 30 which was signed by A.T.'s boyfriend.

For the 2021-2022 school year, Respondent was contacted by Seibert and asked if she was interested in teaching A.T. again for the upcoming year. Respondent initially said no, thought about it and called Seibert back and gave two conditions to her agreeing to continue with A.T. First, Respondent had a feeling that A.T. was not happy with Respondent and wanted the supervisor to contact Kingsway counselor Cappolina and ask if there was any objection on A.T.'s part. And second, that all instruction would have to be virtual as Respondent was having work done on her home and had to be present.

According to Respondent, Seibert got back to her and said everything was fine and virtual was acceptable. Respondent thereafter contacted teachers and made efforts to contact A.T.'s mother. According to Respondent, eventually A.T. texted Respondent that she was excited to start the new year, it being her senior year. Respondent then had contact with A.T. and told her the instruction would only be virtual. A.T. responded that she did not do well on line and wanted to have an in-person tutor. Respondent forwarded A.T.'s text to Cappolina, then offered to meet with A.T. virtually for science (in Respondent's mind while another tutor was sought; a thought not expressed to A.T.) A.T. did not respond to Respondent and the next thing Respondent knew she was in an October 28 meeting.

Respondent testified that she found out about the October 28 meeting at the CRESS offices on the day of the meeting, having received a call from the principal's secretary saying the meeting "would be quick," She learned the subject of the meeting during the meeting when she was given a copy of A.T.'s email complaint. After the manager's read the letter from A.T. to her, she was upset and angry. Her work with A.T. for the 2021-2022 year had been completed months before and had been successful; the challenged student had passed, Respondent testified. Respondent testified that at the meeting she was taken by surprise. The managers asked about whether she was at A.T.'s without a parent present. She responded that she would never do that, that there was always someone over 18 in the house. She recalled that one of the managers made a reference to "forging" a parent signature, and Respondent testified that she told the managers that she would never sign someone else's name and had not done so.

Respondent testified that she believed – since her meeting was a mere 10 minutes long and caught her by surprise – that the investigation would continue. But, she heard nothing further from the District, except a phone call from her building principal informing her that she would be placed on administrative leave "pending investigation."

Respondent testified that she did not intentionally falsify time sheets in order to get paid for work she did not perform; she did not misrepresent the work she performed in order to get paid; she did not intentionally sign someone else's name in order to get paid; she did not sign someone else's name; She did not deprive A.T. of any learning for Respondent's convenience; she did not deprive A.T. of any learning. Respondent testified that if she could go back in time, she would not have accommodated A.T. all the many, many times Respondent accommodated the student's requests to delay and not meet, etc., because the student said she "didn't feel good" or "had a doctor appointment" or "was tired," etc. She would have just written "cancelled" on the forms. By doing so, Respondent explained, she would have still gotten paid and wouldn't be in this mess; although the student wouldn't have gotten the direction and attention she needed. But, Respondent testified, she felt awful for the kid, A.T. "had a shitty life," but she really wanted to work and was able to do so even when she had her illness issues.

Respondent testified that she never actually saw A.T.'s mom sign any forms; that A.T. would take the forms to her mom and come back with them signed. Respondent testified that she always saw A.T.'s mom in the house when she was there; sometimes in her office on the phone other times walking by the kitchen door. She testified that she could get in contact with the mom, although sometimes it took time; "hours, days, weeks." When asked why she did not have the mom sign the forms when A.T. was away

– as the mother was always home – Respondent testified she signed them because A.T. was virtual and Respondent would do as instructed, write "HBI virtual" on the forms and sign her own name.

The contract said start in person and then go live stream, Respondent confirmed. She went on the testified that early on they did one session virtual and she asked Kingsway counselor Cappolina if virtual was okay, and Cappolina told her yes, that she should do what works with the student. In addition, CRESS program manager Emily Seibert also told Respondent in regard to A.T., to start home-bound and then go from there. The contract, Respondent testified, says after HBI, speak with mom and teacher and get a better game plan. That is what she did, Respondent testified; she spoke to mom, emailed A.T.'s teachers and spoke to Cappolina. Respondent testified that, because of the student's needs, the eventual game plan was dictated by A.T. Respondent testified that counselor Cappolina and program manager Seibert knew how she was working with A.T because she had telephone conversations with both of them. She recalled Cappolina even commenting about wondering how the student could manage having a job and going to work, but couldn't go to school in person.

In regard to April 16, 17 and 18 signatures by her classroom assistant, Respondent testified that she first called A.T.'s mom and asked if Respondent could have her classroom assistant sign for the mom, and the mom gave permission. Respondent testified that she did not want to sign the form herself because then the program would ask questions and not pay her; she wasn't not going to get paid for 17 hours of work, Respondent explained.

A.T. was an unusual case, Respondent testified, unlike any other. Things worked early on as A.T. was communicative. But as the summer went by, the student became more and more non-communicative, and Respondent initially decided she no longer wanted to work with the student. She eventually changed her mind in the fall of 2021 because she knows A.T. can work hard, the subjects she was asked to teach A.T. in the autumn were all well known to Respondent and Cappolina had informed Seibert that A.T. had no problem with Respondent teaching her.

In regard to Slader.com, Respondent testified that she told A.T. the web site could show here examples on how to work on problems. The website did not give answers to any homework or tests for A.T. Respondent testified, Slader.com was not an answer key for any of A.T.'s instructional materials. The problem was that when Respondent first began with A.T., the student's math grade was low; a failing grade. (All her other grades were "0.") However, with organization, printing out all of her assignments and putting them in folders at the beginning of her tutoring. and Respondent's monitoring the student when she worked, A.T. quickly improved. A.T. couldn't, or didn't, improve on her own. She needed someone to manager her. She ended up with almost an "A" in the algebra class. A.T. took the math folders with her to Illinois. Respondent testified that A.T. did not need Respondent "teaching" her math; A.T. needed Respondent's guidance as A.T. was not going to do the work on her own.

Schoology is very confusing and there is a lot of content, Respondent testified. Schoology works in three different sections. First, there are supportive assignments that are the least weighted activities; they are more fun, or could be videos. Then there are secondary assignments and study pages. Then there are primary assignments that may be

projects or tests. In math, the primary assignments are only tests. There are exercises to go through, which A.T. did; sometimes a few minutes at a time, sometimes for hours. Respondent agreed that Kingsway was basically paying her to be a kind of "nanny" for A.T., as far as math was concerned. Schoology was, in effect, the lesson plan for A.T.

A.T. did "not once" ask Respondent how to work out a math problem. With organization and guidance from Respondent, A.T. flourished, Respondent testified.

Emails

The parties agreed to the submission of 410 pages of emails relating to A.T. and/or Respondent's work with A.T. during the 2020-2021 and 2021-2022 school years. Many of the emails are repeated as a result of "email chains." One email chain reflects the initial process by which A.T. was assigned her first home instructor for the 2020-2021 school year. The chain begins with an October 9, 2020 email from Cappolina to Seibert providing:

> Good afternoon Emily.
> Do you have updated home instruction form?
> Will one of your home instructors, preferably Kathy Simnor, be available to oversee / monitor 6 subjects (English III, US History II, Biology, Algebra II, Intro to Computers). Your instructor can meet/check in with students and teachers via Zoom.
> Kathy conducted home instruction last year for this student.

Seibert replied October 15, 2020;

> Hi John,
> Attached is our form. I wrote Kathy to see what her thoughts would be. I am assuming this is A.T.? Is she attending school, just needs someone to keep tabs on all of her work? I'm not sure Kathy would be comfortable with the Bio, Alg II, and Computers if it involves instruction of any kind. But if it is for check-ins with student and teachers, and minimal instruction in those areas, she may feel comfortable. The other option would be to split, but I'll see what Kathy says.

Does the student attend any in person learning, or is it all remote?

The same day Cappolina replied:

> ...Yes A.T. Currently, all remote.

The next day Seibert wrote back:

> Hi, Kathy said she would take it! If you would like to move forward, please send the form at your earliest convenience.

The next chain reflects the process by which Respondent began providing A.T. instruction in March 2021, and begins with Cappolina and Seibert having the following email exchange on March 2:

Cappolina:

> Good morning,
> Are your teachers instructing in person or virtual?

Seibert:

> Hi John,
> We have a combo...it really depends on what the family wants, what our teachers feel okay doing. So depending on the case, we can try to match up something if we can.

Cappolina:

> Thank you,
> Would Kathy be interested in instruction at A.T. in person?

Seibert:

> She may...I'll have to reach out to her. She has been one of my staff that was not interested in going into homes for new cases. But since she has a history working with her, knows the home environment. etc, she may be ok with it. Could you share how many hours and for what subject?

Cappolina:

> Good Afternoon,
> Student is behind and needs someone to monitor / check in with all subjects. All her Kingsway teachers are available virtually as they teach live via Zoom. Teachers also have office hours. However, A. needs help / instruction.
> English III
> US History II
> Biology
> Algebra II
> PE II
> Intro to Computers
>
> Thank You

On March 3, Seibert continued the exchange:

> Hi John,
>
> Kathy is not interested at this time to go into A.'s home at this time. She is still not comfortable being in close quarters instructing.
>
> I can ask some of our other instructors, there may be interest! I just would like a little more clarification on what is needed. Does she need help in all subject areas, or only in certain ones? Is she getting on her live instruction with her teachers daily, and this is just supplemental? Any more info you can provide would help me in deciding which direction I go next with asking our staff.

On March 4, Cappolina responded:

> Her attendance has been very inconsistent so she doesn't attend her live stream instruction. She is behind in every subject and most likely will need help in all subjects, however, she can probably catch up quicker in PE and Computers. We want her to attend her daily live stream instruction so you would be supplemental. However, we can recess [sic.] later to see if more instruction is needed.

Seibert, the same day:

So how many hours would you be asking for?
I can most likely find a teacher for this…why don't you fill out the HBI form and I can officially start working on it!

On March 8 Cappolina sent the form to Seibert, noting he was still awaiting final approval on his end, and added:

Typically, A. should be live streaming her classes on Monday, Tuesday, Thursday and Friday. PE/HE is all independent work. Wednesday is Asynchronous.

A. Is very behind.

Cappolina again wrote to Seibert on March 12 and the two had the following exchange that day:

…Home instruction was approved.
Did you find instructors?

Would full time in person home instruction be an option?

Seibert:

What do you mean by full time? Like full time in-person for the X number of hours per week?

I did not pursue it much further because I was waiting on more of the details back that I put in the last email to you 3/4/21. I really need to see the full picture of what is needed.

Cappolina:

…Yes. Do you offer full in person for x numbers of week? [sic.]

Seibert:

We would, if I can find a teacher or two that can take all the classes and be ok with going into the home. I have one that is interested but I don't know that she would be able to do the upper level science and math. I obviously want to get a teacher that is knowledgeable in the content so that A. is getting the support she needs. If it is just someone being the

communicator/liaison between the teachers from school and motivating A. to do her work, it wouldn't be as hard. But when its having a teacher that is competent in all of the subject matter, it gets more complicated obviously.

Cappolina:

Great!
Please keep me posted as we prefer full time home instruction. After they contact student, we may have to increase the amount of hours.

I prefer in person however, still interested in 1 teacher instructing a few subjects in person instruction and another teacher to coordinate.

Seibert:

So can you please submit the request for services form that I have the information to reference? Please put the total number of hours you are asking for per week. and any other important details!

Cappolina:

Great!
Form is attached. Please keep me posted.
We can also increase hours if necessary. Most likely we will extend home instruction.

On March 15 Cappolina checked in with Seibert asking how it was going, and Seibert answered:

Hi John,
If I assign a teacher that would be willing to coordinate with teachers and provide for all subjects she was comfortable with and get her started in there…could she then give us feedback on what she would want me to find another teacher to help with (like her strengths are English, History; she could probably do the PPE/Health, maybe computers). But if we need someone else

> to come in for the Bio and Math. I can do that. I just would like to at least get someone in there to feel our situation!
> Let me know and I'll get going with everything tomorrow if you like the plan!

The next day Cappolina answered; "Yes, that sound like a game plan. And please keep me posted if we need someone else for the other subjects.

On March 17 Seibert wrote Cappolina:

> Hi John,
> I just wanted to check on a few things…I have all subjects covered.
> Jill Mansor will be doing English III and US History II.
> Alix Gillespie Tyson will be doing the remaining subjects.
> Does this mean that A. will only receive instruction through them, or is she still encouraged to get onto the Kingsway classes? Jill will have hours during the school day to instruct (I don't know if the study hall time will work be she had another student right in that same period 5 day per week). I'm thinking after the other student she would work with A. Alix is available after school hours only. So they will coordinate with the mom. I just want to be able to lay out what they can expect to be doing with her and encourage her to do as part of receiving instruction through us.
> Also, can I have the teachers names …

Cappolina answered:

> A. Can receive instruction through home instruction only, however, if she wants to attend her classes live stream she can. Maybe at first primary home instruction and phase to live stream. However, after your teachers speak with mom can get a better plan.

During the time Respondent was assigned to A.T., the record also contains an email from Respondent to A.T.'s math teacher and copies to Cappolina providing, among other things; "[A.T.] read your emails to me. She is away with family issues – far away! [A.] failed to tell you she is in different time zone. She is not available for your office

hours as that would be very early and she is dealing with A LOT! Returning around May 11."

The Student Information sheet describing the services CRESS was to provide through Respondent's efforts for the period March 8 through April 5, 2021 states:

> [A.T.] can receive instruction through home instruction only, however, if she wants to attend her classes live stream she can. Maybe first, primarily provide home instruction and phase into live stream. After HBI's speak with mom and teachers, can get a better game plan.

Arguments of the Parties

The parties submitted lengthy and detailed post hearing briefs presenting factual and legal arguments on the Tenure Charges; briefs that have been fully and carefully considered by the undersigned and will only be summarized herein.

Position of the School District

The District asserts that the evidence supports its tenure charges. Respondent committed serious misconduct by fraudulently billing a sending district for services she did not provide. Such misconduct warrants dismissal. Respondent accepted a contract to provide in-person, one-on-one instruction to A.T. Respondent did not provide the instruction she agreed to provide and instead engaged in conduct that violated several GCSS District policies on home-bound instruction, supervision, reporting, and communications with students. Rather than instructing A.T., the evidence establishes that Respondent provided effectively no instruction to the student for algebra despite accepting a contract to teach the student algebra and billing for algebra instructional time.

Respondent repeatedly admitted at the hearing that she was not good at algebra and assigned A.T. independent work to complete and then billed the work A.T. did to the

sending district as instructional time. Respondent admitted that when it came to algebra, she viewed her role as one of facilitating independent study by A.T. and assisting the student get organized as the student herself self-progressed through her assignments. Submitting time sheets that misrepresent the hours of instruction Respondent actually performed and/or representing that the time student A.T. spent working alone on assignments as "instruction time" is inherently fraudulent and misleading. Respondent's misconduct damages the District's relationship with one of its largest sending districts.

In addition to fraudulent billing, the District has shown that Respondent violated a number of other important District policies. In such regard, the record shows that Respondent failed to communicate to Kingsway School District that A.T. was having serious life issues. Such included A.T. saying she was going to run away; A.T. had asked Respondent about contacting Child Protective Services, and that A.T. had left the state for almost three months. In regard to A.T.'s out-of-state absence, the record establishes that rather than directly and clearly informing Kingsway and her own District that the student had left the state, Respondent instead made a few casual "she's out of town" references to Kingsway teachers and counselor suggesting that A.T. was merely on vacation.

At the hearing, A.T. credibly testified that several signatures on time verification sheets purported to be that of her mother, were "scribbles" by Respondent; conduct Respondent admitted to doing during the District's investigatory interview of the teacher. A.T. also testified that Respondent provided her no in-home instruction during the month of June, but billed for several in-home sessions with A.T. during that month.

During the initial communication between Kingsway counselor Cappolina and the District, Cappolina wrote that A.T. was to receive "instructions through home instruction only" and added that if A.T. wanted to attend classes on live-stream she was welcome to do so. Cappolina went on to write; "Maybe at first primarily provide home instruction and phase into live stream. After HBIs speak with mom and teachers, can get a better game plan." The emails further show that Cappolina instructed that if the District instructor was only able to coordinate A.T.'s subjects, the student would still need to attend live-stream classes. Respondent did not comply with Kingsway's instructions.

The texts submitted by A.T. during the investigation also established that Respondent engaged in false billing. The texts show that Respondent would ask A.T. to text Respondent copies of the student's completed math work so that Respondent could log time as actual instruction. Not only did the texts establish that Respondent billed for "instruction" time that did not occur, but they also establish that Respondent violated the District's policy against teachers texting students. Thus: (1) on April 8, 2021 Respondent texted A.T. and suggested A.T. needed a "breather," and further stated that Respondent would give A.T. credit for working on her own. Despite the fact that such amounted to Respondent cancelling a session with the student rather than the student cancelling the session, Respondent billed Kingsway two hours for the cancelled session. (2) on April 22, Respondent asked if the student had done any algebra, suggesting if she had, she could send it in "we can count it." and get credit. A.T. replied "ok" and added that she could not meet anyway because she felt ill. Respondent then billed Kingsway for two hours on virtual instruction. (3) On April 27, Respondent again texted A.T. saying "just take a pix of algebra for credit." (4) on April 29 A.T. cancelled a lesson and offered to work on her

math, and Respondent agreed and billed for virtual instruction. (5) On June 8 Respondent merely received a screen shot text of work from A.T. and nevertheless billed Kingsway for two hours of virtual instruction. And (6) on May 1 Respondent texted A.T. stating that it was important that A.T. complete her work for her contract to be renewed.

Respondent also acted unprofessionally by directing A.T. to use the Slader.com website; a website where students can search for answers to homework and tests.

Respondent also violated District policy by meeting with A.T. without a parent being in view during instruction.

Respondent's conduct amounts to "unbecoming conduct" under controlling tenure law. Respondent's submitting bills for work not performed has a tendency to destroy public respect for the District's program and damaged confidence in the operation of its home bound services. As results of Respondent's conduct, the District had to apologies to Kingsway and reimburse that district.

Kingsway did not seek a "coordinator" to assist A.T. If she was not qualified to teach the subjects A.T. needed, Respondent did not have to take the Kingsway work that sought full-time, in-home instruction. Respondent admitted on the witness stand that she "bent the rules" and "probably should not have." Contrary to Respondent's claim that she took her actions only to help A.T. out to get "credit" and points for grades, the evidence establishes that Respondent also benefits from such "credit" by billing Kingsway– the time it took A.T. to do work - for "instructions time" that did not occur.

Respondent admitted to billing Kingsway for dozens of hours of instruction Respondent did not perform. A public employer may demonstrate a teacher is unfit for employment with a sufficiently flagrant single incident of misconduct. New Jersey courts

have long recognized that misrepresentation and fraud are sufficient grounds for dismissal. Here, Respondent's conduct was severe and meets the legal standard for conduct unbecoming a public employee. On top of such, Respondent also plainly violated the District's cell phone use policy and care policy by failing to report A.T.'s complaints of abuse and questions regarding Child Protective Services. Finally, Respondent unilaterally abandoned the terms and goals of the District's contract with Kingsway by deciding on her own to cease in-home and go to virtual instruction with no conversation with or approval by, Kingsway. The tenure charges against Respondent for conduct unbecoming and misconduct must be sustained.

Position of Respondent

Respondent maintains that in an unbecoming conduct tenure case, under the *Fulcomer* standard, the arbitrator must first determine whether the employee engaged in the conduct charged, and if such a finding is made, go on to determine the appropriate penalty weighing a number of mitigating factors. Here, the District has not proven that Respondent engaged in, and had the intent to commit, the fraud, theft or forgery alleged. Additionally, the District has not shown just cause for its decision to terminate Respondent.

The District failed to conduct a complete investigation. Instead, the District took A.T.'s October 21, 2021 email to be true on its face. The only person the District "interviewed" was Respondent on October 28, 2021. That 10 minute meeting was not scheduled in advance or with notice to Respondent and, considering the broad and serious claims presented by the student, understandably caught Respondent and the Union's representative off-guard. The District attempted to claim that its investigation was

complete because Respondent admitted: to having "scribbled" the student's mother's name on verification forms; that the mother was not always home when in-home instruction took place; and that Respondent stated that A.T. had to "run away" from home. Respondent credibly testified, and attending Union president Danielle Davis confirmed, that Respondent made no such admissions during the ten-minute meeting. Moreover, Respondent was never given the opportunity to confront A.T., and the District admitted that it did not interview any Kingsway teacher or the Kingsway counselor. Nor did the District review all of the text messages between A.T. and Respondent – instead relying upon the A.T.- selected and incomplete texts – and did not review the hundreds of pages of emails in the District's own records showing communications between Respondent and the Kingsway counselor and Kingsway teachers relating to the efforts of Respondent.

Respondent did not "deprive" A.T. of her education, and it is not true that A.T. "learned absolutely nothing." Respondent was hired to motivate A.T. to complete her classes. At the time Respondent began working with A.T., the student had a grade of 44 in algebra and "0" in other subjects. After Respondent's efforts, the student passed all of her classes, including receiving a high B in algebra and was promoted to her senior year. Clearly, Respondent did not "deprive" A.T. of her education.

The March 2021 email exchange between District Homebound program manager Seibert and Kingsway counselor Cappolina establishes that Respondent was contracted to monitor/check in with A.T.'s Kingsway teachers concerning A.T.'s progress, communicate/coordinate with A.T.'s teachers to obtain A.T.'s assignments from Schoology, and motivate A.T. to do the work. A.T.'s algebra teacher expressed no

concern at Respondent's lack of proficiency in algebra because everything the student needed was on Schoology and what the student needed was motivation. The fact is, the scope of Respondent's role as homebound instructor for A.T. in algebra was mutually understood by Kingsway and the District to be different.

As for the District's claims relating to texting the student, and signing for virtual homebound instruction, the record fails to establish that Respondent ever received onboarding training or a copy of the homebound related manual relied upon by the District to establish its policies. Moreover, both Respondent and Davis testified that they had not seen the CRESS employee manual. Additionally, Respondent testified without contradiction, that CRESS program manager Seibert told Respondent to sign her own initials on the verification form for any virtual homebound instruction, and that Seibert was also made aware that Respondent communicated with A.T. via text messaging using the teacher's cell phone. It is also thus false that Respondent submitted verification forms stating that she performed in home instruction when she had not gone into the student's home. The forms themselves indicate that the time in question was "virtual." Nor did Respondent, or anyone else sign any name other than their own. No signature was "forged."

Contrary to the claims of the District, Respondent was never in A.T.'s home without her mother being at home. Importantly, the allegation raised at the hearing that A.T.'s mother was not present during in home instruction by Respondent, was not included in the Tenure Charges. Similarly, other reasons offered by the District at the hearing for terminating Respondent were not included in the Tenure charges, including claims that A.T. was subject of neglect or abuse.

As for the issue of Respondent's use of cell phone to communicate with the student, the District's policy allows such if directed to do so by a parent. Here, Respondent testified that A.T.'s mother instructed Respondent to contact the student by text, and when A.T. was asked if her mother told Respondent to contact her by text, A.T. testified; "I guess." District manager Seibert also knew Respondent was engaged in texting with the student and never objected to the conduct.

To find forgery, neglect of duty, fraud or theft by deception requires a finding that the acts in question were intentional, made knowingly and purposeful. Respondent did not have such intent. Moreover, for many of the instances of falsely claimed instruction time identified by the District, the record establishes that Respondent would have received the same payments due to the student's untimely cancellations on the days at issue. No harm was done to either the District or Kingsway.

Respondent met the terms of the contract with Kingsway and was successful in moving A.T. from a failing student to a student who was able to move onto her senior year. The Tenure charges should be dismissed.

Discussion

The District bears the burden of proving its Tenure Charges. Based upon careful consideration of the record as a whole, including all testimony and other admitted evidence and the arguments of the parties, I find that the District has failed to establish the truth of its tenure charges against Respondent sufficient to support termination of Respondent, but has met its burden sufficient to support a warning to Respondent.

Credibility

Determinations relating to credibility involve not just conclusions on whether a witness is out-and-out lying or telling the truth, but to an even larger extent, whether the testimony of the individual can be relied upon as an accurate reporting of what did or did not occur in the past. Reliability of a witness's recollection can be impacted by a plethora of factors, such as passage of time, intervening events in the life of the witnesses, the number of times a witness has gone over the events in his or her head, the interests of the witness in recalling events in a way that puts the witness in the best light or advances the witness's interests, a witness's health, substance use, intelligence, age, perspective, environmental factors at the time of an incident, the unusual character of an event, and on and on. When making credibility determinations in this matter, I have reviewed the testimony of witnesses in detail; painstaking detail. In crediting and discrediting all or portions of individual witness testimony, I have considered the consistencies and inconsistencies between various witnesses, the vagueness of testimony, the certainty of testimony, the likelihood of events occurring under the circumstances and the demeanor of each witness. I have also given due consideration to written communications of individuals involved, the absence of prior-recollections-recorded, and the failure to call witnesses with knowledge of the events at issue.

Based upon such considerations, I am persuaded that:

(1) Administrators Monti and Lamonica had little knowledge of the underlying events at issue and assumed as established fact the content of the email of A.T., and in doing so, were inclined to perceive statements by Respondent during their very brief October 28 meeting as supporting their own preconceived conclusions

relating to events. Consequently, the District's investigation of this matter was inappropriately truncated because the two administrators were of the mistaken view that Respondent admitted to the most damning allegations made by A.T. The two, along with Superintendent Dicken, presented testimony about training and onboarding of CRESS staff; testimony about how onboarding should be done, but no testimony as to their respective first-hand experiences with the process. The administrators were consistent in testifying that onboarding materials that set forth the rules and policies for employees are subject to employee "sign off" indicating receipt. (No such acknowledgement of receipt by Respondent was offered into evidence.)

(2) A.T. was, to a degree, sincere in her testimony, but in regard to various issues was not reliable. I found A.T. attempted on occasion to offer answers to questions that were not in her recollection. Thus, in answers to a number of questions I find that A.T. made educated guesses and presented probabilities rather than specific recollections. By way of example in such regard, in her testimony relating to what she told Respondent about her home life, A.T. testimony included numerous responses that she "probably" told the teacher this and that about various issues in her home life and the student's historical challenges. I also found A.T. to be inclined to promote and exaggerate her own efforts and discount the many, many challenges her own unusual circumstances and conduct presented to Kingsway, the District and Respondent. In this regard, A.T. testified that Respondent's efforts to organize, monitor and director her in algebra were of no value. Instead, A.T. was all too willing to conclude that her journey from a failing 44 grade in

algebra in late March to a high B at the end of the school year was entirely because of the student's own effort. Contrary to such claims by the student, the selected text messages A.T. offered the District reveals a student who constantly offered excuses not to meet with Respondent or to not do her work and made ongoing efforts to delay and procrastinate engaging in her school work, and a teacher who continually – and in the medium preferred by the student – pushed, cajoled and directed the student to finish tasks. Additionally, I find that A.T. offered testimony about whether and when she met with Respondent either in person or by text or phone, even though the student did not have specific recollections of dates and times. For example, A.T. offered that she could not have met with Respondent on a day because A.T. had travelled the day before and "would have been tired," and that she did not meet Respondent whatsoever in June, but then admitted she did meet with her in-person at the end of June for a four-hour session attended by her boyfriend. Additionally, and contrary to her own testimony that she did not have interaction with Respondent in June, the selected text messages she offered the District contained communications with Respondent on four different dates in June and for which Respondent billed.;
(3) Respondent also was prone to summarize, exaggerate and avoid specifics. At times when questions were asked that appeared to make her uncomfortable, for example when she was being examined by either counsel about her billing practices, she often talked over counsel and rambled. She was emotional at times, and although such is not unusual for a witness in her position, strong emotions can impact the ability to dispassionately recall events. That being said, in support

of her credibility, I found Respondent was willing to make admissions and be candid in her testimony about events even though they affirmed aspects of the District's argument, such as that she; (a) bent the rules to accommodate the challenging student, (b) did not feel she had the knowledge to teach the student algebra and (c) essentially performed the work of a "nanny" to direct and help A.T. exercise her own talents to succeed in algebra.

The Tenure Charges Themselves

The District's Charge of unbecoming conduct is substantially narrower than the case the District presented at the Tenure hearing. Charge 1 references Respondent's conduct relating only to algebra, and identifies five relatively specific forms of conduct or violations of District policy. As a general rule in such matters, an employer is held to have known the reasons for the termination at the time it makes the decision to terminate. Reasons that are added thereafter, particularly when based upon facts known or available to the employer at the time of the decision to terminate, are often viewed by arbitrators as admissions that the original reasons for the termination were not sufficient to satisfy the employer's burden.

In regard to the District's first Charge, the Charge alleges: (1) That Respondent unilaterally failed to comply with the in-person only instruction requirement of the District's contract with Kingsway and gave herself "credit for performing instruction in A.T.'s home, even though she was not actually present;" (2) That in conversation with Respondent, A.T. threatened to run away out of state with her boyfriend and Respondent violated policy by failing to report the threat; (3) That Respondent violated policy by

using her personal cell phone to communicate with A.T. by calls and text messages; (4) That Respondent received pay for services she was not entitled to receive "as a result of fraud," and (5) That Respondent engaged in fraud by accepting pay for home instruction of A.T. that A.T. did not receive, and thus, "the CRESS program was forced to refund all of the fees paid by Kingsway for A.T.'s instruction in 2021."

> **(1)That text messages between A.T. and Respondent, combined with "falsified parental forms" established that Respondent was giving herself credit for performing instruction in A.T.'s home, even though she was not actually present."**

The District asserts that the contract with Kingsway for services relating to A.T. required in-home instruction only, and that Respondent unilaterally determined to not comply with the contract and to interact with A.T. in ways and manners other than in-person. The District also asserts that Respondent falsely claimed she performed work in the home of A.T. when, in fact, she was not in the student's home.

In regard to the contract claim, Respondent testified that the contract provided that "after HBIs speak with mom and teachers can get a better game plan." Consistent with the contract, Respondent testified, she initially instructed A.T. in the home, thereafter discussed matters with both CRESS program manager Seibert and Kingsway counselor Cappolina and was told by both Seibert and Cappolina that: (1) Respondent should "do what works" to help the student along and (2) that if instruction was done virtually, Respondent was to indicate such by writing "HBI virtual"[7] in the activity space of the parent verification form and sign her own name. Respondent testified that through

[7] Administrator Lamonica similarly testified that when the District went virtual during Covid, CRESS instructors were told to write "virtual" on their verification forms. She further testified that Seibert would have been the one who communicated such to employees.

emails and phone calls, she kept both CRESS program manager Seibert and Kingsway counselor Cappolina informed of her interactions with A.T. and her methods of organizing and guiding the student so the student could keep up with her algebra assignments. Respondent admitted that she is not good at math, testified that A.T. was better at math than was Respondent, and testified that she made her challenges in that regard clear to Seibert, Cappolina and A.T.'s math teacher. Early in the process, Respondent testified, she requested that Seibert find another teacher to teach A.T. algebra, but that because of strong objections from A.T. and the student's insistence that she could get through the class herself, Respondent did not push for another tutor. Respondents also testified that she told both Seibert (who she talked with on an ongoing and frequent basis) and Cappolina, that when it came to A.T. and math, Respondent was performing a guidance, organizing and motivational function; she was not giving direct math instruction to the student.

The District has argued that neither Kingsway nor the District had any idea that Respondent was not engaged in direct instruction of algebra with the student. Under the circumstances, I find the District has a substantial interest in presenting evidence contrary to Respondent's claims that both Cappolina and Seibert authorized the teacher to engage with A.T. virtually and to monitor and guide – rather than directly instruct - the student when it came to math. Notwithstanding such a strong interest, the District did not call either Cappolina or Seibert to testify. In this regard, there was no showing that Seibert, an employee of the District, and Cappolina, an employee of one of the District's most important sending districts, were not available to testify. Considering the importance of the testimony of these two witnesses to a determination of determinative facts in this

matter, I am persuaded that the District's failure to call the witness is sufficient to raise an adverse inference that if called, Siebert and Cappolina would confirm the testimony of Respondent.

Consequently, I credit Respondent's testimony that she was told by her program manager and the Kingsway counselor that she could teach A.T. virtually and to write "HBI virtual" and sign her own name on the verification form when such occurred. I also credit Respondent's testimony that she was directed to do whatever worked for A.T. and that the two employees of both districts, Seibert for the District and Cappolina for Kingsway, knew generally how Respondent was approaching the task presented of attempting to move a very challenging and eminently problematic student along, and agreed with Respondent's approach. [8]

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[8] In addition to the adverse inference, I also find in support of my finding as to knowledge of the methods used by Respondent, the content of email exchanges between Cappolina and Seibert leading up to the engagement of Respondent. For example;

Seibert:

> We would, if I can find a teacher or two that can take all the classes and be ok with going into the home. I have one that is interested but I don't know that she would be able to do the upper level science and math. I obviously want to get a teacher that is knowledgeable in the content so that A. is getting the support she needs. ***If it is just someone being the communicator/liaison between the teachers from school and motivating A. to do her work, it wouldn't be as hard.*** But when its having a teacher that is competent in all of the subject matter, it gets more complicated obviously.

Cappolina:

Great!

> Please keep me posted as we prefer full time home instruction. After they contact student, we may have to increase the amount of hours.
>
> I prefer in person however, still interested in 1 teacher instructing a few subjects in person instruction ***and another teacher to coordinate.*** (Emphasis added.)

In this regard, the record establishes that Kingsway had prior experience with the student, had settled in the past on a teacher just trying to monitor and encourage the student, had originally envisioned such would be the case again in the spring of 2021 for A.T., and that although Kingsway wanted initially to have the student receive full-time, in home instruction, the monitoring and encouragement strategy that Respondent proposed after initially meeting with

To support its claim that Respondent "falsified parental forms," the District relies upon parental verification forms that it claims contain "forged" signatures of A.T.'s mother; signatures that the District asserts were "forged" by Respondent. Considering the records as a whole, I am not persuaded that the District has meet its burden in this regard. First, many of the signatures initially identified as having been forgeries of A.T.'s mother's do not purport to be the mother's name. Upon general examination, they present the names or initials of persons other than the mother. Not purporting to be the signature of anyone other than the signer, the signatures do not meet the definition of forgery.

Also in support of the falsification allegation, the District relied on the testimony of CRESS administrators Monti and Lamonica that during their October 28 meeting with Respondent, the teacher admitted to forging the mother's signature by "scribbling" the mother's name. I do not find that Respondent admitted to the CRESS managers during her brief October 28 meeting that she scribbled the name of A.T.'s mother on the forms. The notes of the meeting co-authored by Monti and Lamonica provide that Respondent said she just scribbled "a" signature on the forms, and both Respondent and Davis testified that Respondent did not make such an admission. In addition, I find that such an admission is unlikely under the circumstances where, as here, the forms themselves establish that Respondent had written her own name on the forms.

The District also relies upon the testimony of A.T. who identified signatures next to "HBI" designations purporting to be that of her mother, but she testified are not her

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A.T. in the home would have been consistent with the strategies discussed in emails between Cappolina and Seibert as well as the way the districts had attempted to deal with the challenging and distinctive student in the past.

To be clear, I am not finding based upon parol evidence that the original contract included such strategy. Instead, I find the two districts would have been receptive to consistent oral modifications of their understanding.

mom's signature. A.T. so identified signatures for March 28, April 5, 6, and June 14 and 15. As for March 28 and April 5 and 6, I find the signatures are sufficiently alike the undisputed signatures of A.T.'s mother so as to support a finding, which I make, that the District has not met the burden of establishing that they are forgeries. As for the June 14 and 15 signatures, they are ambiguous as to who they purport to be. I find based upon the full record, that whether or not the June 14 and 15 signatures are the signatures of A.T.'s mother, signatures of another adult or an effort to mimic the signature of the student's mother, is not sufficiently established by the record for me to make a finding. As the allegation is forgery, and such an allegation places the burden of proof firmly in the lap of the District, I find the District has not met its burden of proving the allegation.

I also find that Respondent's conduct of writing "HBI virtual" on the verification forms was not intended to, and did not as alleged by the District, communicate a false claim that the teacher taught in the student's home on such occasions. The presences of the handwritten phrase "virtual" in the "Activity" columns of the verification forms for the dates and times at issue, in and of itself, contradicts the District's claim that Respondent misrepresented that she was in the student's home on the dates indicated.

The District has failed to establish as true this portion of Charge 1.

(2) That in the presence of Respondent, A.T. threatened to run away out of state with her boyfriend and that Respondent violated policy by failing to report the threat

In addition to the "runaway" allegation contained in Charge 1, at the hearing the District added allegations that A.T. also told Respondent that she was being abused, had asked Respondent about NJ DYFS and had discussed violence in the home involving her mother's boyfriend, and that Respondent violated policy by not reporting such to her

supervisors at the District.[9] Although A.T. testified that she talks a lot and "told everything" to Respondent and answered "yes" when asked if she told the teacher she was considering running away, I do not find that the District has proven this aspect of its Charge 1. First in this regard, as explained above, A.T.'s testimony included too many "probably" answers when it came to what she may have told Respondent about her family life to rely upon her testimony as affirmative and reliable representations of fact.

Second, A.T. testified that whatever statement she may have made about running away, it would have had nothing to do with her boyfriend. She was upset with her mother. She testified that she was in Illinois and Colorado with her boyfriend, but that her weeks-long trip was not running away. Considering that the notes and testimony of administrators Monti and Lamonica reflect that the runaway discussion with Respondent on October 28 was in the context of A.T. and her boyfriend in Illinois, I find that the two administrators made their own incorrect conclusion that the student must have told Respondent she was going to "run away."

I have also not credited the testimony of A.T. that she told Respondent she was thinking about "running away." The "running away" term was one chosen by counsel in his question to the student, and I find it unlikely that A.T. would have used such a direct phrase when talking with Respondent. A.T. plainly does not view herself as a young child

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[9] These are the types of added allegations that tend to constitute an admission by the District that its allegations are not sufficient to support termination. Of similar ilk is the District's repeated references to Respondent's directing A.T. to the *Slader.com* website, and related implication that Respondent was attempting to assist the student in cheating. I find the repeated Slader.com references to be a red herring and "added allegation" similar to those described above, and further, that Respondent's directing the student to the website for guidance on how algebra problems can be solved was not an effort to cheat or encourage cheating. In this latter regard, the evidence establishes that the Slader.com website did not provide answer keys to any assignments, quizzes or tests in the Kingsway curriculum. A.T.'s raising such is further reason for my questioning the student's credibility.

who would use such a term as opposed to an adolescent who has effectively had to function as her own parent and wants to someday get out of her challenging circumstances. The latter is consistent with the testimony of Respondent; testimony I credit. As for the other reporting-related allegations, in addition to their not being included in the Charges, I have found A.T.'s "probably"-laden testimony to be insufficient to support such allegations.

The District has failed to establish as true this portion of Charge 1.

3) Against District Policy, Respondent Used her Personal Cell Phone to Communicate with A.T.

The administrators at the October 28 meeting concluded that Respondent violated District Policy by contacting A.T. by cell phone and that the teacher violated the District's texting policy. The Charge cites CRESS Program Rules, and District Policies 3281.1 and 3283.

Policy 3281.1 "Staff Communication With Students" provides, in part, in regard to cell phones that; *"School staff shall not contact students' cell phones unless directed to do so by the parent/guardian or upon request given permission,"* and that personnel *"shall limit cell phone interaction...to contact that pertains to legitimate school business."* The portion of the Policy relating to "Computer Communications" provides in part; *"...personnel shall adhere to the following guidelines when sending or receiving messages via internet, external E-mail, texting, and social media...All messages shall pertain to legitimate school business."* Policy 3283 prohibits communication between a teaching staff member and a student via a personal cellular telephone, unless approved to do so by a principal or designee *"...if the need to communicate is directly related to the teaching staff member's professional responsibility for a specific purpose..."* The Policy

provides similar language relating to texting. The CRESS Homebound Services Manual provides under Required Documentation, among other things, "Phone/Text/Email Communication Log," and in the Questions/Concerns section at 10. provides: *"When using a cell phone, please be professional in all interactions (e.g. eliminate "group texts" sent to multiple contacts)."*

Respondent testified that A.T.'s mother told her that she did not keep track of A.T.'s work schedule and that Respondent should contact A.T. directly to schedule sessions. When A.T. was asked on the witness stand if her mother directed Respondent to contact A.T. directly and gave the teacher A.T.'s cell phone number, A.T. responded "probably." Similarly, A.T. testified that she likely told Respondent that she preferred being contacted by texts.

I am persuaded that the District has failed to meet its burden of establishing that Respondent was informed of the policies contained in the Homebound services employee manual. In this regard, the District was unable to present any acknowledgement of such receipt by Respondent. However, I do find that as a relatively long term teacher in the District, Respondent either knew or should have known of the District's policies relating to cell phone communication with students.

Policy 3281.1 allows Respondent to contact a student on the student's cell phone with the permission of a parent and for legitimate use. Policy 3283 permits Respondent to have cell phone communication with a student if the communication is directly related to the teacher's professional responsibility for a specific purpose and is approved by a principal or designee. Here, the evidence establishes that Respondent was given

permission to have ongoing contact A.T. by the student's mother *for purposes of scheduling.*

I am persuaded that Respondent did not violate District policy by first contacting A.T. by cell phone for purposes of scheduling as was consistent with the permission given her by A.T.'s mother. However, notwithstanding the permission given by A.T.'s mother and the occasional email reference to texting A.T. that Respondent may have been communicated to Seibert and Cappolina, I find that Respondent violated the District's cell phone use polices by going beyond the scope of the permission given her by the mother of A.T., and by going beyond the narrow, permissible uses of such communication contained in the District's policies. Respondent either was aware or should have been aware of the District's general policy against cell phone communication with students, particularly communications that are frequent and/or go beyond the need to communicate with a student for specific purposes such as those outlined in District Policy 3283. Respondent used cell-phone and cell-phone-text communications with A.T. as primary tools of communication with the student for purposes of instruction, guidance and managing the student's school work. I find there is no reasonable basis in the record to conclude that the District knew that Respondent was primarily engaging with the student by cell phone and text while the student was out of the state for a long period during times when school was in session.

I find the District has met its burden of establishing the truth of its allegation that some of Respondent's conduct violated District communication policies, and that the teacher failed to meet reasonable professional expectations of the District by continuing to so engage with A.T. while the student was out of the state without direct and clear

communication with the District about ongoing and fundamental changes in circumstances relating to the instruction of A.T.

4)That Respondent received pay for services she was not entitled to receive as a result of fraud.

As found above, Respondent's use of "HBI virtual" on verification forms did not communicate, nor was it intended to communicate, that Respondent engaged in in-home instructions of A.T. on the dates indicated. I am not persuaded that the District has established that Respondent engaged in fraud by billing for services to A.T. As discussed above, the District through Siebert and Kingsway through Cappolina, knew of and approved of Respondent's strategy relating to A.T. That being, that the homebound instructor would organize, guide, monitor and encourage the student to complete algebra assignments and take quizzes and tests in Schoology, rather than engage in direct in-person instruction of the student in the subject. In such circumstances, I find that Respondent's billing for time spent guiding and monitoring the student in a manner that, in fact, resulted in the student completing her work and successfully progressing through the Kingsway algebra curriculum does not support a finding that Respondent knew or believed her billing to be false, or that she intended to deceive the District or Kingsway that she exclusively engaged in in-home instruction of A.T.

The District has failed to establish as true this portion of Charge 1.

5)The District was Forced to Refund Money to Kingsway

The District failed to establish this allegation of its Charge. In fact, District witnesses established just the opposite; the District has not refunded payments it made for Respondent's services by Kingsway, either as a result of "force" or otherwise.

The District has failed to establish as true this portion of Charge 1.

Charge 2: Other Just Cause

> The above described conduct amounts to neglect of duty, fraud, and theft by deception which constitutes other just cause warranting Tyson's permanent dismissal from employment.

Based upon relevant considerations discussed above, I find the record fails to support findings that Respondent engaged in conduct amounting to neglect of duty, fraud, and theft by deception sufficient to constitute other just cause to support the termination of Respondent.

Discharge is not an Appropriate Level of Discipline Under the Circumstances.

Having found merit to a portion of the allegations contained in the tenure Charges, I make the following conclusions based upon the *Fulcomer* and Just Cause standards:

1. **Applying the *Fulcomer* Test**

I find that Respondent has a significantly long teaching career; has a good overall teaching record; that the potential impact of termination on Respondent's teaching career would be substantial; and that the record is devoid of evidence establishing any intent on Respondent's part to punish anyone. As for the nature and gravity of the Respondent's

offenses relating to cell phone communication and failure to apprize the District of the long-distance aspect of Respondent's engagement with A.T., I find they are significantly mitigated by the facts herein found that Respondent's conduct was consistent with the "anything that works" nature of her assignment, and was engaged in in good faith with a sincere effort to aid a struggling student through disadvantages and challenges not entirely of her own making. I find there is no significant likelihood of harm or injury that Respondent's conduct may have on maintenance of discipline and the proper administration of the school system. Finally, I am persuaded that, considering the filing of Tenure charges and the discipline of Respondent ordered herein, it is unlikely that Respondent will repeat her cell phone related behavior.

Applying the *Fulcomer* considerations, I find that termination is unwarranted in this matter.

2. **Just Cause**

The TEACHNJ Act incorporates the just cause standard wherein it provides that a school district shall not dismiss or reduce the compensation of a tenured teachers except for "inefficiency, incapacity, or conduct unbecoming ...*or other just cause*," (emphasis added). An analysis of whether or not Respondent's discharge was for just cause under generally recognized standards requires consideration of all of the circumstances in determining whether the issuance of discipline was "fair." Some of the several factors often considered when applying the just cause standard include whether or not: (1) the rule or policy being enforced is reasonable; (2) there was prior notice to the employee of the rule and the consequences for its violation; (3) the disciplinary investigation was adequately and fairly conducted and the employee was afforded an appropriate level of

due process under the circumstances; (4) the employer was justified in concluding that the employee engaged in the conduct as charged; (5) the rule has been consistently and fairly enforced and (6) whether or not the discipline issued was appropriate given the relative gravity of the offense, the employee's disciplinary record and considerations of progressive discipline and due process.

In the instant matter, I find the District failed to show that the discipline of discharge was appropriate given the relative gravity of the offense found, Respondent's disciplinary record and considerations of progressive discipline and due process.

The Corrective Nature of Progressive Discipline

In is widely recognized that in all but the most egregious cases, discipline in the employment context is primarily intended to be corrective in nature; discipline is an effort by an employer to correct questionable conduct or poor performance by employees. Under the just cause standard, discipline is not a means to punish an employee or gain retribution for an employee's conduct. Only when efforts to correct have failed through reasonable efforts under the circumstances, is discipline justly used to terminate the employment relationship.

I find that Respondent's conduct was not of such an egregious character as to warrant immediate termination of the long tenured teacher. In her years of employment with the District, Respondent was never previously disciplined. Nor has Respondent been given the opportunity to correct her conduct relating to her cell phone use and failure to keep her supervisors fully informed of the circumstances relating to home-bound students.

Additionally, I find that to a significant degree, both the District through its program manager Seibert and Kingsway through its counselor Cappolina encouraged Respondent to think outside of the box when addressing the significant challenges of educating A.T. The nontraditional efforts of Respondent were successful. However, that being said, the District was entitled to have been kept apprised of the manner in which Respondent was engaging the student and particularly the cell-phone-based, and long-distance nature of Respondent's work. The decision to engage in such methods was the District's, not Respondent's. [10]

Appropriate Discipline

Having found that termination of Respondent is disproportionate to the conduct found, I nevertheless find that Respondent's conduct relating to her cell phone use and failure to keep her supervisors fully informed of the circumstances relating to A.T. warrants a comparative level of discipline, while giving her an opportunity to correct her conduct.

Considering the entire record in this matter, I will order that Respondent be promptly reinstated, that Respondent be made whole for losses in pay, benefits and seniority resulting from the filing of the Tenure Charges, including any suspension relating thereto, and that Respondent's termination be reduced to a warning relating to communication with students and reporting requirements.

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[10] I am also persuaded that in terms of consideration of mitigating factors, when the allegations of A.T. were first disclosed to the District, there was a degree of scapegoating that, as scapegoating tends to do, unfairly flowed exclusively to the level of least authority; that being Respondent.

Conclusion

The Tenure Charges are sustained in part and dismissed in part.

AWARD
I/M/O Tenure Charges of Alix Gillespie
Agency Docket Case No. 241-12/21

The subject tenure charges against Respondent are sustained in part and dismissed in part.

The District is ordered to:

1. Reduce Respondent's termination to a warning;

2. Promptly offer Respondent reinstatement to her former position;

3. Make Respondent whole for losses in pay, benefits and seniority resulting from her suspension/termination.

Dated: May 11, 2022

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Award in Agency Docket Case No. 241-12/22 relating to tenure charges against Alix Gillespie on Wednesday, May 11, 2022.

Timothy J Brown

98-22

New Jersey Commissioner of Education

Final Decision

Jaroslaw Nimczyk,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent New Jersey State Board of Examiners (SBE) that he had not met the requirements for issuance of an administrative certificate with a Supervisor endorsement pursuant to *N.J.A.C.* 6A:9B-12.6. Specifically, the SBE determined that petitioner had not successfully completed the required number of graduate credits necessary for a Supervisor certificate.

The ALJ found, *inter alia,* that: the pivotal issue in this case is whether petitioner satisfied his burden of demonstrating, by a preponderance of the evidence, that the SBE acted in a manner that was arbitrary, capricious, or contrary to law when it determined not to accept petitioner's alternative education to satisfy the remaining requirements that petitioner needed to receive a Supervisor certificate; *N.J.A.C.* 6A:9B-12.6(a) sets forth the eligibility requirements for a standard administrative certificate with a supervisor endorsement; the SBE determined that petitioner did not satisfy the three graduate credits in general principles of curriculum design and development for preschool through grade twelve which is required to qualify for a Supervisor certificate; petitioner's proffered alternative education was not deemed equivalent to satisfy that deficiency; and petitioner failed to establish that the SBE's decision to deny his application for a Supervisor certificate was arbitrary, capricious or unreasonable. Accordingly, the ALJ affirmed the SBE's decision and dismissed the petition.

Upon comprehensive review, the Commissioner found, *inter alia,* that: the ALJ mistakenly applied the wrong standard of review in the Initial Decision, stating that the SBE's decision will not be overturned unless the petitioner proves that the SBE acted in a manner that was arbitrary, capricious or contrary to law; the appropriate standard of review here is whether the SBE's decision was consistent with the applicable statutory and regulatory provisions of *N.J.A.C.* 6A:3; nonetheless, the record of this matter demonstrates that the petitioner did not complete the required course work and that the SBE's decision to deny his application was consistent with the applicable regulatory provisions. Accordingly, the Initial Decision of the OAL was modified with respect to the appropriate standard of review and the petition was dismissed.

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

98-22
OAL Dkt. No. EDU 15422-19
Agency Dkt. No. 242-9/19

New Jersey Commissioner of Education

Final Decision

Jaroslaw Nimczyk,

Petitioner,

v.

Department of Education, State Board of Examiners,

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.

In this case, petitioner Jaroslaw Nimczyk filed a petition of appeal under *N.J.A.C.* 6A:3.1 *et seq*. challenging the State Board of Examiners' (Board) decision denying his application for an administrative certificate with a Supervisor endorsement. After a hearing at the OAL, the Administrative Law Judge (ALJ) determined that the petitioner did not satisfy the requirements necessary to obtain a Supervisor endorsement pursuant to *N.J.A.C.* 6A:9B-12.6 because he had not attained the requisite graduate credits.

As a threshold matter, a discussion of the applicable standard of review for petitions of appeal that are filed under *N.J.A.C.* 6A:3 is necessary. When there is a challenge to a determination made by an office within the Department of Education, the Commissioner is not mandated to give deference to her staff, but instead determines if the finding was legally

appropriate. *See*, *Board of Trustees of the Passaic County Elks Cerebral Palsy Center v. New Jersey Dept. of Educ., Office of Fiscal Accountability and Compliance*, Commissioner's Decision No. 334-14, dated August 14, 2014 (finding that a decision of the Office of Fiscal Accountability and Compliance is not given deference by the Commissioner). Moreover, where the Department of Education has limited the scope of review of a subordinate office or division, it has done so by regulation, *i.e.* appeals filed under *N.J.A.C.* 6A:4 challenging a decision of the State Board of Examiners revoking/suspending a certificate, or a decision of the School Ethics Commission.

In the Initial Decision, the ALJ mistakenly referenced *N.J.A.C.* 6A:4-4.1(a) and stated that the Board's decision in this case will not be overturned unless the petitioner proves that the Board acted in a manner that was arbitrary, capricious or contrary to law. It is important to recognize that a decision by the Board denying an application for a certificate is not entitled to the arbitrary, capricious or unreasonable standard of review that is afforded to appeals filed under *N.J.A.C.* 6A:4, challenging a decision of the Board revoking or suspending a certificate. *See*, *Jessica Walder v. New Jersey Department of Education, State Board of Examiners*, Commissioner's Decision No. 503-14, decided December 29, 2014 (finding that the Commissioner does not give deference to a decision of the State Board of Examiners denying a request for issuance of a certificate). The petition of appeal in this matter was filed in accordance with *N.J.A.C.* 6A:3, which consists of completely different regulatory provisions than *N.J.A.C.* 6A:4; these two Administrative Code Sections should never be conflated. As such, the standard of review that governs appeals filed under *N.J.A.C.* 6A:4 does not apply to this case.

Therefore, the appropriate standard of review of the Boards' decision is whether the decision is consistent with the applicable statutory and regulatory provisions.

Upon a comprehensive review of the record and applying the appropriate standard of review, the Commissioner is in accord with the Board's determination that the petitioner did not satisfy the requirements necessary to qualify for a Supervisor certificate under *N.J.A.C.* 6A:9B-12.6. Although the ALJ applied an inaccurate standard of review, the record of the matter, which includes the transcript from the October 26, 2020 hearing at the OAL, demonstrates that the petitioner did not complete the required course work and that the Board's decision to deny his application was consistent with the applicable regulatory provisions.

Accordingly, the Initial Decision is modified with respect to the appropriate standard of review and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 16, 2022
Date of Mailing: May 18, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

99-22
OAL Dkt. No. EDU 08394-20
Agency Dkt. No. 173-8/20

New Jersey Commissioner of Education

Final Decision

Christine Werner,

Petitioner,

v.

Board of Education of the Borough of Hampton, Hunterdon 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. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that Paragraph 1 of the Agreement references actions that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 19, 2022
Date of Mailing: May 19, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08394-20
AGENCY DKT. NO. 173-8/20

CHRISTINE WERNER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOUROUGH OF HAMPTON, HUNTERDON COUNTY,

Respondent.

Michael G. Kane, Esq., for petitioner (Cashdan & Kane, PLLC, attorneys)

Alyssa K. Weinstein, Esq., for respondent (The Busch Law Group, LLC, attorneys)

Record Closed: March 22, 2022 Decided: April 4, 2022

BEFORE **ELIA A. PELIOS,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on September 4, 2020, 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 March 22, 2022, the parties filed a fully executed Settlement Agreement and the Board Resolution approving the settlement. The Agreement and Resolution are attached and fully incorporated herein.

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 4, 2022, 2022
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: 4/4/2022

Date Mailed to Parties: 4/5/2022

/dw

CHRISTINE WERNER, Petitioner, v. HAMPTON BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW **Docket Nos. EDU 08394-20 and EDU 08411-21** Agency Ref. Nos. 173-8/20 and 172-9/21 **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (the "Agreement") is entered into by and between Christine Werner ("Petitioner"), and the Hampton Board of Education ("Board") with administrative offices located at 32-41 South Street, Hampton, New Jersey 08827. Petitioner and the Board are collectively referred to as the "Parties."

WHEREAS, disputes have arisen regarding, *inter alia*, Petitioner's employment with the Board, Petitioner's separation from the Board, and the Board's subsequent employment of, or contract with, persons or entities to perform certain duties previously performed by Petitioner; and

WHEREAS, Petitioner sent the Board two Notices of Tort Claim on or about December 20, 2019; and

WHEREAS, Petitioner filed the above-captioned Petitions on or about August 18, 2020 and September 10, 2021; and

WHEREAS, Petitioner initiated a Superior Court action on or about May 10, 2021, which action was dismissed without prejudice on or about December 9, 2021; and

WHEREAS, the Parties have negotiated in good faith and have a desire to settle their disputes in an amicable way without any admission of wrongdoing by any Party;

NOW, THEREFORE, the Parties hereby agree as follows:

1. Within thirty (30) days of approval of this Agreement by the Administrative Law Judge, the Board and/or its insurance carrier will issue payment to Petitioner (via her attorney) in the total amount of one hundred seventy five thousand dollars ($175,000.00), as sole consideration for the release set forth in paragraph 3 of this Agreement. Said payment shall be comprised of the following three (3) separate checks:

a. A check from the Board made payable to Christine Werner in the amount of sixty thousand dollars ($60,000.00), to be reported on a 1099 MISC form as "other income;"

b. A check from the Board's insurance carrier made payable to Christine Werner in the amount of fifty six thousand six hundred sixty seven dollars ($56,667.00), to be reported on a 1099 MISC form as "other income;" and

c. A check from the Board's insurance carrier made payable to Cashdan & Kane, PLLC in the amount of fifty eight thousand three hundred thirty three dollars ($58,333), to be reported on a 1099 MISC form as "gross proceeds paid to an attorney."

2. Prior to submission of this Agreement to the Administrative Law Judge for approval, the amount of the settlement payment described in this Agreement shall be subject to approval by the Board's insurance carrier, School Alliance Insurance Fund and/or School Alliance Insurance Fund's third-party administrator and/or School Alliance Insurance Fund's agent, in addition to the acceptance and ratification of this Agreement by the Hampton Board of Education, and is without prejudice to the Parties if the Board's insurance carrier, School Alliance Insurance Fund and/or School Alliance Insurance Fund's third-party administrator and/or School Alliance Insurance Fund's agent, and the Board do not approve the amount of the settlement payment. The foregoing settlement payment to Petitioner by the Board's insurance carrier, School Alliance Insurance Fund and/or School Alliance Insurance Fund's third-party administrator and/or School Alliance Insurance Fund's agent, shall only be made upon the final approval of same by School Alliance Insurance Fund and/or School Alliance Insurance Fund's third-party administrator and/or School Alliance Insurance Fund's agent, in addition to the

acceptance, approval and ratification of this Agreement by the Hampton Board of Education and subsequent to defense counsel's receipt of a fully executed and notarized copy of this Agreement, completed W-9 forms for Petitioner and her attorney, and a clear child support judgment search report for Petitioner.

3. The Parties expressly agree that this Agreement resolves any and all issues between the Parties that arose or could have arisen from the beginning of time through the date of approval of this Agreement by the Administrative Law Judge. In consideration for the items set forth in this Agreement, Petitioner and her past, present, and future representatives, agents, attorneys, successors, beneficiaries, transferees, heirs, assigns, family members, and any and all persons acting under her direction or control or on her behalf, hereby waive and release any and all rights to file or cause to be filed any suit, petition, demand, administrative, judicial, or other proceeding, claim, complaint, or other action of any kind against the Board or its members, officers, administrators, agents, employees, insurers, or assigns based upon any set of facts which have allegedly occurred or which may occur from the beginning of time through the date of approval of this Agreement by the Administrative Law Judge. This waiver and release includes but is not limited to any and all claims, procedural, substantive, or otherwise, known and unknown, foreseen and unforeseen, regardless of whether or not asserted in the above-captioned Petitions or in the above-referenced Notices of Tort Claim or in the above-referenced Superior Court action, relating to Petitioner's employment with the Board, relating to Petitioner's separation from the Board, relating to the Board's subsequent employment of, or contract with, persons or entities to perform certain duties previously performed by Petitioner, relating to the employment and civil rights of Petitioner under any federal or state constitution, statute, regulation, common law, or public policy (including but not limited to claims alleging any form of negligence, tortious conduct, breach of duty, or breach of contract, and claims under the New Jersey Law Against Discrimination, New Jersey Statutes Title 18A, Americans with Disabilities

Act, Age Discrimination in Employment Act, Older Workers Benefit Protection Act, Sections 1981 through 1988 of Title 42 of the United States Code, Federal and State Civil Rights Acts, Federal and State Constitutions, National Labor Relations Act, Employee Retirement Income Security Act, Fair Labor Standards Act, Occupational Safety and Health Act, Public Plaintiff's Occupational Safety and Health Act, Fair Credit Reporting Act, Consolidated Omnibus Budget Reconciliation Act, Family and Medical Leave Act, New Jersey Family Leave Act, Worker's Compensation Act, Worker Adjustment Retraining Notification Act, Smokers' Rights Law, Equal Pay Act, Genetic Privacy Act, Conscientious Employee Protection Act, wage and hour laws, and/or the Rehabilitation Act of 1973), alleging past, present, or future economic loss, personal injury, physical injury, bodily injury, emotional injury, pain and suffering, reputational damage, loss of opportunity, impairment of earning capacity, and/or demanding reinstatement, compensatory damages, consequential damages, liquidated damages, punitive damages, specific performance, interest, reimbursements, injunctive relief, attorney fees, expert fees, litigation costs, and/or any and all other form of legal and/or equitable relief from the beginning of time through the date of approval of this Agreement by the Administrative Law Judge. Notwithstanding the provisions of this paragraph, all Parties expressly reserve the right to file a claim to enforce this Agreement.

4. The Parties expressly agree that, because this Agreement is the result of a compromise, there is no "prevailing party," and each party is responsible for its own attorney fees, expert/consultant fees, and litigation costs.

5. Petitioner expressly acknowledges and agrees that, as a condition of this Agreement, all claims and/or liens, past, current, and/or future, arising out of this Agreement or asserted against the settlement payment referenced in paragraph 1 above, are to be satisfied by Petitioner, including but not limited to Medicare or Medicaid claims/liens, child support claims/liens, Social Security claims/liens, pension claims/liens, creditor claims/liens,

hospital/physician claims/liens, health insurer claims/liens, attorney/expert/consultant claims/liens, and/or any statutory, equitable, common law, or judgment claims/liens, including but not limited to claims/liens based on subrogation or any other legal or equitable theory.

6. Neither the Board nor its insurance carrier, attorney, nor other representative has made any representations regarding the taxability of the settlement payment referenced in paragraph 1 above. Petitioner expressly acknowledges and agrees that she is solely responsible for determining and paying any taxes which might be associated with the settlement payment. In the event Petitioner fails to pay some or all taxes owed, she agrees to defend and hold the Board, its insurer, and its attorney harmless for any taxes, interest, fines, or penalties associated with or arising from any failure to pay any taxes that are her responsibility to pay.

7. This Agreement is solely for the benefit of the Parties hereto and shall not in any way inure to the benefit of, provide a release to, or create any rights whatsoever in any third person or entity unless expressly provided for herein. Petitioner expressly declares, warrants, and affirms that she has not previously assigned or transferred, in whole or in part, any rights and/or claims against the Board (or its members, officers, administrators, agents, employees, insurers, or assigns) which are the subject of this Agreement.

8. This Agreement represents the entire agreement between these Parties and cannot be modified in whole or in part except by mutual written agreement.

9. This Agreement is subject to Board approval and is without prejudice to any Party if the terms are not approved by the Board and its insurance carrier. A good faith effort will be made to present this Agreement to the Board at the next scheduled regular Board meeting following execution of this Agreement by Petitioner. In the event this Agreement is not approved by the Board and its insurance carrier, this Agreement shall be inadmissible in any legal proceeding between the Parties, and neither Party shall be bound to same. The Board's

approval of this Agreement shall be evidenced by a certified copy of the resolution passed by the Board.

10. Following Board approval of this Agreement, the Parties will submit this Agreement to the Administrative Law Judge assigned to the above-captioned Petition for the judge's entry of an Order Approving Settlement.

11. It is acknowledged that this Agreement has been entered into freely, willingly, and voluntarily, without duress or coercion, with a full understanding of its contents, and with the opportunity for the Parties to consult with representation of their choosing and at their option. Petitioner has been represented by Michael G. Kane, Esq. of Cashdan & Kane PLLC, and is satisfied with his representation. The Board has been represented by Alyssa K. Weinstein, Esq. of The Busch Law Group LLC, and is satisfied with her representation. The Parties acknowledge that they understand the contents of this Agreement and that they were given the opportunity to review it with representatives of their choosing.

12. This Agreement is made without any admissions or findings of liability or responsibility by any Party hereto.

13. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective Party.

14. This Agreement shall be construed fairly, according to the plain language of its terms.

15. This Agreement shall be governed by the Laws of the State of New Jersey. If any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement, or the application of such term to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

16. This Agreement shall remain confidential to the maximum extent permitted by law and shall not be disclosed by either Party to any third party other than a Party's attorney, insurer, accountant/tax preparer, and as otherwise required by law. If either Party is asked about the disputes, such Party may respond "The disputes have been resolved." It is expressly agreed that no Party to this Agreement shall engage in any disparagement of any other Party to this Agreement at any time. **Pursuant to N.J.S.A. 10:5-12.8, although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.**

IN WITNESS WHEREOF, the Parties hereto set their hands to this Agreement as follows:

PETITIONER, CHRISTINE WERNER:

Christine Werner Dated: 02/26/2022

Christine Werner

STATE OF NEW JERSEY, COUNTY OF BURLINGTON:
I CERTIFY that, on February 26, 2022, Christine Werner personally came before me and acknowledged under oath, to my satisfaction, that she: (a) is named in and personally signed this document; and (b) signed, sealed, and delivered this document as her act and dee d.

JULIE NAWAR
NOTARY PUBLIC
State of New Jersey
My Comm. Expires September 24, 2026

Attorney or Notary Public

RESPONDENT, HAMPTON BOARD OF EDUCATION:

Elizabeth Mayo Dated: 2/14/2022

Board President

Hampton Public School

"Inspiring our community to thrive and engage in a dynamic learning experience."

Mr. Daniel Kerr
Chief School Administrator
Director of Special Services

Ms. Ruth Ann Dalrymple
Principal

Mr. James Schlessinger
Business Administrator/Board Secretary

EXTRACT OF MEETING MINUTES

DATE OF MEETING: March 15, 2022 CALL TO ORDER: 7:03 p.m.

Present: Elizabeth Monaghan, President
Alicia Noon, Vice President
Megan Bruton
Denise Bryant
Dana Daneault

DISTRICT ADMINISTRATORS
Present: Mr. Daniel Kerr, Chief School Administrator
Mr. James Schlessinger, Business Administrator Board Secretary

Legal Settlement
BE IT RESOLVED upon the recommendation of the Superintendent and Board Counsel, that the Settlement Agreement and Release in the matter of C.W. v. Hampton Board of Education, OAL Docket Nos. EDU 08394-20 and 08411-21 be approved and that the Board of Education approves the contribution of sixty thousand dollars ($60,000.00) toward that settlement, with the insurance carrier contributing the balance of the total settlement, and that the Board President is duly authorized to sign the Agreement on behalf of the Board.

Moved by Ms. Daneault, seconded by Ms. Bryant.
On roll call vote, resolution was ADOPTED as follows

Ms. Bruton	Ms. Bryant	Ms. Daneault	Ms. Monaghan	Ms. Noon
Yes	Yes	Yes	Yes	Yes

The forgoing information is a true copy of the official records of Hampton Public School District Board of Education, having been extracted from and compared with the contents of the original minutes by me

James Schlessinger
Business Administrator/Board Secretary

100-22

OAL Dkt. No. EDU 08382-21
Agency Dkt. No. 124-8/21

New Jersey Commissioner of Education

Decision

Benjamin Wood,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

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

Upon review, the Commissioner agrees with the Administrative Law Judge's determination that this matter should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 19, 2022
Date of Mailing: May 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - DISMISSAL
OAL DKT. NO. EDU 08382-21
AGENCY DKT. NO. 124-8/21

BENJAMIN WOOD,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF STUDENT PROTECTION,
Respondent.

Benjamin Wood, petitioner, pro se

Joshua P. Bohn, Deputy Attorney General, for respondent (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

Record Closed: April 11, 2022 Decided: April 19, 2022

BEFORE **EDWARD J. DELANOY, JR.**, Deputy Director and ALAJ:

The matter was transmitted to the Office of Administrative Law (OAL), on October 7, 2021, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Petitioner challenges his disqualification from school employment due to his criminal background.

During the telephone conference conducted on February 25, 2022, petitioner advised that was going to withdraw his petition and was given until March 4, 2022, to file that withdrawal letter.

No withdrawal letter was received at the OAL and on March 31, 2022, a letter was sent to petitioner:

> . . . If you still intend to withdraw your appeal, please complete the attached withdrawal form and return to our office in the self-addressed stamped envelope by April 11, 2022. If you no longer wish to withdraw your appeal and would like to proceed with your appeal, please contact my assistant . . . at the phone number listed above and indicate your intention to proceed. Absent a response by April 11, 2022, an initial decision dismissing the appeal will be issued.

Petitioner has not forwarded either a letter of withdrawal or a request to move forward to a hearing. Therefore, I **CONCLUDE** that respondent has abandoned his appeal.

ORDER

It is hereby **ORDERED** that this 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.

April 19, 2022
DATE

EDWARD J. DELANOY, JR., Deputy Director and ALAJ

Date Received at Agency: April 19, 2022

Date Mailed to Parties: April 19, 2022

mph

101-22

OAL Dkt. No. EDU 08737-21
Agency Dkt. No. 131-9/21

New Jersey Commissioner of Education

Decision

Calvin Abramowitz,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

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

Upon review, the Commissioner agrees with the Administrative Law Judge's determination that the Board of Examiners' Motion to Dismiss should be granted. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, J.d.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 19, 2022
Date of Mailing: May 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08737-21
AGENCY DKT. NO. 131-9/21

CALVIN ABRAMOWITZ,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,
Respondent.

Calvin Abramowitz, petitioner, pro se

Sadia Ahsanuddin, Deputy Attorney General, for respondent (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

Record Closed: April 6, 2022 Decided: April 14, 2022

BEFORE **SARAH G. CROWLEY,** ALJ:

STATEMENT OF THE CASE

Petitioner Calvin Abramowitz (petitioner) challenges the denial of his application for a supplemental instruction in reading and mathematics (K-8) Certificate of Eligibility by the State Board of Examiners (the Examiners). The Examiners reply that petitioner failed to meet the regulatory requirements for issuance of this certificate set forth in N.J.A.C. 6A:9B-8.3. The reasons for the denial were that he lacked the requisite cumulative grade point average (GPA) requirements in the regulations. Under the applicable regulations, the petitioner needed a

cumulative GPA of at least 2.75. The petitioner's GPA was 2.35, and thus the application was denied.

PROCEDURAL HISTORY

Petitioner filed a petition of appeal with the Commissioner of Education (the Commissioner) on August 30, 2021. A Motion to Dismiss, in lieu of an Answer, was filed by the Examiners, and the contested case was transmitted to the Office of Administrative Law (OAL) on October 19, 2021. The petitioner filed opposition to the motion and several conference calls were conducted with the parties.

FINDINGS OF FACT

The Examiners' Motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a Motion to Dismiss, in lieu of an Answer. In ruling on a Motion to Dismiss:

> [t]he judge considers whether all the evidence together with all legitimate inferences therefrom could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with weight, worth, nature or extent of the evidence. The judge must accept all the evidence supporting the party defending against the motion and accord that party the benefit of all inferences that can reasonably and legitimately be deduced therefrom. If reasonable minds could differ, the motion must be denied.
>
> [37 New Jersey Practice, Administrative Law and Practice § 5.19, at 259-60 (Steven Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000).]

Accordingly, for purposes of the Motion, the facts alleged by the petition will be deemed admitted. I **FIND** as follows:

1. The petitioner applied for a supplemental instruction in reading and mathematics (K-8) Certificate of Eligibility.

2. Petitioner submitted a transcript from Yeshiva University demonstrating a bachelor's degree with a grade-point average of 2.35.

3. The degree included courses from other institutions for which he had obtained credits with a pass/fail grade. Accordingly, no GPA is attributed to pass classes and they were accorded no weight in the GPA calculation.

4. The petitioner's overall GPA fails to meet the requirement of the regulations for Certification for Supplemental Instruction in Reading and Mathematics (K-8).

The above facts are not in dispute and are **FOUND** as **FACT.**

LEGAL ANALYSIS AND CONCLUSIONS

The issue presented by this appeal is "whether the decision [by the Examiners to deny Abramowitz's application is consistent with the applicable statutory and regulatory provisions." Walder v. State Bd. of Exam'rs, OAL Dkt. No. EDU 08530-14, Initial Decision (November 10, 2014), aff'd with mod., Comm'r (December 29, 2014), http://njlaw.rutgers.edu/collections/oal/. Abramowitz carries the burden of demonstrating by a preponderance of the credible evidence that he is entitled to the certification he seeks. Farrar v. State Bd. of Exam'rs, OAL Dkt. No. EDU 13763-08, Initial Decision (April 27, 2010), aff'd, Comm'r (July 26, 2010), http://njlaw.rutgers.edu/collections/oal/. I **CONCLUDE** that the Examiners' decision was consistent with applicable law and thus, must be upheld.

The petitioner does not meet the GPA requirements of the regulations and petitioner has not demonstrated by a preponderance of the evidence that the Board's decision was not consistent with the applicable law. The petitioner's argument that he should be able to pick and choose which courses are used in calculating his GPA has no legal foundation. Accordingly, I **CONCLUDE** that the Board's Motion to Dismiss is granted, and the appeal is **DISMISSED**.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the Board of Examiners' Motion to Dismiss is **GRANTED** and the petition of appeal is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 14, 2022
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: April 14, 2022

Date Mailed to Parties: April 14, 2022

SGC/sm

102-22

New Jersey Commissioner of Education

Final Decision

R.H., on behalf of minor child,

Petitioner,

v.

Board of Education of the Town of Hackettstown, Warren County,

Respondent.

Synopsis

Petitioner challenged the determination of the respondent Board that his minor child is not entitled to bus transportation because their home it is located less than two miles from the school his child attends. Following a Board hearing on April 21, 2021, the Board issued a final determination – via email dated April 22, 2021 – that petitioner's home was not "remote" pursuant to *N.J.A.C.* 6A:27-1.3(a)(1)(i). Despite multiple notifications that petitioner could appeal the final determination to the Commissioner of Education, the within appeal was not filed until October 25, 2021. The Board filed a motion to dismiss in lieu of an answer, contending that petitioner's appeal was untimely.

The ALJ found, *inter alia*, that: pursuant to *N.J.A.C.* 6A:3-1.3(i), petitioners must 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; here, the petitioner received notice of the Board's final decision to deny his request for busing on April 22, 2021, but failed to perfect his appeal until October 25, 2021 – well beyond the 90 day limitations period set forth in *N.J.A.C.* 6A:3-1.3. Accordingly, the ALJ granted the Board's motion to dismiss the petition.

Upon a comprehensive review, the Commissioner concurred with the ALJ that this matter is time-barred by the 90-day limitations period set forth in *N.J.A.C.* 6A:3-1.3(i). Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed as untimely.

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

102-22

OAL Dkt. No. EDU 09183-21
Agency Dkt. No. 202-10/21

New Jersey Commissioner of Education

Final Decision

R.H., on behalf of minor child,

Petitioner,

v.

Board of Education of the Town of Hackettstown, Warren County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, along with petitioner's exceptions – filed pursuant to *N.J.A.C.* 1:1-18.4 – and the Board's reply thereto.

In this matter, petitioner challenges the Board's determination that his second-grade child is not entitled to bus transportation from their home to the Willow Grove Elementary School because they live under two miles from the school. Pursuant to *N.J.A.C.* 6A:27-1.3(a), districts must provide transportation to students who live remote from school, which means beyond two miles for students in grades preschool through eight and two and one-half miles for high school students. Such distance is measured using the shortest route along public roadways between the entrance to the student's home and the closest public entrance to the school. *N.J.A.C.* 6A:27-1.3(a)(1)(ii).

Petitioner contends that his home is between 1.95 – 2.00 miles from the school, which would round up to two miles, and requires that his child receive transportation. The Board argues that the same route is 1.93 miles, resulting in its determination that the child is ineligible for busing. Petitioner raised this issue with the Board on or about April 10, 2021 and the matter was addressed at a Board hearing on April 21, 2021. The following day, April 22, 2021, the Board informed petitioner via email that it had not overturned its determination that his home was not eligible for transportation services. Nevertheless, the Board indicated that petitioner would be permitted to submit his measurements along the route in question so that the Transportation Specialist could confirm the determination. The Board further explained that if petitioner did not provide the supplemental information, it would consider the April 22, 2021 email to be the Board's final decision on the matter and that petitioner could appeal to the Commissioner of Education through the Office of Controversies and Disputes (Controversies and Disputes). Thereafter, petitioner sent follow-up communications, and the Board informed petitioner on April 27, 2021 that, upon review, it had confirmed that his home is ineligible for transportation and that the April 22, 2021 email constituted the final decision on the matter. Again, the Board informed petitioner that he could file an appeal with the Controversies and Disputes and provided a link to its website.

Thereafter, petitioner continued to send correspondence to various school officials, as well as the Executive County Superintendent, who informed him numerous times that the next step would be to file an appeal with the Commissioner. Petitioner maintained that he was waiting for information regarding the Board's distance calculations in order to appeal to the Commissioner, but on May 4, 2021, the Board Secretary recommended that he forward all of

his emails, information and attachments to Controversies and Disputes, and that if additional information was required for his appeal, he would be informed of such.

On May 14 and 18, 2021, an attorney representing petitioner sent correspondence to multiple parties seeking clarity on the busing dispute, and also acknowledged that she may need to appeal this to the Commissioner. Thereafter, on May 19, 2021, the Board's attorney sent petitioner's counsel a letter, informing her of the many communications that had already occurred on this matter; that petitioner's dispute had been heard and rejected by the Board; and that petitioner could appeal to the Commissioner.

Petitioner did not file an appeal, and on July 31, 2021, petitioner sent an email to multiple school officials indicating that he had obtained a professional survey, the results of which he attached to the email. The information was reviewed at the Board's August 11, 2021 committee meeting, and on August 13, 2021, the Board Secretary informed petitioner that he had previously been informed of his right to file an appeal, but that given the amount of time that had elapsed, the Board would submit the matter to the Department of Education for a decision. Thereafter, the Board sent a letter to the Office of School Finance summarizing the dispute and indicating that petitioner had not filed an appeal with the Commissioner. Ultimately, petitioner filed his appeal with the Commissioner on October 25, 2021.

The Administrative Law Judge (ALJ) found that the appeal was filed outside of the 90-day limitations period set forth in *N.J.A.C.* 6A:3-1.3. The ALJ found that petitioner had received notice of the Board's final decision to deny his request for busing on April 22, 2021 and failed to demonstrate that the rule should be relaxed. As such, the ALJ granted the Board's motion to dismiss the petition.

In his exceptions, petitioner argues that the Board never gave him the information he requested so that he could file a petition. Petitioner also argues that the Board indicated that it would be submitting the matter to the Commissioner on his behalf after he provided his certified land survey, but the Board's statement was misleading because it sent the information to the Office of School Finance instead. Petitioner maintains that he did not realize until a month later that the matter had not been filed with Controversies and Disputes. As such, petitioner requests that the Initial Decision be rejected.

In reply, the Board maintains that petitioner had all the information he needed to file an appeal, specifically the April 22, 2021 final determination. The Board contends that petitioner failed to file an appeal despite consistent advisement that he should do so. Additionally, the Board argues that petitioner's attempt to continue communications after the final decision did not invalidate that decision, and there is no support for recalculating the 90-day deadline based on the Board's communication to the Office of School Finance. The Board maintains that the ALJ appropriately weighed the timeline of communications and determined that the matter was out of time. As such, the Board urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner agrees with the ALJ that this matter is time barred by the 90-day limitations period set forth in *N.J.A.C.* 6A:3-1.3(i). At the latest, petitioner was informed on April 27, 2021 of the Board's final decision. The Board's April 22, 2021 communication provided a caveat that petitioner could submit additional information, but that otherwise it would be the final decision. After petitioner submitted additional correspondence, the Board informed him on April 27, 2021 that it had reviewed his additional submissions and confirmed that his home is ineligible for transportation. As such, the Board indicated that the

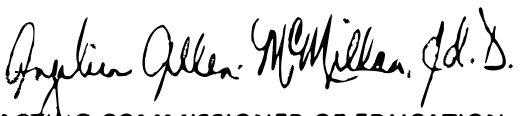
April 22, 2021 email constituted the final decision on the matter and that he could file an appeal of the determination with the Commissioner. There is no question that as of April 27, 2021, petitioner had been informed of a final decision of the Board, as well as his appeal rights, but he did not file an appeal until October 25, 2021 – almost six months later. While petitioner attempted to engage the Board in further communications, he was informed numerous times that his next recourse would be to file an appeal with the Commissioner. When petitioner maintained that he needed certain information to file an appeal, he was advised to submit all of his current documents and communications to Controversies and Disputes and he would be informed if anything else was needed. Furthermore, it appears that petitioner obtained the services of an attorney, who sent correspondence on his behalf and acknowledged that petitioner may need to file an appeal. In response, the Board attorney reiterated that the Board had already heard and rejected petitioner's argument, and that the attorney could file an appeal. As such, it is clear that petitioner had been informed many times of his appeal rights, had obtained an attorney who was also aware of his appeal rights, but yet chose not to timely file the appeal.

The Commissioner does not find petitioner's exceptions to be persuasive. *N.J.A.C.* 6A:3-1.3 and *N.J.A.C.* 6A:3-1.4 do not require that petitioner obtain records from the Board prior to filing a petition. Even if petitioner was not aware of what is required to initiate an appeal, he obtained an attorney who should have advised him, and he was also informed by the Board Secretary on May 4, 2021 that he should file an appeal with the communications and documents in his possession. Additionally, the Commissioner is not convinced by petitioner's argument that he was misled because the Board Secretary indicated he would submit the

matter to the Commissioner through Controversies and Disputes for a decision after petitioner provided a certified land survey, but instead sent it to the Office of School Finance. The Commissioner notes that 90 days from April 27, 2021 is July 26, 2021. Petitioner did not submit his land survey to the Board until July 31, 2021, after the filing deadline had already passed. As such, any purportedly misleading statement by the Board Secretary did not cause petitioner to miss the opportunity to file a timely appeal because he had already sat on his rights.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed as out of time.

IT IS SO ORDERED.[1]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 19, 2022
Date of Mailing: May 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 09183-2021
AGENCY DKT. NO. 202-10/21

R.H., on behalf of minor child
Petitioner,
v.
Board of Education of the Town of Hackettstown, Warren County,
Respondent.

R.H., pro se, petitioner

Raina M. Pitts, Esq. for respondent (Methfessel & Werbel, attorneys)

Record Closed: January 24, 2022 Decided: February 17, 2022

BEFORE: **MATTHEW G. MILLER,** ALJ

STATEMENT OF THE CASE

Petitioner, R.H., the parent of minor child M.C.[1], has challenged the determination made by the respondent, Board of Education of the Town of Hackettstown, Warren County (Respondent

[1] Minor Child. There is no dispute that the child in question is currently attending the 2nd grade at Willow Grove Elementary School in Hackettstown, N.J.

or Board), that M.C. is not entitled to bus transportation from their home at Address "A"[2] to the Willow Grove Elementary School, located at 601 Willow Grove Street, per N.J.S.A. 18A:39-1 et seq.[3]

PROCEDURAL HISTORY

On April 10, 2021[4], Petitioner contacted Respondent about bus transportation for his child, M.C., from her home to the Willow Grove Elementary School. On April 13, Respondent notified Petitioner that M.C. was ineligible for bus transportation, since it had been determined that their residence was at least 2 miles from the school. The day after an April 21 Board of Education meeting, Petitioner was advised that no action to overturn the initial decision. On August 17, Respondent wrote to the Department of Education's Office of School Finance, asking it "to consider the matter". On September 29, Petitioner forwarded an e-mail to the Department of Education's Office of Controversies and Disputes and on October 25, Petitioner filed a Petition for Appeal and Motion for Emergent Relief with the Department of Education and the Department transmitted this matter to the Office of Administrative Law (OAL) on November 1, 2021, for a hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On November 9, 2021, Respondent filed a Cross Motion to Dismiss in Lieu of Answer and hearing on the Motion for Emergent Relief was scheduled for November 10, 2021. An initial conference was held on November 10, 2021 at which time it was stipulated by Petitioner that this matter was not emergent in nature.

Additional conferences were thereafter held on November 24, 2021, December 8, 2021 and January 18, 2022 and oral argument on the motion was conducted on January 21, 2022. Following oral argument, the record was held open briefly for the supplying of additional documentation and it was ultimately closed on January 24, 2022.

[2] Redacted. There is no dispute as to Petitioner's address.
[3] All addresses are located in Hackettstown.
[4] Unless specified, all dates are 2021

Factual Background

The basic facts and nature of the case are not in dispute. Petitioner and M.C. (along with Petitioner's wife and another minor child) live at Address "A" in Hackettstown, which is located 2 miles, give or take, from Willow Grove Elementary School, where M.C. attends classes. It is that "give or take" which is at the core of the dispute.

The parties agree that per N.J.S.A. 18A:39-1 et seq. and N.J.A.C. 6A:27-1.3 et seq. Respondent is required to provide transportation to M.C. from her home to Willow Grove if she is determined to "reside remote from (her) school of attendance". N.J.A.C. 6A:27-1.3(a). For the purposes of eligibility for transportation;

> i. "Remote" shall mean beyond two and one-half miles for high school students (grades nine through 12) and beyond two miles for elementary school students (preschool through grade eight).
>
> N.J.A.C. 6A:27-1.3(a)(1)(i).

The parties further agree on how that distance should be measured;

> ii. Distance shall be measured using the shortest route along public roadways or public walkways between the entrance of the student's residence nearest the public roadway or public walkway and the nearest public entrance of the school the student attends.
>
> N.J.A.C. 6A:27-1.3(a)(1)(i).

Finally, the parties also agree that the measurement should be rounded to the nearest 1/10 of a mile per the Manual for Completion of 2021-2022 District Report of Transported Resident Students (DRTRS), published by the New Jersey Department of Education, Office of School Finance, Student Transportation Unit;

> 4. One-Way Home to School Miles
> Enter the shortest one-way distance between the student's home and the school.

> Mileage must be between 0.1 and 99.9 miles (round to the nearest tenth of a mile).
>
> NOTE: The home to school mileage reported for each student shall be measured by the shortest route along public roadways or walkways between the entrance of the student's home nearest such public roadway or walkway and the nearest public entrance of the school which the student attends (NJAC 6A:27-I.2).
>
> **(Exhibit R-DRTRS 27)**

The dispute arises over how that distance was measured. Petitioner argues that he has produced sufficient evidence, including a report from a licensed surveyor, demonstrating that the family home, using the "door-to-door" prescribed distance, is somewhere between 1.95 – 2.00 miles from the entrance to the school.

Respondent's position is that the vendor it utilized to determine transportation status for its students uses Google Distance Matrix API, Google Geocoding and Directions APIs to calculate mileage and that it has measured the same route at 1.93 miles, which giving the rounding directive noted above, would make M.C. ineligible for busing. **(Exhibit R-HBOE 13)**.

For all practical purposes the dispute ranges, depending on the measurement, from 105.6 feet to 369.6 feet.[5]

MOTION

The subject matter of the motion before the court, while obviously intertwined with the factual dispute between the parties, is, in reality, independent of it. Respondent argues simply that Petitioner failed to comply with the ninety-day time limit encoded in N.J.A.C. 6A:3-1.3(i) to appeal its denial of his request for busing.

If Respondent prevails on this motion, it is argued that the merits of the case are never reached and that the appeal must be dismissed.

[5] 105.6 feet is the difference between 1.93 and 1.95 miles, while 369.6 feet is the difference between 1.93 and 2.00 miles.

Petitioner opposes the motion for reasons that will be set forth below and argues that its appeal was timely served.

I emphasize that the decision on this motion should in no way be interpreted as a reflection that any conclusions have been reached concerning the underlying merit of Petitioner's claims.

LEGAL ARGUMENT

Petitioner

Petitioner argues, in essence, that the actions of Respondent were never "final" and that they were misled into sleeping on his rights. Even then, he argues that an appeal was timely filed.

More specifically, he argues that a May 19, 2021 letter from Respondent's attorney may potentially be considered a final order. It was also argued that besides that letter, Respondent acted with "question(able) motives", since they were not "told there was an actual ticking clock against us", pointing in particular to the August 17, 2021 letter from the BOE Business Administrator to the Director of School Finance when combined with and August 13, 2021 e-mail advising that the BOE would "take…action on your behalf."

It was further argued that the "90 day timeline" should be reset by the " 'action' of bringing a new measurement" and that there were "constant 'actions' taking place".

During oral argument, R.H. emphasized that he felt misled and confused by Respondent's continued engagement after the April 21, 2021 Board meeting and that he was never made aware of any deadline to appeal, only the avenue to do so.

Respondent

Respondent argues that Petitioner failed to comply with the with the ninety-day time limit encoded in N.J.A.C. 6A:3-1.3(i) to appeal its denial of his request for busing.

More specifically, it was argued that it is clear the final order was communicated to Petitioner on April 22, 2021 (as a result of the April 21, 2021 school board meeting) and that R.H. had ninety-days from then to file the appeal. It was also argued that Petitioner acknowledged that order/ruling/action on multiple occasions and failed to take any timely action.

Respondent also argued that despite continued interactions with Petitioner, including an August 17 letter to the Director of New Jersey Department of Education's Office of School Finance in which it requested that his office consider the dispute, the ninety-day deadline should be enforced and the appeal dismissed.

Key Participants

Given the multitude of communications in this case, at the onset it would be helpful to identify the key participants. Many of the e-mails were forwarded or copied to other parties, but the below is a roster of the persons who were by far the most involved in the process.

RH – Petitioner

BOE – Hackettstown Board of Education

HPS – Hackettstown Public Schools

Mango – David C. Mango, Superintendent, HPS

Havlusch – Timothy Havlusch, Business Administrator/Board Secretary, HPS

Peck – Mark R. Peck, Esq. of Steinhardt Cappelli Tipton & Taylor, L.L.C., attorney for the "Town of Hackettstown"

Lamonte – Rosalie S. Lamonte, Ph.D., Interim Executive Warren County Superintendent

Herbst – Mike Herbst, President, Hackettstown BOE

Stewart – Raechel Stewart, Esq., attorney for RH

Toscano – Mark G. Toscano, Esq. of Comegno Law Group, P.C., attorney for the Hackettstown BOE

OCD - Department of Education's Office of Controversies and Disputes

Commissioner – Commissioner of the Department of Education

Logic 54 – Respondent's busing vendor

Charles J. Kelly – Logic 54 representative

Timeline

Perhaps the best way to understand the issues raised by this motion is to create a detailed timeline from the onset of the dispute on April 10, 2021 through the time of the filing of appeal with OCD.

Please note that this timeline does not include each and every e-mail involving the parties, but only the ones relevant to the ninety-day appellate argument proffered by Respondent. Further, some of the times on the e-mails may not be 100% accurate, since some were forwarded and/or were parts of e-mail chains, which make it difficult to determine at exactly what time they were sent. The dates and order of receipt are, however, accurate.

Please note that only the portions of the e-mails reproduced/summarized below are those which concern the notice/appellate deadline issue.

April

04/10/21 – First e-mail sent by RH about transportation. **(Exhibit P-1)**

04/13/21 (4:04 p.m.) – e-mail from Mango to RH - "At this time, both Mr. Havlusch and my office have provided adequate responses by way of email to your inquiry. As stated, there exists, no eligibility for transportation at your home address and location." **(Exhibit R-HBOE 1-2)**

04/15/21 (11:35 a.m.) – e-mail from Havlusch to RH – "After another review of the facts…13 Arthur Terrace is ineligible for transportation…" It was recommended that RH appear at the next scheduled BOE meeting on April 21. **(Exhibit R-HBOE 6)**

04/21/21 – BOE meeting involving RH.

04/22/21 (11:02 a.m.) – e-mail from Havlusch to RH saying the "the Board took no action to overturn the determination that your home is not eligible to receive transportation services, the Board was willing to have its Transportation Specialist review this issue one more time in order to verify that its calculations were accurate and to take into account the information you shared with us last night." **(Exhibit R-HBOE 32)**

04/27/21 (3:56 p.m.) – e-mail from Havlusch to RH saying that "the 4/22/21 email constitutes the Board's final decision on this matter, which you can appeal to the Commissioner of Education

through the Department of Education's Office of Controversies and Disputes, which can be found here https://www.nj.gov/education/cd/.'" **(Exhibit R-HBOE 39)**

04/27/21 (5:54 p.m.) – e-mail from Mango to RH – "So, in your right to due process, I encourage you to contact the Commissioner of Education's Office of Controversies and Disputes." **(Exhibit R-HBOE 40)**

04/27/21 (6:14 p.m.) – e-mail from RH to Mango – "For me to properly address the Commissioner of Controversies and Disputes, which I will assuredly do…" **(Exhibit R-HBOE 42)**

04/27/21(8:44 p.m.) – e-mail from Mango to RH – "I am encouraging you to appeal to the Commissioner, as did Mr. Havlusch." **(Exhibit R-HBOE 45)**

04/28/21 (3:14 p.m.) – e-mail from Lamonte to RH – "your next step, should you choose to take it, is to file a petition with the NJ Department of Education's Office of Controversies & Disputes. There is information about this process at this link: https://www.nj.gov/education/cd/ **(Exhibit R-HBOE 67)**

04/28/21 (3:43 p.m.) – e-mail from RH to Lamonte – "I am no lawyer by any means but I did find this to be the route I must go first." **(Exhibit R-HBOE 77)**

04/28/21 (4:03 pm.) – e-mail from Lamonte to RH – "an appeal to Controversies & Disputes would be your next step." **(Exhibit R-HBOE 76a)**

04/28/21 (4:17 p.m.) – e-mail from RH to Havlusch – "I fully intend in going to the Commissioner and county…" **(Exhibit R-HBOE 137)**

04/28/21 (7:01 p.m.) – e-mail from Lamonte to RH – "The correct next step is through Controversies and Disputes." **(Exhibit R-HBOE 76b)**

04/30/21 (8:56 a.m.) – e-mail from RH to Havlusch – "I can not approach a Commissioner with information that doesn't specifically provide what is said to be true." **(Exhibit R-HBOE 140)**

04/30/21 (4:26 p.m.) – e-mail from RH to Havlusch – "How am I to go about speaking with the Commissioner and debate my situation where there is no proof against our mileage?" **(Exhibit R-HBOE 136)**

04/30/21 (8:07 p.m.) – e-mail from Herbst to RH. "The District has rendered a decision and that decision is supported by the Board. You have also been provided an avenue to lodge a protest if you wish." **(Exhibit R-HBOE 134)**

May

05/03/21 (4:28 p.m.) – e-mail from RH to Havlusch – "Still currently awaiting the information asked for to approach the Commissioner." **(Exhibit R-HBOE 143-144)**

05/04/21 (9:44 a.m.) – e-mail from Havlusch to RH – My recommendation at this time is to forward all of the prior e-mails, information and attachments that you have been sent to date on this matter to the Department of Education's Office of Controversies & Disputes, which can be found here https://www.nj.gov/education/cd/...I would suggest that the sooner this information nis provided to them, the sooner an opinion can be determined by the Office of Controversies and Disputes… **(Exhibit R-HBOE 143)**

05/04/21 (12:08 p.m.) – e-mail from Havlusch to RH – "All on this e-mail have implored you to continue your path of due process. In a prior e-mail, the Board President informed you that the district had exhausted all options based on evidence and that the Board rendered a final decision. So please, I ask that you move forward to the offices in Trenton if you believe strongly enough to do so. **(Exhibit R-HBOE 147-148)**

05/05/21 – LF[6] Peck to RH advising that the "town is not responsible for the transportation of your child". **(Exhibit R-OPP 1)**

05/14/21 – LF Stewart to Logic 54 seeking information and noting that; "We may need to appeal this to NJ Disputes and Controversies but we would like to resolve this issue at the local level if possible." **(Exhibit R-HBOE 154)**

05/18/21 (12:32 p.m.) – e-mail from Stewart to multiple parties (but not OCD) – requesting clarity about the situation. **(Exhibit R-HBOE 153)**

05/19/21 – LF Toscano to multiple, including Stewart – "your client's position and appeal has been heard and rejected by the Board. As advised by both the Board and the Warren County Office of Education, your client has the ability and can appeal that determination to the New Jersey Commissioner of Education, through the Department of Education's Office of Controversies and Disputes." **(Exhibit R-HBOE 156-157)**

June

None

July

07/19/21 – 90 days from April 22, 2021

07/31/21 (10:33 a.m.) – e-mail from RH to multiple covering a survey from Joseph Messina, P.L.S. and asking that it be reviewed as well as noting that they would be "more than willing to bring our certified documentation of our findings to the courts if need be." **(Exhibit R-HBOE 158)**

August

08/03/21 (11:38 a.m.) – e-mail from RH to multiple – follow-up **(Exhibit R-HBOE Reply 1)**

[6] Letter from

08/03/21 (12:24 p.m.) – e-mail from Mango to RH advising that the BOE had received his documentation and that it would be reviewed "at our August 11 committee meetings". **(Exhibit R-HBOE Reply 1-2)**

08/11/21 (10:08 a.m.) – e-mail from RH – committee meeting **(Exhibit R-HBOE Reply 1a)**

08/11/21 – Board of Education committee meetings

08/12/21 (12:03 p.m.) – e-mail from RH – committee meeting **(Exhibit R-HBOE Reply 1b)**

08/13/21 (10:35 a.m.) – e-mail from Havlusch to R.H. quoting the appeal language of the 5/19/21 letter from Toscano. The e-mail also noted that Respondent "will be submitting all of the information pertaining to this matter to the Office of Controversies and Disputes so as to render a decision." It was further noted that the Board would abide by this decision. **(Exhibit R-HBOE Reply 1c)**

08/13/21 (11:08 a.m.) – e-mail from R.H. to Havlusch responding to the 10:35 a.m. e-mail and stating; "We understand your point of reference to the attorneys letter and the time that has passed. However finding a professional representative who was willing to look into our situation and have the time to take an actual measurement has been a time consuming and costly process." He also asked what need to be done "on our part if the district is taking this to the Disputes and Controversies?" **(Exhibit R-HBOE Reply 4)**

08/17/21 – 90 days from May 19, 2021

08/17/21 – LF Havlusch to Director, Office of School Finance, New Jersey Department of Education explaining the dispute, that RH had yet to file an Appeal through Controversies and Disputes and requesting that his office "consider this matter and let us know if there is any additional action or other avenue that (RH) and/or the Board can take at this point." (cc. RH, various other parties) **(Exhibit P-2)**

September

09/29/21 – RH original "appeal" e-mail sent to OCD. **(Exhibit P-3).**

October

10/23/21 – Pro se petition of appeal (verified date) **(Exhibit P-4).**

10/25/21 – Pro se petition of appeal filed with supporting documentation. **(Exhibit P-5).**

10/27/21 – e-mail from RH to OCD requesting emergency status. **(Exhibit P-3).**

November

11/01/21 – Case transmitted to OAL.

11/11/21 – 90 days from August 13, 2021

11/15/21 – 90 days from August 17, 2021

Law and Analysis

The regulation concerning appeals is N.J.A.C. 6A:3-1.3(i), which reads as follows;

> Filing and service of petition of appeal - 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*, that 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.
>
> **(emphasis added)**

This rule (along with others in this chapter of the Administrative Code) can be "relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice". N.J.A.C. 6A:3-1.16.

In the case at bar, there are a multitude of factors that must be weighed before an informed decision can be made and that begins with a close look at the timeline and a determination of when the ninety-day appellate deadline was triggered. Respondent argues that this date is April 22, the day Petitioner was advised by Mr. Havlusch that the BOE "took no action to overturn the determination that your home is not eligible to receive transportation services". It is further argued that this was confirmed in Mr. Havlusch's April 27 e-mail, in which he noted;

> "the 4/22/21 email constitutes the Board's final decision on this matter, which you can appeal to the Commissioner of Education through the Department of Education's Office of Controversies and Disputes, which can be found here https://www.nj.gov/education/cd/."'
>
> **(Exhibit R-HBOE 39)**

This was followed by the e-mail from Mr. Mango later than day in which he encouraged R.H. to appeal to the Commissioner. **(Exhibit R-HBOE 40)**. These communications were acknowledged by Petitioner, who advised that he would "assuredly…address the Commissioner of Controversies and Disputes". **(Exhibit R-HBOE 42)**.

In reviewing the totality of the circumstances, at least at this point, R.H. had been made aware of the BOE's "final decision" that had been made on April 22 and had acknowledged same. He was separately advised of the "next step" (to file an appeal with OCD) on at least the following nine occasions;

1. 4/27/21 e-mail from Havlusch
2. 4/27/21 e-mail from Mango
3. 4/28/21 e-mail from Lamonte (1)
4. 4/28/21 e-mail from Lamonte (2)
5. 4/30/21 e-mail from Herbst
6. 5/4/21 e-mail from Havlusch (1)
7. 5/4/21 e-mail from Havlusch (2)
8. 5/14/21 letter from Stewart
9. 5/19/21 letter from Toscano

Further, RH acknowledged what the "next step" was on multiple occasions;

1. 4/27/21 e-mail to Mango
2. 4/28/21 e-mail to Lamonte
3. 4/28/21 e-mail to Havlusch
4. 4/30/21 e-mail to Havlusch
5. 4/30/21 e-mail to Havlusch
6. 5/3/21 e-mail to Havlusch

Petitioner argues that if there ever was a "final order" in this matter, it was the May 19 letter from Mr. Toscano, since in same he advised that "there will not be any further communication on this issue". **(Exhibit R-HBOE 156-157).** He also argues that he was, in essence, misled, by Respondent's continued interactions with him and that he was unaware of the 90 day "ticking clock".

Concerning the phrase 'final order, ruling, or other action", I **FIND** that the facts support a conclusion that same was made on April 21, 2021 when the BOE failed to overturn the initial decision to deny busing services to M.C. The clock started "ticking" the next day (April 22) when R.H. was advised of same in Mr. Havlusch's e-mail. That this was a "final decision" was confirmed via e-mail by both Mr. Havlusch and Mr. Mango on April 27. Both of those e-mails provided specific instructions on how and where to appeal the decision and were acknowledged by Petitioner.

The language of Mr. Havlusch's e-mails was direct and the message clear; that the BOE had made a final decision and that the next step for RH was to appeal same to the OCD.

While there was continuing dialogue between various parties, in none of those e-mails is R.H. advised that the April 21 decision was not a "final" one or had been rescinded. The May 19 letter from Mr. Toscano merely reiterated what R.H. had been told previously; that the appeal had already been rejected by the BOE and that R.H. can appeal same with the OCD. The contents of that letter do nothing to support Petitioner's contention that it "finalized" anything or that the April 21 BOE decision was an interim or unofficial one.

The more interesting aspect of Petitioner's argument concerns the events of July 31 through August 17. It was at this point that R.H. supplied the surveyor's report and received an e-mail from Mr. Mango on August 3 that same would be reviewed during the August 11 Board of Education committee meetings. Following the meetings, on August 13 Mr. Havlusch e-mailed R.H. After quoting the May 19 Toscano letter, he then offered to submit the dispute to the OCD on R.H.'s behalf. **(Exhibit R-HBOE Reply 1)**. R.H. acknowledged that e-mail and specified that;

> We understand your point of reference to the attorneys letter and the time that has passed. However finding a professional representative who was willing to look into our situation and have the time to take an actual measurement has been a time consuming and costly process.
>
> **(Exhibit R-HBOE Reply 4)**

He also asked, however, what steps that he needed to take now that the BOE was submitting the matter to OCD.

As it turns out, however, Mr. Havlusch actually submitted same to the Director of the Office of School Finance for the New Jersey Department of Education and there was no subsequent action taken on same. It should be noted, however, that R.H. was copied on that letter and would have been aware that it had been submitted to the Office of School Finance and not OCD (despite his denial during oral argument). **(Exhibit P-2)**.

Exceptions to the 90 day "rule"

With the finding above, we delve into an area that, unfortunately, went completely unbriefed by the parties, although it was raised during oral argument. As noted above, the ninety-day appellate deadline can be "relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice". N.J.A.C. 6A:3-1.16.

In exploring the case law surrounding the relaxation of the ninety-day rule, it becomes very apparent, very quickly, that the courts do not look indulgently on same. One of the most oft-cited cases involving this issue is Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572 (1993). Kaprow involved the termination of a tenured assistant superintendent effective June 30, 1981. After a rather complicated series of events involving RIF[7] rights and the "re-creation" of assistant superintendent positions year later, Kaprow filed a petition with the Commissioner on August 1, 1988 asserting a claim to one of the re-created positions. He amended that petition on December 16, 1988 to assert, for the first time, that the 1981 RIF was improper and had been made in bad faith. Id. at 576-78.

In the face of a partial victory for Kaprow in the underlying OAL case, the Commissioner dismissed the petition, finding, in part, "that the bad-faith claim was untimely instead of unsupported". That decision was affirmed by the State Board of Education, which found that the August 1, 1988 petition "was time barred by the ninety-day limitations period of N.J.A.C. 6:24-1.2(c)" and the Appellate Division affirmed the Board's decision. Id. at 578.

[7] Reduction in force.

After discussing the validity of the ninety-day limitation period rule, the "statutory entitlement" argument[8] and due process rights, the court discussed the purpose of the rule as well as what constituted "adequate notice". As for the purpose, the Court held that;

> 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. Ochs v. Federal Ins. Co., 90 N.J. 108, 112, 447 A.2d 163 (1982). The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115, 299 A.2d 394 (1973)).

As for "adequate notice";

> 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. See Burns v. West Am. Corp., 137 N.J. Super. 442, 446, 349 A.2d 142 (Dist.Ct.1975). Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period. See Apex Roofing Supply Co. v. Howell, 59 N.J. Super. 462, 467, 158 A.2d 49 (App.Div.1960). 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. Ochs v. Federal Ins. Co., 90 N.J. 108, 112, 447 A.2d 163 (1982). The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115, 299 A.2d 394 (1973)).
>
> > When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. [Farrell, supra, 62 N.J. at 115, 299 A.2d 394.]

[8] The "statutory entitlement" argument is not applicable here. In essence, it concerns a request for an exception to the deadline in cases where the petitioner is seeking a denied benefit that to which they were statutorily entitled. Kaprow, supra, 131 N.J. at 584-585. See also, Lavin v. Hackensack Bd. of Ed., 90 N.J. 145 (1982), Polaha v. Buena Reg'l Sch. Dist., 212 N.J. Super. 628 (App. Div. 1986).

Kaprow, 131 N.J. at 586-87.

Kaprow also addressed the issue Petitioner's continued attempts to resolve the claim after the April 22 e-mail, citing to Riely v. Hunterdon Central Bd. of Educ., 173 N.J. Super. 109 (App. Div. 1980). Riely concerned the non-renewal of the contract of a non-tenured teacher. She had received notice of the non-renewal on April 13, 1976 and there had been an informal hearing before the school board on May 10, 1976. The next day, she was sent a letter informing her that the non-renewal decision remained unchanged. Then, in May, 1976, she filed a contract grievance, which she lost in a decision dated May 1, 1977, which led to her filing a petition of appeal with the Commissioner on June 20, 1977. Id. at 110.

While the Commissioner denied a motion to dismiss the petition, the State Board reversed, citing the ninety-day rule. The Court held that even though the rule did not come into effect until October 6, 1976, the limitation still applied, citing to Union Cty. Bd. of Ed. v. Union Cty. Teachers Ass'n, 145 N.J. Super, 435, 437 (App. Div. 1976), certif. den. 74 N.J. 248 (1977) where the Commissioner had ruled that given the rule changes, relief should have been requested from the Commissioner and not via arbitration and that the petitioner had 90 days from the adoption of the rule in which to file her appeal. Riely, 173 N.J. Super. at 112. See also, Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 326-327, n.4 (1979).

More specifically, the Kaprow court found that his "attempt to resolve his claim through negotiations with the Local Board is irrelevant. It does not negate the fact that he received adequate notice on February 23, nor does it toll the running of the limitations period." Id. at 587, cit. Riely, supra. It determined that Kaprow had;

> (r)eceived adequate notice under N.J.A.C. 6:24- 1.2(c) on February 23, 1988, to trigger the ninety-day limitations period. On that day, he learned from the Local Board the existence of that state of facts that would enable him to file a timely claim. To insist under these circumstances that there be additional or more-specific notice will not further the objectives of the regulatory scheme, and would only defeat the considerations of repose and interfere with the efficient administration of the school laws. Because Kaprow received adequate notice on February 23, he was obligated to file his petition within the ninety-day period. Kaprow, however, did not file his petition until August 1, more than two months after the limitations period had expired. We therefore find that his claims are time-barred by N.J.A.C. 6:24-1.2(c).

Kaprow, 131 N.J. at 589.

Finally, Kaprow also addressed the other argument inferred by Petitioner; that by their actions, Respondent should be equitably estopped from asserting the statute of limitations. As noted by the court;

> Equitable estoppel has been used to prevent a defendant from asserting the statute of limitations when the defendant engages in conduct calculated to mislead plaintiff into believing that it is unnecessary to seek civil redress. See W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 553, 562 A.2d 222 (1989). Although public entities have a heightened duty to "turn square corners," F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 427, 495 A.2d 1313 (1985), equitable estoppel is rarely invoked against public entities. O'Malley v. Department of Energy, 109 N.J. 309, 316, 537 A.2d 647 (1987).
>
> Id. at 589.

The Court noted that there were no evidence that Mr. Kaprow had relied on the Local Board's misconduct and that it further made no misrepresentations that were "calculated to lull (him) into a false sense of security with respect to his right to take judicial action". Id at.589. This, despite the Appellate Division deeming some the Local's Board's actions/inactions to be "stonewalling". The only part of the opinion that inures to RH's benefit is that, unlike Kaprow, here, the Board did indicate that it would take some action on his behalf via the August 13 e-mail. **(Exhibit R-HBOE Reply 4)**. Ibid.

The Kaprow court cited Friedman v. Friendly Ice Cream, Co., 133 N.J. Super. 333 (App. Div. 1975), where an insurance carrier was alleged to have intentionally protracted settlement negotiations with the intention of exhausting the statute of limitations in a case where the defendant had essentially admitted liability. The court held that given the "meager record" and the specific allegations made by Friedman, the matter was inappropriate for a summary judgment motion. Id. at 337-38.

With no indication of detrimental reliance, the Kaprow court declined to toll the ninety-day time limit on equitable estoppel grounds. Id. at 590. See also, Beltran v. Doe, 145 N.J. Super. 152 (App. Div. 1976), Peloso v. Hartford Fire Ins. Co., 56 N.J. 514 (1970), Petermann v. Duarte, 2019 N.J. Super. Unpub. LEXIS 807 (2019).

Here, with the finding above that R.H. received notice of the agency's "final action" on April 22, it is obvious that the delay in filing was unrelated to the actions of Respondent, particularly since there did not appear to be any communication between the parties from the May 19 Toscano letter until RH served the surveyor's report on August 31. **(Exhibits R-HBOE 156-157 and R-HBOE 158)**. In fact, R.H.'s reply to that e-mail clearly inferred that even at this point, he was not relying on anything Respondent had done thus far;

> We understand your point of reference to the attorneys letter and the time that has passed. However finding a professional representative who was willing to look into our situation and have the time to take an actual measurement has been a time consuming and costly process.
>
> **(Exhibit R-HBOE Reply 4)**

The court in Riely looked askance at such a course, noting;

> Respondent had ample time to file the petition after promulgation of N.J.A.C. 6:24-1.2. it is evidence to us that she gambled on a favorable arbitration award and, having lost, then decided to seek furth relief at the hand of the Commission. By then, her petition was out of time.
>
> Id. at 112. See also, Raymond v. Bd. of Ed. of Bor. of River Edge, 94 N.J.A.R.2d (EDU) 203.

This issue is also addressed in LeMee v. Bd of Ed. of Ridgewood, 1990 S.L.D. 663 (1990), which cites to Pacio v. Bd. of Ed of Lakeland Reg'l High Sch. Dist., 1989 S.L.D. 2060 (1989) in holding;

> "Initially, the Commissioner notes that Pacio, supra, is clearly dispositive of the threshold question herein, in that it stands unequivocally for the proposition that in nonrenewal disputes the 90-day period for appealing to 10 the Commissioner is tolled from receipt of the nonrenewal notice, requests for reconsideration notwithstanding." See, also, Portee v. Newark Bd. of Ed., 94 N.J.A.R.2d (EDU) 381(1994).
>
> Wise v. Bd. of Ed. of Trenton, 2000 N.J. AGEN LEXIS 1147, cit. LeMee, 1990 S.L.D. at 672. (emphasis added).

That leads us into the final area of analysis; situations where the ninety-day deadline has been relaxed. There are a multitude of reported court and administrative cases that explore this issue, one of the most cited being Pacio. While Pacio discusses multiple issues, there, a terminated high school teacher filed an action well past the ninety-day appellate deadline. In granting the defendant's motion for summary decision, the Court noted the strict standard applied by the Commissioner in relaxing that deadline. It would only happen;

> Where a substantial constitutional issue was presented, where judicial review was sought of an informal administrative determination, and where a matter of significant public interest is involved. [citations omitted] Miller v. Morris School District 1980 S.L.D. ___ (February 25, 1980).
>
> Pacio, supra, 1989 S.L.D. at 2063. See also, Morris-Union Jointure Commission v. Bd. of Ed. of South River, 92 N.J.A.R 2d (EDU) 453 (1992) and Balwierczak v. Bd. of Educ. of Berkeley Heights, 1999 N.J. AGEN LEXIS 707 (Dec. 16, 1998).

The bar can also be relaxed "when strict adherence would possibly result in an injustice." Grompone v. State Operated Sch. Dist. Of Jersey City, 1999 N.J. AGEN LEXIS 786 (Dec. 20, 1999) at 17., app. denied, 1994 N.J. Super. Unpub. LEXIS 4, cit. Bogert v. East Orange Bd. of Educ., OAL DKT. NO. EDU 6245-82 (January 26, 1983), aff'd Commissioner of Education (March 14, 1983).

Morris-Union also confirmed that "it is petitioner's burden to show that it will suffer injustice if the 90-day rule is strictly enforced." Id. at 471. Further, "the fact that application of the rule may result in the dismissal of a meritorious claim does not warrant relaxation of the rule." K.B. v. Bd. of Ed. of Rancocas Valley Reg. High Sch. Dist., 2002 N.J. AGEN LEXIS 52 (March 1, 2002) at 43-44.

Cases where the rule is not relaxed are much more prevalent that those where it was;

1. Rule not relaxed when petition filed two days late while petitioner investigated appropriate grievance procedure. (Dreher v. Jersey City Bd. of Ed., 1987 S.L.D. 1706, aff'd St. Bd., 1988 S.L.D. 2439, rev'd o.g. App. Div. A-6120-82 (Feb. 28, 1988)

2. Rule not relaxed in teacher removal case where no claim of constitutional issue or issue of fundamental public policy made. Portee v. Bd. of Ed. of Newark, 1994 N.J.A.R.2d (EDU) 381 (1994). See also, Wise, supra.

3. Rule not relaxed in late filing case involving an alleged violation of N.J.S.A. 18A:37-2.1 accusing a school board of failing to commence expulsion proceedings against a student who assaulted a teacher. Markulin v. Bd. of Ed. of Neptune, 1992 N.J.A.R.2d (EDU) 406 (1992).

4. Rule not relaxed when the provisions of the Administrative Code were changed to now include a ninety-day appellate deadline where there was no such deadline previously. Riely, supra.

5. Rule not relaxed when school board committed misconduct and failed to respond to inquiries regarding the issue at hand. Kaprow, supra.

6. Rule not relaxed when teachers asserted a statutory claim to sick pay amounts in the absence of a clear "final decision" and employment terms were being negotiated, but when vouchers for less than expected amount were distributed. Nadasky v. Bd. of Ed. of Twp. of Clark, 2001 N.J. AGEN LEXIS 1385 (July 9, 2001). See also, Balwierczak, supra.

Cases where the ninety-day limitation was relaxed are relatively rare and involve circumstances much different than those presented here and even then, after the decision in some of these cases, that rule has been tightened. Bey v. Bd. of Educ. of the City of Newark, 93 N.J.A.R.2d (EDU) 288 (March 5, 1993) explores these matters in some detail, including a case where the rule was relaxed when the Commissioner concluded that petitioner had been discriminated against due to gender and pregnancy when sick leave was not granted. Shokey v. Bd. of Ed. of Cinnaminson, 1978 S.L.D. 919 (November 29, 1978). However, the court noted that the Shokey decision "might not be rendered today", since Riely, supra, and Pacio, supra were both decided subsequently to it. Bey at 45.

Perhaps ironically, despite reviewing all the reasons why the rule should *not* be relaxed, the Bey court actually relaxed the rule in a case involving the delinquent filing of an appeal involving the assignment of "a teaching staff member who had been accused of misusing, mismanaging, and possibly misappropriating school funds entrusted to him in his capacity as school treasurer". Id. at 43.

The court saw this case as unique since the prior cases discussed in the decision;

> ...ha(ve) dealt with an individual concern of the involved petitioner only, such as a refusal to re-employ. None of these precedents dealt with concerns that could affect a wider spectrum of the public.
>
> Id. at 44.

Other "relaxation" cases involved a student expulsion where a *pro se* parent's timely appeal was technically deficient [J.N. v. Elizabeth Bd. of Educ., 2005 N.J. AGEN LEXIS 814 (July 8, 2005)] and where illegal conduct was being alleged against the respondent, where that conduct was discovered after the expiration of the ninety-days [Eisenberg v. Fort Lee Bd. of Educ., 2008 N.J. AGEN LEXIS 45 (Jan. 9, 2008)].

Here, the evidence simply does not support a conclusion that this issue is anything but a personal one for Petitioner. There has been no argument that there is a figurative "class" of students that are impacted by this specific, limited issue. While the overall issue (the specific data utilized by the vendor in question to determine the distance in question) is not literally exclusive to Petitioner, it would only, at best, potentially impact a very limited number of persons who live on or near the two mile border, do not have access to courtesy or subscription busing and who challenge the measured distance from their home to the school. In other words, the result of this specific case would have a negligible impact, if any at all, on any persons other than Petitioner.

There is obviously no Constitutional issue at play here and there is no significant public interest involved. That leaves the "injustice" issue and, to a degree in conjunction with that, the "continuing violation" issue.

The issue of the continuing violation is the most appealing factually and facially for Petitioner. Not only does Respondent's decision impact M.C., but it also has the very real potential to impact M.C.'s sibling, who is currently kindergartener in Respondent's school system and where it is anticipated that he will attend the same school as his big sister in the 2023-24 school year.[9]

The concern is that by not addressing this issue in dispute regarding M.C., we will only revisit same in two years with her brother (who is not a party to this case).

[9] Willow Grove educates students in Grades 2-4.

However, in Kallimanis v. Carlstadt Bd. of Educ. OAL DKT. EDU 868-80 (August 8, 1980), aff'd Comm'r of Ed. (September 26, 1980) aff'd State Bd. (March 4, 1981), where the petitioner alleged a continuing violation of his rights (such as here, where the refusal to offer M.C. busing occurs each school day), the court held that the ninety-day rule should not be relaxed. In fact, the Court in North Plainfield Educ. Ass'n v. Bd of Educ. of the Borough of North Plainfield, 96 N.J. 587 (1984), addressed the issue as well in the context of an allegedly improper withholding of an incremental salary increase. It noted that the despite the plaintiff continuing to lag behind in salary, that lag was caused by a singular decision and did not constitute a new violation each year. Therefore, the ninety-day deadline from the date of the original denial should not be relaxed. Id. at 595. See also, Medford Investor Associates, L.L.C. v. Medford Bd. of Educ., 2013 N.J. AGEN LEXIS 271 (Oct. 8, 2013).

The only "continuing violation" cases where the ninety-day rule was relaxed appear to be in statutory rights claims, such as the improper reassignment of teacher in violation of her tenure rights [City Ass'n of Supervisors v. Newark Sch. Dist., 2014 N.J. AGEN LEXIS 515 (Aug. 27, 2014)] or the failure to properly credit service [Board of Ed. of Borough of Alpha v. Alpha Educ. Ass'n, 190 N.J. 34 (2006)].

In fact, the courts are practically unanimous in finding that "continuing violation" claims concern discrimination cases and little else. O'Donnell v. Hanover Tp. Bd. of Educ., 97 N.J.A.R.2d (EDU) 264 (1997), cit. North Plainfield Educ. Ass'n, supra.

Finally, there is simply no evidence that an "injustice" to the degree inferred by the courts would occur if this matter were procedurally dismissed. While in every "losing" case there may be some degree of "injustice", the fact that Petitioner's daughter remains ineligible for busing is not a sufficiently negative result as to warrant a relaxation of the ninety-day rule given its almost uniformly strict interpretation by the courts. See, generally, Eisenberg, supra.

Ultimately, I **FIND** that there is insufficient evidence to demonstrate that the ninety-day appellate deadline as delineated in N.J.A.C. 6A:3-1.16 should be relaxed.

CONCLUSION

Given the totality of the evidence, I **CONCLUDE** that Petitioner received notice that that Respondent had issued a "final order" to deny his request that it provide M.C. with busing on April 22, 2021.

I further **CONCLUDE** that Petitioner's appeal was filed out of time in violation of N.J.A.C. 6A:3-1.3 and I further **CONCLUDE** that Petitioner has supplied insufficient evidence to demonstrate that the rule should be relaxed per the dictates of N.J.A.C. 6A:3-1.16.

ORDER

Based on the foregoing, Respondent's motion to dismiss Petitioner's appeal be and is hereby **GRANTED** and;

It is hereby **ORDERED** that summary decision be **ENTERED** on behalf of respondent and that the Petitioner's appeal be and is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 17, 2022
DATE



Matthew G. Miller, ALJ

Date Received at Agency: February 17, 2022

Date Mailed to Parties: February 17, 2022

MGM/mm

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

P-1	April 10 e-mail from RH to Respondent
P-2	August 17 letter from Havlusch to Office of School Finance
P-3	September 29 e-mail from RH to OCD
P-3a	October 27 e-mail from RH to OCD requesting emergency status
P-4	October 23 petition of appeal
P-5	October 25 filed petition of appeal

For respondent:

R-DTRS-27	2021-22 District Report of Transported Resident Students (DRTRS)
R-HBOE 1-2	April 13 e-mail from Havlusch to RH
R-HBOE 6	April 15 e-mail from Havlusch to RH
R-HBOE 13	April 15 e-mail from Havlusch to RH
R-HBOE 32	April 22 e-mail from Havlusch to RH
R-HBOE 39	April 27 e-mail from Havlusch to RH
R-HBOE 40	April 27 e-mail from Mango to RH
R-HBOE 42	April 27 e-mail from RH to Mango
R-HBOE 45	April 27 e-mail from Mango to RH
R-HBOE 67	April 28 e-mail from Lamonte to RH
R-HBOE 76a	April 28 e-mail from Lamonte to RH

R-HBOE 76b	April 28 e-mail from Lamonte to RH
R-HBOE 77	April 28 e-mail from RH to Lamonte
R-HBOE 134	April 30 e-mail from Herbst to RH
R-HBOE 136	April 30 e-mail from RH to Havlusch
R-HBOE 137	April 28 e-mail from RH to Havlusch
R-HBOE 140	April 30 e-mail from RH to Havlusch
R-HBOE 143	May 4 e-mail from Havlusch to RH
R-HBOE 143-144	May 3 e-mail from RH to Havlusch
R-HBOE 147-148	May 4 e-mail from Havlusch to RH
R-HBOE 153	May 18 e-mail from Stewart to multiple
R-HBOE 154	May 14 letter from Stewart to Logic 54
R-HBOE 156-157	May 19 letter from Toscano to Stewart, multiple
R-HBOE 158	July 31 e-mail from RH to multiple
R-HBOE Reply 1	August 3 e-mail from RH to multiple
R-HBOE Reply 1-2	August 3 e-mail from Mango to RH
R-HBOE Reply 1a	August 11 e-mail from RH
R-HBOE Reply 1b	August 12 e-mail from RH
R-HBOE Reply 1c	August 13 e-mail from Havlusch to RH
R-HBOE Reply 4	August 13 e-mail from RH to Havlusch
R-OPP 1	May 5 letter from Peck to RH

103-22

Agency Dkt. No. 232-12/21

New Jersey Commissioner of Education

Decision

In the Matter of the Suspension of the School Counselor Certificate of Elizabeth Wood Norman, Trenton Stem-to-Civics Charter School, Mercer County.

For petitioner, Andrew W. Li, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on December 28, 2021, by way of an Order to Show Cause served by petitioner (Trenton Stem-to-Civics Charter School) upon respondent (Elizabeth Wood Norman), requiring respondent to show cause why an order should not be entered suspending her school counselor certificate pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for resigning without giving the notice required by her employment contract and without the notice required for tenured employees. By notice dated January 12, 2022, the Office of Controversies and Disputes (Office) acknowledged 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, on March 15, 2022, the Office sent respondent a second and final notice – via certified and regular mail – directing that she must 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. No answer to the Order to Show Cause has been filed as of this date.

The petition and supporting exhibits submitted by petitioner in this matter indicate that: respondent was a tenured employee; respondent entered into a contract to work as a full-time school counselor for the 2021-22 school year that required 60-days' notice prior to termination; on October 22, 2021, respondent sent correspondence indicating that she was resigning and her last day would be November 12, 2021, providing less than 60 days' notice. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's school counselor certification pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, summary decision is hereby granted to petitioner, and respondent's school counselor 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. [1]

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 19, 2022
Date of Mailing: May 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

104-22

Agency Dkt. No. 239-12/21

New Jersey Commissioner of Education

Decision

In the Matter of the Suspension of the Teaching Certificates of Mackenzie Cahill, Empowerment Academy Charter School, Hudson County.

For petitioner, Thomas O. Johnston, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on January 19, 2022, by way of an Order to Show Cause served by petitioner (Empowerment Academy Charter School) upon respondent (Mackenzie Cahill), requiring respondent to show cause why an order should not be entered suspending her teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by her teaching contract. By notice dated January 19, 2022, the Office of Controversies and Disputes (Office) acknowledged 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, on March 15, 2022, the Office sent respondent a second and final notice – via certified and regular mail – directing that she must 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 certified mail tracking indicates that the notice sent by certified mail was delivered on March 17, 2022. No answer to the Order to Show Cause has been filed as of this date.

The petition and supporting exhibits submitted by petitioner in this matter indicate that: the respondent entered into a contract to work as a teacher for the 2021-22 school year that required 60-days' notice prior to termination; on September 17, 2021, respondent sent an email to the principal indicating that she was resigning but would work for 60 days; on September 20, 2021, respondent submitted another written resignation; on October 14, 2021, respondent sent an email to the principal that her last day would be the following day, October 15, 2021. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be 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.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 19, 2022
Date of Mailing: May 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

105-22SEC

SEC Dkt No. C28-20
OAL Dkt. No. EEC 01138-21
Agency Dkt. No. 1-1/22A

New Jersey Commissioner of Education

Final Decision

In the Matter of Marilyn Roman and Sudhan Thomas, Jersey City Board of Education, Hudson County.

This matter involves an appeal of the School Ethics Commission's (Commission) January 25, 2022 decision determining that appellants Marilyn Roman and Sudhan Thomas, members of the Jersey City Board of Education (Board), violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act (Act) by approving a settlement agreement that resolved litigation filed against them individually. Having carefully reviewed the Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision finding that appellants violated the Act is supported by sufficient, credible evidence, and that appellants failed to establish that the decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-1.1(a). The Commissioner further finds that the Commission appropriately assessed the penalty of a reprimand.

This matter arises from litigation filed in early 2019 by a former Jersey City Superintendent of Schools. An action filed in U.S. District Court named the Board as a defendant, as well as both appellants individually. An administrative action filed with the Commissioner named the Board as a respondent, as well as appellant Thomas individually. In November 2019, the Board voted to approve a settlement agreement resolving both the federal court and administrative proceedings. Appellants participated in that vote. Thereafter, a member of the public filed a complaint with the Commission, alleging that appellants had violated the Act by voting to settle litigation that had been

filed against them personally. The Commission found probable cause to credit the allegations that appellants violated *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24.1(e) and transmitted the matter to the Office of Administrative Law (OAL). Following a hearing at the OAL, the Administrative Law Judge (ALJ) concluded that appellants violated *N.J.S.A.* 18A:12-24(c) but did not violate *N.J.S.A.* 18A:12-24.1(e). The ALJ recommended the penalty of a reprimand. In its January 25, 2022 decision, the Commission adopted the ALJ's findings of fact, legal conclusions, and recommended penalty.

On appeal, appellants argue that they were parties to the litigation in name only and that the allegations made against them pertained solely to their official capacities as members of the Board. Appellants also note that they were entitled to indemnification from the Board for the costs of the defense and any liability, regardless of whether they won or lost the litigation. Therefore, according to appellants, they had no personal stake in the outcome of the litigation and did not receive any benefit from the settlement different than the benefit to the Board as a whole. Appellants also contend that they relied in good faith on the advice of an experienced school board attorney regarding a technical legal question, where the Commission had not issued any precedent squarely on point, and that no reasonable member of the public would conclude that appellants acted unethically to approve the settlement under the totality of the circumstances. Finally, appellants argue that even if the Commissioner finds they violated the Act, no discipline should be imposed.

In reply, the Commission argues that its decision that appellants violated *N.J.S.A.* 18A:12-24(c) was reasonable and supported by the record. The Commission indicates that the allegations in the litigation were specifically directed towards appellants in their personal capacities and contends that regardless of whether they faced direct financial liability, their interest in resolving

the claims was not an interest fully shared with the public. The Commission argues that reliance on legal advice is not a defense to a finding that a violation occurred, although it can be a defense to a penalty, as occurred here when the ALJ recommended a penalty of reprimand rather than censure based on appellants' reliance on the advice of the Board's counsel.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission that appellants violated *N.J.S.A.* 18A:12-24(c) is supported by sufficient credible evidence, and appellants have not established that the Commission's decision was arbitrary, capricious, or contrary to law. A review of the complaint and petition demonstrates that the former superintendent alleged that appellants – personally, and separately from their actions as Board members – acted improperly, including by engaging in a pattern of misconduct and harassment. Therefore, appellants' interest in resolving the claims is not one fully shared with the public. *See Friends Retirement Concepts v. Bd. of Educ. of the Borough of Somerville*, 356 *N.J.* 203, 215 (N.J. Super. Ct. Law Div. July 25, 2002), quoting *Wyzykowski v. Rizas*, 132 *N.J.* 509, 524 (1993). The fact that appellants were financially indemnified for the costs of the litigation and the settlement is not determinative, as financial costs are not the only benefit to settling litigation. Given the personal allegations against appellants, a member of the public could justifiably believe that their objectivity was impaired when voting to approve the settlement. *See School Ethics Comm'n v. Michael Kilmurray, Lacey Twp. Bd. of Educ., Ocean Cty.*, School Ethics Commission Dkt. No. C12-94 (February 24, 1998), *aff'd, In the Matter of Michael Kilmurray, Lacey Twp. Bd. of Educ., Ocean Cty.*, Commissioner Decision No. 155-98 (April 15, 1998).

The Commissioner further concurs with the ALJ and the Commission that a reprimand is the appropriate penalty. Appellants' conduct is similar to the conduct of board of education members found to have violated *N.J.S.A.* 18A:12-24(c) in *In the Matter of Obdulia Gonzalez, Israel Varela,*

Milady Tejeda, Samuel Lebreault, and *Kenneth Puccio, Perth Amboy Bd. of Educ., Middlesex Cty.*, School Ethics Commission Dkt. No. C08-15 (November 27, 2018). In both *Gonzalez* and the instant case, board members voted to approve settlements of litigation that involved them personally. While appellants argue that their factual circumstances are different, because the litigation against them involved the board as a whole rather than the individual ethics charges settled in G*onzalez*, the Commissioner does not find that distinction persuasive in terms of finding a violation of *N.J.S.A.* 18A:12-24(c). However, the distinction does become relevant when assessing a penalty, as the board members in *Gonzalez* were suspended for 60 days, while the Commission recommended that appellants be reprimanded, a lesser penalty. That lesser penalty is also consistent with appellants' reliance on the advice of the Board's counsel, which, although not an absolute defense to the finding that they violated the Act, does serve to mitigate the penalty. *See In the Matter of Carmelo Garcia, Hoboken Bd. of Educ., Hudson Cty.*, School Ethics Commission Dkt. No. C41-05 (October 24, 2006).

Accordingly, appellants are hereby reprimanded as school officials found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 19, 2022
Date of Mailing: May 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-01138-21
SEC Docket No.: C28-20
Final Decision

Matthew Schapiro,
Complainant

v.

Marilyn Roman and Sudhan Thomas,
Jersey City Board of Education, Hudson County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on June 15, 2020, by Matthew Schapiro (Complainant), alleging that Marilyn Roman and Sudhan Thomas (Respondents), members of the Jersey City Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq*. More specifically, the Complaint alleges that Respondents violated *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members (Code).

At its meeting on September 29, 2020, and after reviewing Respondents' Motion to Dismiss in Lieu of Answer (Motion to Dismiss), along with Complainant's response thereto, the School Ethics Commission (Commission) voted to deny Respondents' Motion to Dismiss in its entirety and directed Respondents to file an Answer to Complaint (Answer). On October 17, 2020, Respondents filed an Answer as directed.

At its meeting on December 22, 2020, the Commission found probable cause to credit the allegations that Respondents violated *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24.1(e). Based on its findings of probable cause, the Commission transmitted the matter to the Office of Administrative Law (OAL) for a plenary hearing on January 24, 2021, and, pursuant to *N.J.A.C.* 6A:28-10.7(b), the attorney for the Commission (Petitioner) was charged with prosecuting the allegations in the Complaint which the Commission found probable cause to credit.

At the OAL, the matter was assigned to the Honorable Nanci G. Stokes, Administrative Law Judge (ALJ Stokes). On February 18, 2021, ALJ Stokes conducted telephone conferences in which the parties "agreed that the material facts were largely undisputed, and a motion for summary decision could be appropriate." *Initial Decision* at 2. On August 3, 2021, Respondents Roman and Thomas filed their motion for summary decision, and on August 10, 2021, the Commission filed its opposition and a cross-motion for summary decision. *Id.* at 3. On August 26, 2021, Respondents Roman and Thomas filed a response to the cross-motion. *Id.* On September 6, 2021, Respondents Roman and Thomas filed their reply, and on September 16,

2021, the Commission submitted its reply. *Id.* On October 18, 2021, at the ALJ's request, Respondents filed a revised stipulation of facts and then ALJ Stokes closed the record. *Id.*

On October 22, 2021, ALJ Stokes issued an *Initial Decision* detailing her findings of fact and legal conclusions. The Commission acknowledged receipt of ALJ Stokes' *Initial Decision* on the date it was issued (October 22, 2021); therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was December 6, 2021. Prior to December 6, 2021, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions (if any). Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until January 20, 2022. Prior to January 20, 2022, the Commission requested and, for good cause shown, was granted a second extension to January 30, 2022, to allow the Commission to adopt its decision at its regularly scheduled meeting on January 25, 2022.

On October 26, 2021, Respondents filed Exceptions to ALJ Stokes' *Initial Decision*. On November 18, 2021, Petitioner filed Exceptions, and filed a response to Respondents' Exceptions.

At its meeting on December 14, 2021, the Commission considered the full record in this matter, including the filed Exceptions and the filed reply. Thereafter, and at its meeting on January 25, 2022, the Commission voted to adopt the findings of fact from ALJ Stokes' *Initial Decision*; to adopt the legal conclusion that, based on the admissible evidence, there is sufficient credible evidence to establish a violation of *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24.1(e) of the Code; and to adopt the recommended penalty of reprimand.

II. Initial Decision

In the *Initial Decision*, ALJ Stokes offered the following ***findings of fact*** as stipulated by the parties:

- As of January 2019, Respondents were members of the Board.
- On January 30, 2020, Jersey City Superintendent of Schools Marcia Lyles (Superintendent Lyles) commenced an action in the U.S. District Court for NJ, accusing the Board and its members of colluding with the Jersey City Education Association (JCEA) to place her unlawfully on administrative leave. Also joined as defendants were the JCEA, and Respondents 'both individually and as a member of' the Board.
- Superintendent Lyles also commenced separate administrative action before the Commissioner of Education on April 18, 2019. This petition alleged that the Board and Respondent Thomas colluded with the JCEA to have Superintendent Lyles placed on leave. Respondent Roman was not joined as a party to that proceeding.
- Respondents were afforded indemnification and legal counsel at the Board's expense. Respondent Thomas was also afforded indemnification and legal counsel at the Board's expense in the administrative case. In all proceedings the Board, and Respondents were represented by Genova Burns LLC.

- On August 20, 2019, all claims against Respondent Thomas in the administrative proceeding before the Commissioner of Education were dismissed for lack of jurisdiction by order of Thomas Betancourt, Administrative Law Judge (ALJ Betancourt).
- On November 7, 2019, the Board voted to approve a written agreement settling both the federal court and administrative proceedings. Respondents were both present and voted in favor of approving the settlement.
- Respondents consulted with Board Counsel, Michael Gross, Esq. before voting on the settlement, and he "explicitly advised" Respondents that there was no ethical impediment to their voting on the matter or signing the settlement agreement.

Initial Decision at 3-4.

After outlining the stipulation of facts, ALJ Stokes presents her conclusions of law. Regarding the motions for Summary Decision, ALJ Stokes asserts that a genuine issue as to the material facts does not exist and the only issues presented are whether Respondents' votes for approval and execution of the settlement agreement violated *N.J.S.A.* 18A:12-24(c) and/or *N.J.S.A.* 18A:12-24.1(e) and if so, any appropriate sanction. ALJ Stokes further asserts a genuine issue does not exist that Respondents served as Board members, they both voted to approve a settlement of federal litigation against the Board and themselves on November 7, 2019, that they signed the settlement agreement, and that the settlement agreement resolved an administrative claim against the Board and Respondent Thomas. However, an order dismissed the claims against Respondent Thomas, concluding that Superintendent Lyles did not present her case to the agency with jurisdiction. Board counsel advised Respondents that there was no ethical impediment that would preclude their involvement in the settlement. Therefore, ALJ Stokes ***concluded*** that this case was ripe for summary decision.

As to the School Ethics Act, ALJ Stokes asserts the Commission found probable cause to credit the allegations that Respondents violated *N.J.S.A.* 18A:12-24(c), which "prohibits a school official's actions where such involvement might reasonably be expected to impair their judgement or if benefit is conferred upon the school official or their family members." ALJ Stokes notes Respondents argued that Superintendent Lyles "named them individually in name only and that the only relief sought was against the Board." ALJ Stokes cites, *In re Petition for Review of Opinion 552 of Advisory Committee on Professional Ethics*, 102 *N.J.* 194 (1986) (Opinion) and notes that "opinion explains the difference between an action based on 'official-capacity' or action involving 'personal-capacity' and the real party in interest." *Initial Decision* at 9. With that in mind, ALJ Stokes maintains the lawsuit against the Board and Respondents individually and the administrative action against the Board and Respondent Thomas are "official capacity" actions. *Id.*

ALJ Stokes further explains, "the Court's decision does not address whether the official's action regarding the litigation or its resolution can create an ethical conflict for the official." *Id.* at 10. ALJ Stokes notes that Superintendent Lyles' complaint "alleged specific actions improperly taken by [Respondents] for which the Board was vicariously responsible" and the administrative case "asserted [Respondent] Thomas colluded with the JCEA to place [Superintendent] Lyles on administrative leave." *Id.* Citing *In Re Kilmurray*, ALJ Stokes

maintains, "Regardless, whether the claims against [Respondents] are in their official capacity, which the government entity will be held ultimately responsible financially, the review of a government official's actions regarding such legal matters is from the perspective of a reasonable person." *Id.* (citing *In re Kilmurray, Lacey Township Board of Education, Ocean County*, C12-94 Comm'n Decision (April 15, 1998), https://www.state.nj.us/education/legal/ethics/index.html).

According to ALJ Stokes, the Commission "argues that the facts here are nearly identical to those in [*In re Gonzalez*] and warrant the same conclusion," which is that Respondents "voted to approve the settlement agreement and signed it" and, therefore, violated the Act. *Id.* (citing *In re Gonazalez*, EEC19282-1, Initial Decision, (Sept. 11, 2018), http://njlaw.rutgers.edu/collections/oal/search.html, *aff'd*, C08-15, Comm'n Decision (Nov. 27, 2018), https://www.state.nj.us/education/legal/ethics/index.html). *Id.* at 11. However, Respondents argue, "their circumstances are distinct from those" noted in Gonzalez because the petitioners in Gonzalez gained a personal benefit when they dismissed the ethics charges against them where the Board was not the real party in interest." *Id.* ALJ Stokes maintains "a review of [Superintendent] Lyles' complaint and administrative petitions demonstrates she alleged improper official actions taken by [Respondent] Thomas in both cases and [Respondent] Roman in the lawsuit" and, therefore, their "interest in resolving these claims is one not fully shared with the public." *Id.* at 11-12.

ALJ Stokes also finds it noteworthy that Respondents "acted upon the advice of counsel and rely upon counsel's determination that no ethical impediment precluded their voting upon or executing the settlement agreement." *Id.* at 12. ALJ Stokes asserts, "reliance on advice of counsel only serves as a defense to a penalty." *Id.* (citations omitted). ALJ Stokes further maintains that Board counsel advised Respondents "before the vote, and counsel was well aware of the allegations against [Respondents] in both actions"; Respondents "voiced their concerns that they were named individually in" the matters; Board counsel was experienced and was responsible for "ethically guiding" Board members; Board counsel's recommendation was to "vote upon and execute the settlement agreement" without restrictions; Board counsel certified that the Board "indemnified" Respondents in the Superintendent Lyles' cases "as the matter sought redress from the Board"; and Board counsel believed that Respondents did not secure a personal benefit in resolving those matters and that an ethical problem did not exist. *Id.* at 13. Therefore, ALJ Stokes ***concludes*** Respondents evidenced sensitivity to the issue of potential conflict in seeking counsel's advice and that it was reasonable to rely upon such advice.

ALJ Stokes further notes that because of Superintendent Lyles' alleged unethical conduct of Respondents in the lawsuit and the administrative action that was resolved by the agreement, ALJ Stokes concludes that a public member could justifiably believe that their objectivity was impaired when voting upon and executing the settlement. ALJ Stokes asserts the terms of the settlement agreement "was a bargained-for-exchange where the interests of all parties, including those of" Respondents, was served. *Id.* at 14. Therefore, ALJ Stokes further ***concludes*** that Respondents acted in their official capacity in a matter where they had personal involvement and received a benefit in violation of *N.J.S.A.* 18A:12-24(c).

Regarding the Code violation, *N.J.S.A.* 18A:12-24.1(e), ALJ Stokes maintains the Commission's "probable cause determination asserts that because [Respondents] had personal involvement in the litigation that this suggests 'action' beyond the scope of their duties as board members." *Id.* at 15. However, the Commission "routinely agrees that those 'board members, who are acting in their capacity as board members, and not as private citizens, do not violate *N.J.S.A.* 18A:12-24.1(e).'" *Id.* ALJ Stokes cites several previous cases and asserts "there is no evidence that [Respondent] Thomas or [Respondent] Roman acted outside their official capacities in voting upon or executing the settlement agreement or that the Board did not authorize [Respondent] Thomas or [Respondent] Roman to act concerning the agreement." *Id.* at 16. According to ALJ Stokes, the vote occurred at a public meeting and "no conduct asserted suggests [Respondent] Thomas or [Respondent] Roman made promises to anyone concerning these acts." *Id.* Therefore, ALJ Stokes ***concludes*** that neither Respondent violated *N.J.S.A.* 18A:12-24.1(e) in their official actions as Board members voting to approve and executing a settlement resolving the litigation.

As to the penalty, ALJ Stokes maintains that Respondents "seek to rely upon the defense that they acted under the advice of counsel to avoid any penalty, even if [the ALJ] conclude[s] violations occurred." *Id.* at 17. ALJ Stokes notes Respondent Thomas is no longer a Board member and, therefore, the maximum penalty that he could receive would be a censure. ALJ Stokes reiterates Respondents' "reasonable reliance on the advice of counsel mitigates the penalty here." *Id.* at 17-19 (citations omitted). Therefore, ALJ Stokes ***concludes*** the appropriate ***penalty*** for Respondents is ***reprimand***.

In summary, ALJ Stokes orders, based on the stipulation of facts and conclusions of law, that Complainant's motion for summary decision is partially granted as to Respondents violation of *N.J.S.A.* 18A:12-24(c), and that Respondents' motion for summary decision is partially granted as to Respondents' lack of a violation of *N.J.S.A.* 18A:12-24.1(e). ALJ Stokes further orders that Respondents receive a reprimand for their respective violations of *N.J.S.A.* 18A:12-24(c).

III. Exceptions

Respondents' Exceptions

In their Exceptions, which were filed on October 26, 2021, Respondents argue they were "never at risk of any financial exposure due to the [D]istrict's legal obligation to indemnify them," and unlike the Respondents in *Gonzalez*, Respondents Thomas and Roman did not secure a personal benefit unique to them. Respondents disagree with ALJ Stokes' finding that because Respondents "received a release of any claims and a promise of confidentiality, a reasonable person would conclude there was enough of a personal benefit to implicate *N.J.S.A.* 18A:12-24(c)." Respondents argue the "release was as to claims that [R]espondents were fully indemnified for, and the promise of confidentiality was no more valuable to Respondents than any of the other Board members who voted to approve the settlement and had an interest as Board members in bringing this litigation to an end." Respondents further argue "a reasonable person" knowing that Respondents did not have a personal stake "in the outcome of the

proceedings would not assume they were unethically feathering their own nest by voting to approve this settlement."

Next, Respondents "agree that school board members should not be able to hide behind legal advice that they know, or reasonably should know, is questionable." However, Respondents assert that did not happen here. Respondents reassert they "relied in good faith on the advice of an experienced school board attorney regarding a technical legal question, where the Commission had not issued any precedent squarely on point." Respondents note that if the Commission still finds, notwithstanding Respondents' good faith reliance on legal advice, that Respondents should not have voted on the settlement, a penalty should still not be imposed. Respondents maintain that the Commission should "take the opportunity to educate the school community on what it views as the proper interpretation of the rule at issue, provide clear guidance prospectively, and refrain from imposing discipline."

Petitioner's Exceptions and Reply to Respondents' Exceptions

In Respondents' Exceptions, which were filed on November 18, 2021, Petitioner (Commission) initially notes that they agree with ALJ Stokes' decision that Respondents violated *N.J.S.A.* 18A:12-24(c), but "takes exception to the conclusion that Respondents did not violate *N.J.S.A.* 18A:12-24.1(e) and, therefore, recommends that the Initial Decision be modified. More specifically, Petitioner asserts ALJ Stokes "correctly determined" Respondents' approval and execution of the settlement agreement violated *N.J.S.A.* 18A:12-24(c), because Superintendent Lyles agreed not to sue Respondents "in exchange for her resignation and monetary consideration." Furthermore, Superintendent Lyles agreed to "dismiss the administrative action and federal lawsuit and to never disclose any of the circumstances leading to the agreement." Petitioner contends ALJ Stokes concluded, based on the settlement agreement that a "public member could justifiably believe that [R]espondents' objectivity was impaired when voting to approve that settlement agreement – which served the interests of all parties involved – and therefore, [R]espondents violated *N.J.S.A.* 18A:12-24(c)." However, according to Petitioner, ALJ Stokes "incorrectly determined" that Complainant did not demonstrate that Respondents "made promises to anyone concerning these acts." Petitioner notes that ALJ Stokes "failed to consider that [R]espondents' actions to execute the settlement agreement had the potential to compromise the Board" and, therefore, Petitioner argues that the ALJ's determination that Respondents did not violate *N.J.S.A.* 18A:12-24.1(e), is "incorrect[]."

Petitioner argues that ALJ Stokes' conclusion that Respondents did not violate *N.J.S.A.* 18A:12-24.1(e), "must be rejected, and her decision modified to reflect a violation of the Code" because Respondents did not deny "the undisputed facts of this matter" and they "entered into a settlement agreement that released claims made against them as individuals." Petitioner further argues when Respondents voted to approve the settlement agreement at a public Board meeting, "and did so without Board approval," Respondents "acted beyond the scope of their duties that compromised the [B]oard." Petitioner cites I/M/O Lorenzo Richardson, Jersey City Bd. of Educ., Hudson Cty., 2021 N.J. AGEN LEXIS 30 (Jan. 26, 2021), and notes that similarly, Respondents "acted beyond the scope of their duties, and compromised the Board, by resolving a legal action, by entering into a settlement agreement, by signing the agreement with their individual names, and by voting to approve that settlement agreement at a Board meeting – all of which was done

despite a clear conflict of interest." Therefore, Petitioner asserts Respondents violated the Code and the *Initial Decision* should be modified to reflect this violation.

As to a violation of *N.J.S.A.* 18A:12-24(c) and Respondents' exceptions, Petitioner asserts ALJ Stokes' "reasoning ... is in line with the law, and the ALJ's conclusion is not erroneous." Petitioner reaffirms the settlement was "a bargained-for-exchange agreement that served the interest of [R]espondents." Petitioner argues, "Regardless of whether [R]espondents faced direct financial liability from the administrative or federal actions, [R]espondents engaged in conduct that served their interests not shared in common with other members of the public" and, therefore, ALJ Stokes did not "err in her conclusion" that Respondents "acted in a manner where they had personal involvement and received a benefit in violation of the Act." Furthermore, according to Petitioner, Respondents' argument that their "good faith reliance on legal advice was a valid defense and justifies no disciplinary action against them" is also incorrect. Petitioner notes ALJ Stokes' conclusion that Respondents' reliance on legal advice "does not insulate an official from a finding that a violation occurred, but it acts as a defense to a penalty for that violation" is correct and as for the penalty, Petitioner further notes ALJ Stokes "correctly assessed the penalty of reprimand ... ." Therefore, Petitioner reasserts the *Initial Decision* should be "adopted in part as to a violation of *N.J.S.A.* 18A:12-24(c), and rejected in part and modified to reflect a violation of *N.J.S.A.* 18A:12-24.1(e)."

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission **adopts** ALJ Stokes' findings of fact, and **adopts** the legal conclusion that Respondents violated *N.J.S.A.* 18A:12-24(c), but did not violate *N.J.S.A.* 18A:12-24.1(e). In finding a violation of *N.J.S.A.* 18A:12-24(c) when Respondents voted to approve a written agreement settling proceedings in which Respondents were parties, ALJ Stokes properly concluded that Respondents acted in their official capacity in a matter where they had a personal involvement and received a benefit. The Commission holds that ALJ Stokes correctly determined that Respondents' approval and execution of the settlement agreement violated *N.J.S.A.* 18A:12-24(c). The Commission further concurs that Respondents did not violate *N.J.S.A.* 18A:12-24.1(e). Respondents neither acted outside their official capacities nor made promises to anyone in connection with voting upon or executing the settlement agreement at issue.

V. Decision

The Commission adopts ALJ Stokes' Initial Decision finding that Respondents violated *N.J.S.A.* 18A:12-24(c), but did not violate *N.J.S.A.* 12-24.1(e).

VI. Penalty

In recommending the penalty, ALJ Stokes notes that Respondent Thomas is no longer a Board member and, therefore, the maximum penalty that he could receive would be a censure. ALJ Stokes further highlights Respondents' reasonable reliance on the advice of counsel. Based on the above, the Commission **adopts** the recommended penalty of **reprimand.**

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (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 brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: January 25, 2022

Resolution Adopting Decision in Connection with C28-20

Whereas, by correspondence dated January 24, 2021, the School Ethics Commission (Commission) transmitted the above-referenced matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, at the OAL, both Respondents and Petitioner filed Motions for Summary Decision; and

Whereas, the Honorable Nanci G. Stokes, Administrative Law Judge (ALJ Stokes) issued an Initial Decision dated October 22, 2021; and

Whereas, in her Initial Decision, ALJ Stokes partially granted Petitioner's motion for summary decision as to Respondents' violation of *N.J.S.A.* 18A:12-24(c) and partially granted Respondents motion for summary decision as to Respondents lack of a violation of *N.J.S.A.* 18A:12-24.1(e).

Whereas, on October 26, 2021, Respondents filed Exceptions to the Initial Decision; and

Whereas, on November 18, 2021, Petitioner filed exceptions and a reply to Respondents' Exceptions; and

Whereas, at its meeting on December 14, 2021, the Commission reviewed and discussed the record, including ALJ Stokes' Initial Decision and the filed Exceptions; and

Whereas, at its meeting on December 14, 2021, the Commission discussed adopting the findings of fact from the Initial Decision, adopting the legal conclusion that Respondents violated *N.J.S.A.* 18A:12-24(c), but did not violate *N.J.S.A.* 18A:12-24.1(e); and adopting the recommended penalty of reprimand; and

Whereas, at its meeting on January 25, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on December 14, 2021; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its meeting on January 25, 2022.

Salma T. Chand

Salma T. Chand, Executive Director
School Ethics Commission

106-22

OAL Dkt. No. EDU 08411-21
Agency Dkt. No. 172-9/21

New Jersey Commissioner of Education

Final Decision

Christine Werner,

Petitioner,

v.

Board of Education of the Borough of Hampton, Hunterdon 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. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that Paragraph 1 of the Agreement references actions that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 19, 2022
Date of Mailing: May 19, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08411-21
AGENCY DKT. NO. 172-9/21

CHRISTINE WERNER,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOUROUGH OF HAMPTON, HUNTERDON COUNTY,

Respondent.

Michael G. Kane, Esq., for petitioner (Cashdan & Kane, PLLC, attorneys)

Alyssa K. Weinstein, Esq., for respondent (The Busch Law Group, LLC, attorneys)

Record Closed: March 22, 2022 Decided: April 4, 2022

BEFORE **ELIA A. PELIOS,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 8, 2021, 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 March 22, 2022, the parties filed a fully executed Settlement Agreement and the Board Resolution approving the settlement. The Agreement and Resolution are attached and fully incorporated herein.

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 4, 2022
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: 4/4/2022

Date Mailed to Parties: 4/5/2022

/dw

CHRISTINE WERNER, Petitioner, v. HAMPTON BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW **Docket Nos. EDU 08394-20 and EDU 08411-21** Agency Ref. Nos. 173-8/20 and 172-9/21 **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (the "Agreement") is entered into by and between Christine Werner ("Petitioner"), and the Hampton Board of Education ("Board") with administrative offices located at 32-41 South Street, Hampton, New Jersey 08827. Petitioner and the Board are collectively referred to as the "Parties."

WHEREAS, disputes have arisen regarding, *inter alia*, Petitioner's employment with the Board, Petitioner's separation from the Board, and the Board's subsequent employment of, or contract with, persons or entities to perform certain duties previously performed by Petitioner; and

WHEREAS, Petitioner sent the Board two Notices of Tort Claim on or about December 20, 2019; and

WHEREAS, Petitioner filed the above-captioned Petitions on or about August 18, 2020 and September 10, 2021; and

WHEREAS, Petitioner initiated a Superior Court action on or about May 10, 2021, which action was dismissed without prejudice on or about December 9, 2021; and

WHEREAS, the Parties have negotiated in good faith and have a desire to settle their disputes in an amicable way without any admission of wrongdoing by any Party;

NOW, THEREFORE, the Parties hereby agree as follows:

1. Within thirty (30) days of approval of this Agreement by the Administrative Law Judge, the Board and/or its insurance carrier will issue payment to Petitioner (via her attorney) in the total amount of one hundred seventy five thousand dollars ($175,000.00), as sole consideration for the release set forth in paragraph 3 of this Agreement. Said payment shall be comprised of the following three (3) separate checks:

a. A check from the Board made payable to Christine Werner in the amount of sixty thousand dollars ($60,000.00), to be reported on a 1099 MISC form as "other income;"

b. A check from the Board's insurance carrier made payable to Christine Werner in the amount of fifty six thousand six hundred sixty seven dollars ($56,667.00), to be reported on a 1099 MISC form as "other income;" and

c. A check from the Board's insurance carrier made payable to Cashdan & Kane, PLLC in the amount of fifty eight thousand three hundred thirty three dollars ($58,333), to be reported on a 1099 MISC form as "gross proceeds paid to an attorney."

2. Prior to submission of this Agreement to the Administrative Law Judge for approval, the amount of the settlement payment described in this Agreement shall be subject to approval by the Board's insurance carrier, School Alliance Insurance Fund and/or School Alliance Insurance Fund's third-party administrator and/or School Alliance Insurance Fund's agent, in addition to the acceptance and ratification of this Agreement by the Hampton Board of Education, and is without prejudice to the Parties if the Board's insurance carrier, School Alliance Insurance Fund and/or School Alliance Insurance Fund's third-party administrator and/or School Alliance Insurance Fund's agent, and the Board do not approve the amount of the settlement payment. The foregoing settlement payment to Petitioner by the Board's insurance carrier, School Alliance Insurance Fund and/or School Alliance Insurance Fund's third-party administrator and/or School Alliance Insurance Fund's agent, shall only be made upon the final approval of same by School Alliance Insurance Fund and/or School Alliance Insurance Fund's third-party administrator and/or School Alliance Insurance Fund's agent, in addition to the

acceptance, approval and ratification of this Agreement by the Hampton Board of Education and subsequent to defense counsel's receipt of a fully executed and notarized copy of this Agreement, completed W-9 forms for Petitioner and her attorney, and a clear child support judgment search report for Petitioner.

3. The Parties expressly agree that this Agreement resolves any and all issues between the Parties that arose or could have arisen from the beginning of time through the date of approval of this Agreement by the Administrative Law Judge. In consideration for the items set forth in this Agreement, Petitioner and her past, present, and future representatives, agents, attorneys, successors, beneficiaries, transferees, heirs, assigns, family members, and any and all persons acting under her direction or control or on her behalf, hereby waive and release any and all rights to file or cause to be filed any suit, petition, demand, administrative, judicial, or other proceeding, claim, complaint, or other action of any kind against the Board or its members, officers, administrators, agents, employees, insurers, or assigns based upon any set of facts which have allegedly occurred or which may occur from the beginning of time through the date of approval of this Agreement by the Administrative Law Judge. This waiver and release includes but is not limited to any and all claims, procedural, substantive, or otherwise, known and unknown, foreseen and unforeseen, regardless of whether or not asserted in the above-captioned Petitions or in the above-referenced Notices of Tort Claim or in the above-referenced Superior Court action, relating to Petitioner's employment with the Board, relating to Petitioner's separation from the Board, relating to the Board's subsequent employment of, or contract with, persons or entities to perform certain duties previously performed by Petitioner, relating to the employment and civil rights of Petitioner under any federal or state constitution, statute, regulation, common law, or public policy (including but not limited to claims alleging any form of negligence, tortious conduct, breach of duty, or breach of contract, and claims under the New Jersey Law Against Discrimination, New Jersey Statutes Title 18A, Americans with Disabilities

Act, Age Discrimination in Employment Act, Older Workers Benefit Protection Act, Sections 1981 through 1988 of Title 42 of the United States Code, Federal and State Civil Rights Acts, Federal and State Constitutions, National Labor Relations Act, Employee Retirement Income Security Act, Fair Labor Standards Act, Occupational Safety and Health Act, Public Plaintiff's Occupational Safety and Health Act, Fair Credit Reporting Act, Consolidated Omnibus Budget Reconciliation Act, Family and Medical Leave Act, New Jersey Family Leave Act, Worker's Compensation Act, Worker Adjustment Retraining Notification Act, Smokers' Rights Law, Equal Pay Act, Genetic Privacy Act, Conscientious Employee Protection Act, wage and hour laws, and/or the Rehabilitation Act of 1973), alleging past, present, or future economic loss, personal injury, physical injury, bodily injury, emotional injury, pain and suffering, reputational damage, loss of opportunity, impairment of earning capacity, and/or demanding reinstatement, compensatory damages, consequential damages, liquidated damages, punitive damages, specific performance, interest, reimbursements, injunctive relief, attorney fees, expert fees, litigation costs, and/or any and all other form of legal and/or equitable relief from the beginning of time through the date of approval of this Agreement by the Administrative Law Judge. Notwithstanding the provisions of this paragraph, all Parties expressly reserve the right to file a claim to enforce this Agreement.

4. The Parties expressly agree that, because this Agreement is the result of a compromise, there is no "prevailing party," and each party is responsible for its own attorney fees, expert/consultant fees, and litigation costs.

5. Petitioner expressly acknowledges and agrees that, as a condition of this Agreement, all claims and/or liens, past, current, and/or future, arising out of this Agreement or asserted against the settlement payment referenced in paragraph 1 above, are to be satisfied by Petitioner, including but not limited to Medicare or Medicaid claims/liens, child support claims/liens, Social Security claims/liens, pension claims/liens, creditor claims/liens,

hospital/physician claims/liens, health insurer claims/liens, attorney/expert/consultant claims/liens, and/or any statutory, equitable, common law, or judgment claims/liens, including but not limited to claims/liens based on subrogation or any other legal or equitable theory.

6. Neither the Board nor its insurance carrier, attorney, nor other representative has made any representations regarding the taxability of the settlement payment referenced in paragraph 1 above. Petitioner expressly acknowledges and agrees that she is solely responsible for determining and paying any taxes which might be associated with the settlement payment. In the event Petitioner fails to pay some or all taxes owed, she agrees to defend and hold the Board, its insurer, and its attorney harmless for any taxes, interest, fines, or penalties associated with or arising from any failure to pay any taxes that are her responsibility to pay.

7. This Agreement is solely for the benefit of the Parties hereto and shall not in any way inure to the benefit of, provide a release to, or create any rights whatsoever in any third person or entity unless expressly provided for herein. Petitioner expressly declares, warrants, and affirms that she has not previously assigned or transferred, in whole or in part, any rights and/or claims against the Board (or its members, officers, administrators, agents, employees, insurers, or assigns) which are the subject of this Agreement.

8. This Agreement represents the entire agreement between these Parties and cannot be modified in whole or in part except by mutual written agreement.

9. This Agreement is subject to Board approval and is without prejudice to any Party if the terms are not approved by the Board and its insurance carrier. A good faith effort will be made to present this Agreement to the Board at the next scheduled regular Board meeting following execution of this Agreement by Petitioner. In the event this Agreement is not approved by the Board and its insurance carrier, this Agreement shall be inadmissible in any legal proceeding between the Parties, and neither Party shall be bound to same. The Board's

approval of this Agreement shall be evidenced by a certified copy of the resolution passed by the Board.

10. Following Board approval of this Agreement, the Parties will submit this Agreement to the Administrative Law Judge assigned to the above-captioned Petition for the judge's entry of an Order Approving Settlement.

11. It is acknowledged that this Agreement has been entered into freely, willingly, and voluntarily, without duress or coercion, with a full understanding of its contents, and with the opportunity for the Parties to consult with representation of their choosing and at their option. Petitioner has been represented by Michael G. Kane, Esq. of Cashdan & Kane PLLC, and is satisfied with his representation. The Board has been represented by Alyssa K. Weinstein, Esq. of The Busch Law Group LLC, and is satisfied with her representation. The Parties acknowledge that they understand the contents of this Agreement and that they were given the opportunity to review it with representatives of their choosing.

12. This Agreement is made without any admissions or findings of liability or responsibility by any Party hereto.

13. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective Party.

14. This Agreement shall be construed fairly, according to the plain language of its terms.

15. This Agreement shall be governed by the Laws of the State of New Jersey. If any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement, or the application of such term to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

16. This Agreement shall remain confidential to the maximum extent permitted by law and shall not be disclosed by either Party to any third party other than a Party's attorney, insurer, accountant/tax preparer, and as otherwise required by law. If either Party is asked about the disputes, such Party may respond "The disputes have been resolved." It is expressly agreed that no Party to this Agreement shall engage in any disparagement of any other Party to this Agreement at any time. **Pursuant to N.J.S.A. 10:5-12.8, although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.**

IN WITNESS WHEREOF, the Parties hereto set their hands to this Agreement as follows:

PETITIONER, CHRISTINE WERNER:

Christine Werner Dated: 02/26/2022

STATE OF NEW JERSEY, COUNTY OF BURLINGTON:
I CERTIFY that, on February 26, 2022, Christine Werner personally came before me and acknowledged under oath, to my satisfaction, that she: (a) is named in and personally signed this document; and (b) signed, sealed, and delivered this document as her act and deed.

JULIE NAWAR
NOTARY PUBLIC
State of New Jersey
My Comm. Expires September 24, 2026

Attorney or Notary Public

RESPONDENT, HAMPTON BOARD OF EDUCATION:

Board President Dated: 2/14/2022

Hampton Public School

"Inspiring our community to thrive and engage in a dynamic learning experience."

Mr. Daniel Kerr
Chief School Administrator
Director of Special Services

Ms. Ruth Ann Dalrymple
Principal

Mr. James Schlessinger
Business Administrator/Board Secretary

EXTRACT OF MEETING MINUTES

DATE OF MEETING: March 15, 2022 CALL TO ORDER: 7:03 p.m.

Present: Elizabeth Monaghan, President
Alicia Noon, Vice President
Megan Bruton
Denise Bryant
Dana Daneault

DISTRICT ADMINISTRATORS
Present: Mr. Daniel Kerr, Chief School Administrator
Mr. James Schlessinger, Business Administrator Board Secretary

Legal Settlement
BE IT RESOLVED upon the recommendation of the Superintendent and Board Counsel, that the Settlement Agreement and Release in the matter of C.W. v. Hampton Board of Education, OAL Docket Nos. EDU 08394-20 and 08411-21 be approved and that the Board of Education approves the contribution of sixty thousand dollars ($60,000.00) toward that settlement, with the insurance carrier contributing the balance of the total settlement, and that the Board President is duly authorized to sign the Agreement on behalf of the Board.

Moved by Ms. Daneault, seconded by Ms. Bryant.
On roll call vote, resolution was ADOPTED as follows

Ms. Bruton	Ms. Bryant	Ms. Daneault	Ms. Monaghan	Ms. Noon
Yes	Yes	Yes	Yes	Yes

The foregoing information is a true copy of the official records of Hampton Public School District Board of Education, having been extracted from and compared with the contents of the original minutes by me.

James Schlessinger
Business Administrator/Board Secretary

108-22
OAL Dkt. No. EDU 02648-22
Agency Dkt. No. 68-4/22

New Jersey Commissioner of Education

Final Decision

T.V. on behalf of minor child, H.B.,

Petitioner,

v.

Board of Education of the Township of West Orange, Essex County,

Respondent.

The record of this matter, the proposed Stipulation of Settlement 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 such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that Paragraph 1 of the Agreement references actions that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelina Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 19, 2022
Date of Mailing: May 19, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 02648-22
AGENCY DKT. NO. 68-4/22

T.V. ON BEHALF OF MINOR CHILD H.B.,
Petitioner,
v.
WEST ORANGE BOARD OF EDUCATION,
Respondent.

T.V., petitioner, pro se

Danielle A. Panizzi, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, attorneys)

Record Closed: April 14, 2022 Decided: April 19, 2022

BEFORE **MARGARET M. MONACO**, ALJ:

On or about April 1, 2022, petitioner, T.V., on behalf of his child, H.B., filed an "Emergency Petition" with the Commissioner of Education seeking that the District provide remote, virtual synchronous instruction for H.B. as a result of medical condition. The Department of Education transmitted the matter to the Office of Administrative Law,

where it was filed on April 6, 2022, and scheduled for oral argument on April 12, 2022. Prior to the scheduled oral argument, the parties engaged in discussions toward an amicable resolution of the matter. Subsequently, under letter dated April 14, 2022, counsel for respondent submitted the attached Stipulation of Settlement and General Release, indicating the terms of agreement between the parties.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or 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 19, 2022
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: 4-21-22

Date Mailed to Parties: 4-21-22

jb

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T.V. o/b/o H.B., Petitioner, v. WEST ORANGE PUBLIC SCHOOLS BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW Agency Ref. No.: 68-4/22 OAL Dkt. No: EDU 02648-22 **STIPULATION OF SETTLEMENT AND GENERAL RELEASE**

This Stipulation of Settlement and General Release ("Agreement") is entered into by and between T.V. ("Parent"), on behalf of their child, H.B., and the Board of Education of the West Orange Board of Education ("Board"), having principal offices at 179 Eagle Rock Avenue, West Orange, NJ 07052 (the Board and Parent collectively referred to as the "Parties").

WHEREAS, H.B. is currently ten (10) years old (D.O.B. 7/7/11) and in the fifth (5^{th}) grade; and

WHEREAS, the Board is the local educational authority with the responsibility of providing a free public education to H.B.; and

WHEREAS, on April 1, 2022, Petitioner filed an "Emergency Petition" with the Office of Controversies and Disputes, seeking that the District provide remote, virtual synchronous instruction for H.V. as a result of a medical condition; and

WHEREAS, after extensive negotiations, the Parties wish to fully resolve the issues in the Emergent Petition.

NOW, THEREFORE, in consideration of the mutual promises contained herein and other good and sufficient consideration, the receipt and adequacy of which is hereby acknowledged, the Parties now desire to memorialize the terms of their terms and conditions agreement in writing, as follows:

1. The Board agrees to provide H.B. with virtual, synchronous classroom instruction solely for the period of April 11, 2022 through April 29, 2022.

2. The Board agrees to excuse H.B.'s school absences from the period of March 30, 2022 through April 8, 2022.

3. H.B. will not receive virtual synchronous classroom instruction from the District beyond April 29, 2022, unless she is diagnosed with COVID-19 or deemed a "close contact" of a positive COVID-19 case pursuant to Board Policy. Rather, should H.B. require further accommodations beyond April 29, 2022, the District will assess documentation from her medical providers for the need for home instruction (not synchronous virtual instruction) pursuant to N.J.A.C. 6A:16-10.1 and District Policy 2412.

4. In consideration of the terms of this Agreement, Parent hereby waives and releases the Board, its employees and agents from all possible claims that have or may have been accrued against the Board relating to anything that has happened until now, regardless of the forum in which such claims may have been pursuable including, but not limited to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.*; the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. §1232, *et seq.*; the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400, *et seq.*; the Americans with Disabilities Act ("ADA"), 42

U.S.C. §12132, *et seq.*; N.J.A.C. 6A:14-1.1, *et seq.*; Title VII of the Civil Rights Act of 1964, all as amended; any statutes of New Jersey including, but not limited to, the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1, *et seq.*, or any other claims which have been or could have been asserted by H.B. or her Parent on behalf of H.B., in any forum arising out of or connected with H.B.'s education by the Board, including, but not limited to, claims for professional fees and costs, compensatory education, reimbursement related to any unilateral and/or out-of-district placement of H.B., whether known or unknown, or to the extent permitted by applicable law through the date this Agreement is executed. Nothing in this release set forth in this Paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement. Nothing in this Agreement shall preclude Petitioner or Respondent from making any claims that may accrue after the date of this Agreement.

5. Parent acknowledges that he has had the opportunity to review this Agreement in detail, and that Parent fully understands its requirements and limitations. Parent hereby states that he is signing this Agreement voluntarily, of his own free will, and not under duress or coercion of any kind.

6. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

7. 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 parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

8. This Agreement is to be kept confidential by both parties to the maximum extent permitted by Law.

9. This Agreement represents the entire Agreement between the Parties, and will not be modified in whole or in part except by a mutual subsequent written and signed agreement.

10. This Agreement is governed by the laws of the State of New Jersey. The Parties agree that the courts of the State or District Court of New Jersey shall be the sole forum in which any legal action concerning or relating to this agreement shall be brought.

11. In the event that any provision of this contract is held to be void or unenforceable by any court or regulatory authority having jurisdiction thereof, such ruling will not affect the validity of this contract; the remaining provisions shall continue to be in full force and effect.

12. This Agreement may be executed in one or more original, emailed or telecopied counterparts, all of which together shall be one instrument, and all of which shall be considered duplicate originals.

The parties hereby acknowledge their agreement to the terms set forth above by signing below.

PARENT FOR HIMSELF AND FOR H.B.:

Witness for Parent:

Notary or Attorney at Law, State of NJ

OFFICIAL SEAL
SHARIANN P. QUIRK
NOTARY PUBLIC - NEW JERSEY
My Comm. Expires 04/13/2025

SHARIANN P. QUIRK
NOTARY PUBLIC
NEW JERSEY

Dated: _____, 2022

FOR THE WEST ORANGE BOARD OF EDUCATION:

_____C. Lauren Selgren_____

Dated: _____, 2022

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

May 19, 2022

Benjamin B. Brenner, Esq.
The Carroll Law Firm
1 N. New York Road, Suite 39
Galloway, New Jersey 08205

Steven R. Cohen, Esq.
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700 East Gate Drive, Suite 502
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Re: ***In the Matter of the Tenure Hearing of Jessica Gaeckle, School District of the City of Pleasantville, Atlantic County, Agency Dkt. No. 306-12/18***

Dear Counsel:

I have reviewed the record in the above-captioned matter. The record includes the Pleasantville School District's request to withdraw the tenure charges filed in this matter based upon the fact that respondent, Jessica Gaeckle, entered into a plea agreement with the Atlantic County Prosecutor wherein she agreed to surrender her teaching certificate. As a result, respondent is no longer employed with the District. In light of this information, I find that no purpose would be served by further proceedings in this matter.

Accordingly, I approve the dismissal of the tenure charges with prejudice and dismiss the matter as a contested case before me.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

107-22L

112-22

New Jersey Commissioner of Education

Decision

Board of Education of the City of Absecon,
Atlantic County,

Petitioner,

v.

Board of Education of the City of Pleasantville,
Atlantic County,

Respondent.

Synopsis

Petitioner Absecon Board of Education (Absecon) filed a petition seeking a severance of its sending-receiving relationship with respondent Pleasantville Board of Education (Pleasantville), which provides for Absecon's high school students to be educated in Pleasantville. Absecon proposed to enter into a sending-receiving relationship with the Greater Egg Harbor Regional School District Board of Education, under which Absecon would send its high school students to Greater Egg Harbor's Absegami High School (Absegami). Subsequent to transmittal of the matter to the Office of Administrative Law, Pleasantville withdrew its opposition to Absecon's request for severance of the sending-receiving relationship. The file was returned to the Commissioner as an uncontested case, to proceed according to the procedural requirements set forth in *N.J.A.C.* 6A:3-6.1.

Upon review of the record, the Commissioner found, *inter alia*, that: the criteria for withdrawal from a sending-receiving relationship at the high school level is set forth at *N.J.S.A.* 18A:38-13, and establishes that prior to severance of a relationship, the Commissioner must consider public comment regarding the proposed severance and make an equitable determination that the proposed severance will have no substantial negative impact on the educational programs, finances, and racial composition of the districts; in this case, a feasibility study established that the withdrawal of Absecon's high school students from Pleasantville would cause no substantial negative educational or financial impact on the two school districts; however, severance of the sending-receiving agreement would have a substantial negative effect on the racial composition of Pleasantville's student body because, while the proportional change in the racial demographics of the school may seem negligible, it would result in the loss of 50 to 80 percent of Pleasantville's white population – a significant reduction in the gross number of white students attending Pleasantville. Accordingly, the Commissioner denied Absecon's application for severance from its sending-receiving relationship with Pleasantville.

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

112-22
Agency Dkt. No. 232-9/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Absecon, Atlantic County,

Petitioner,

v.

Board of Education of the City of Pleasantville, Atlantic County,

Respondent.

In this matter, petitioner Absecon Board of Education (Absecon) filed a petition seeking a severance of the sending-receiving relationship with respondent Pleasantville Board of Education (Pleasantville) which provides for Absecon's high school students to be educated in Pleasantville. Absecon proposes to enter into a sending-receiving relationship with the Greater Egg Harbor Regional School District Board of Education to send its high school students to Absegami High School (Absegami). After the matter was transmitted to the Office of Administrative Law as a contested case, Pleasantville withdrew its opposition to the request for severance of the sending-receiving relationship. Accordingly, the file was returned to the Commissioner so that it could proceed as an uncontested case, in compliance with the procedural requirements set forth in *N.J.A.C.* 6A:3-6.1.[1]

[1] Several months later, Pleasantville advised the Commissioner that it intended to rescind its prior withdrawal of its opposition to the petition for severance of the sending-receiving relationship and

Subsequently, the Commissioner received numerous public comments regarding the proposed severance, from parents, educators, and statewide advocacy groups. Supporters, who consisted mostly of parents with children who reside in Absecon, argue that severance will provide Absecon's students with more academic and extra-curricular opportunities, as Absegami offers more Advanced Placement courses, magnet schools, and sports and clubs. They also expressed concern about student safety and the financial mismanagement at Pleasantville. Finally, supporters contend that lower income and special education students are the most negatively impacted by the current sending-receiving relationship since wealthier families often send their children to private schools, and others compete for slots at choice schools or technical schools.

The comments submitted in opposition to the severance argue that if granted, there will be a significant impact on the racial composition of Pleasantville. One comment submitted by the New Jersey Coalition Against Racial Exclusion, on behalf of parents with children in Pleasantville, faith and community leaders, and the local chapter of the NAACP, strenuously objected to the severance, maintaining that it would completely isolate Pleasantville as a segregated and impoverished district, and would leave its students without any hope of an integrated and inclusive education. Although there are only a small number of Absecon students at issue here, those few students represent a large percentage of the total white population at Pleasantville. Therefore, opponents of the severance emphasize that losing Absecon students will effectively result in Pleasantville becoming an all-minority district. As

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reinstate its opposition to its termination. Because the matter was already pending before the Commissioner, however, it has proceeded as an uncontested case.

such, the Commissioner should deny Absecon's application to sever its sending-receiving relationship with Pleasantville.

In response, Absecon maintains that severance of the sending-receiving relationship will not cause a substantial educational, financial, or racial impact. Absecon argues that the loss of its students will cause no educational impact in Pleasantville and will in fact have a positive effect on Absecon's students, especially its 45% economically disadvantaged population, as they are more likely to perform better academically at Absegami. With respect to race, Absecon argues that any racial impact on Pleasantville will be *de minimis* because Absecon's white population represents only about half a percent of Pleasantville's total population, with about 1 white Absecon student in each Pleasantville graduating class of approximately 200 students. Absecon contends that severance of the sending-receiving relationship will not render Pleasantville an all-minority district, as evidenced by the increased white population in Pleasantville's elementary and middle schools. Finally, Absecon maintains that there will be no racial impact on its own students as it has a diverse student body that is made up of 50% minority students, and Absegami is also a diverse school.

Upon a comprehensive review of the record in this matter including the public comments, the feasibility study, the parties' submissions, and the updated enrollment information submitted by Absecon at the Commissioner's request, the Commissioner cannot approve the severance of the sending-receiving agreement between Absecon and Pleasantville. The criteria for withdrawal from a sending-receiving relationship at the high school level is set forth at *N.J.S.A.* 18A:38-13, and establishes that prior to severance of a relationship, the Commissioner will make an equitable determination based on the circumstances, "including the

educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts." If there is no substantial negative impact, the Commissioner will grant the requested severance. *N.J.S.A.* 18A:38-13. Here, the Commissioner is satisfied that the withdrawal of Absecon's high school students from Pleasantville would cause no substantial negative educational or financial impact on the two school districts. However, the removal of Absecon's high school students from Pleasantville would have a substantial negative effect on the racial composition of Pleasantville.

In 1988, the Commissioner denied a previous request from Absecon to sever the sending-receiving relationship with Pleasantville, finding that the removal of one-third to one-half of the white population at Pleasantville, which had an overwhelming black to white student population ratio, would have a significant negative effect on the racial composition of the school. The Commissioner further explained:

> Moreover, the Commissioner finds the true issue in this matter is not what number of whites actually attend the public high school, but rather is what number are eligible to attend. The undisputed operative facts reveal that there are some 350 Absecon students attending a parochial school in the area. Thus, if white residents of Absecon choose to send their children to private schools rather than to the school which is legally designated as the receiving district, their choice of non-attendance should not be expected to result in a state-endorsed policy which would result in total or almost total racial isolation of the school officially designated as the receiving district.
>
> [*Board of Education of the City of Absecon v. Board of Education of the City of Pleasantville, Atlantic County*, 1988 *S.L.D.* 1034, 1052 (emphasis in original).]

In affirming the Commissioner's dismissal of this matter, the State Board of Education did not reach the issue of racial impact, and instead based its denial of the sending-receiving relationship on Absecon's failure to propose a new receiving district.

In *Board of Education of the Borough of Englewood Cliffs, Bergen County v. Board of Education of the City of Englewood, Bergen County*, 257 *N.J. Super.* 413 (App. Div. 1992), severance of Englewood Cliffs' sending-receiving relationship with Englewood – in which Englewood Cliffs sent its high school students to Englewood's high school – was denied because of the substantial negative impact on racial balance and educational quality. Had severance been granted in that case, the percentage of white students at Englewood's high school would have decreased by only 1.6 percent – arguably a negligible or *de minimis* effect on the racial population at Englewood. *Id.* at 439. However, the loss of those 15 white Englewood Cliffs students – considering that Englewood had only 94 white students in total – represented a 16 percent reduction in the overall white population at Englewood, resulting in a significant impact on the racial balance of Englewood's high school. *Ibid.* Additionally, given the trend toward a rapid decline in white student enrollment, withdrawal of the Englewood Cliffs students would have a substantial negative impact on the quality of education because it would be seen as a symbolic loss. *Id.* at 430.

On the other hand, in *Board of Education of the Borough of Longport, Atlantic City v. Board of Education of the City of Atlantic City, Atlantic County and Board of Education of the City of Ocean City, Cape May County*, Commissioner's Decision No. 238-14, dated June 5, 2014, the withdrawal of 9 white Longport students from Atlantic City's high school represented a proportional change of 0.4 percent of the total student body. Those 9 students, in the overall

context of Atlantic City's 442 white students, represented a 2 percent change in the gross population of white students in Atlantic City. *Id.* at 7-8. Considering the circumstances, the Commissioner granted permission for Longport to sever its sending-receiving relationship with Atlantic City, finding that severance would not have a substantial negative impact on the racial composition of Atlantic City's high school. *Id.* at 8-9.

The Commissioner recently applied these concepts and denied the request for limited severance of a sending-receiving relationship proposed in a settlement agreement that was submitted by the Mine Hill Board of Education (Mine Hill) and the Dover Board of Education (Dover). *Board of Education of the Township of Mine Hill, Morris County v. Board of Education of the Town of Dover, Morris County*, Commissioner's Decision No. 9-19, dated January 14, 2019, affirmed, Appellate Division, March 10, 2020. Since 1963, Mine Hill and Dover have had a send-receive relationship in which Mine Hill students in grades seven through twelve are educated in Dover. In the proposed settlement agreement, the parties' sought a modification of their sending-receiving relationship so that Mine Hill's seventh and eighth grade students would be educated in Mine Hill and return to Dover for high school. If the severance were allowed, the loss of Mine Hill students from Dover Middle School would have resulted in a proportional change of only 2.6 to 3 percent of the total student body. *Id.* at 5. However, the loss of 17 of the 38 white students in one of the years at issue would have reduced the gross population of white students at Dover Middle School by 45 percent, a figure that the Commissioner found was not insignificant and could not be ignored. *Id.* at 5-6. Therefore, the Commissioner denied the request for severance, despite the fact that it was supported by both

districts, due to the substantial negative impact severance would have on the racial composition of Dover Middle School.

In the current application, reviewing the enrollment information for the 2019-2020 school year indicates that 26 Absecon students attended Pleasantville, 4 of whom were white, while Pleasantville High School had 5 total white students out of a total student body of 820 students. Given the limited total number of white students in the school compared to the entire student body, removal of the Absecon students would result in a proportional change of less than half a percent of the total student body. However, when considering the gross population of white students, it would result in a loss of 4 of 5 total white students, or an 80 percent reduction in the white population of Pleasantville. Similarly, in the 2021-2022 school year, while the loss of 25 Absecon students, including 6 white students, would result in a proportional change of less than a percent of the student body, the loss of 6 out of 11 white students would result in a 54.5 percent reduction in the gross population of white students at Pleasantville.

The Commissioner cannot find that the loss of 50 to 80 percent of Pleasantville's white population is insignificant. The loss of 50 to 80 percent of the white population is larger than the 45 percent loss in *Mine Hill* or the 16 percent loss in *Englewood Cliffs*, both of which resulted in denial of the applications for severance. While the proportional change of less than a percent may seem *de minimis* given the few Absecon students leaving Pleasantville, the Commissioner cannot ignore the substantial negative effect withdrawal would have on the gross population of white students at Pleasantville.

Accordingly, Absecon's application for severance of the sending-receiving relationship with Pleasantville is denied due to the substantial negative impact severance would have on the racial composition of Pleasantville.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 25, 2022
Date of Mailing: May 25, 2022

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Milltown, Middlesex County,

Petitioner,

v.

Egnita Pardo,

Respondent.

Synopsis

The petitioning Board filed this matter seeking to preclude respondent from being sworn in as a member of the board due to her interest in a claim against the school district. The Commissioner granted emergent relief to the Board in an Order that precluded respondent from being sworn in as a Board member pending a final decision on the merits of the case. Respondent, who was elected to the Board in November 2021 and was due to be sworn in on January 4, 2022, had filed a notice of tort claim with her husband against the Board on behalf of her minor son in 2017. Respondent withdrew her notice of tort claim in December 2021, and later executed a release of her minor son's claims, which was approved by the Superior Court in a friendly hearing on January 28, 2022. The Board filed a motion for summary decision; respondent filed a cross-motion seeking indemnification for her costs and attorney fees in defending this matter.

The ALJ found, *inter alia*, that: the issue of indemnification of members of boards of education against the cost of legal proceedings is governed by *N.J.S.A.* 18A:12-20, which provides for indemnification when a legal action against a sitting board member arises out of and in the course of the performance of their duties as a member of the board; the issue here is whether *N.J.S.A.* 18A:12-20 requires that petitioner be indemnified for legal fees and expenses incurred in connection with her defense in this matter; respondent cured the initial conflict of interest by executing the release of claims, but also has a direct interest in a claim for reimbursement for costs and attorney's fees; respondent is not entitled to indemnification as the Board's actions in seeking to preclude her from being sworn in were justified based on her conflict of interest in violation of *N.J.A.C.* 1:1-18.4; and respondent's expenditures in this matter are related to resolving her own conflict of interest prior to being seated on the Board. The ALJ concluded that respondent has not shown entitlement to indemnification as her actions and expenditures were related to resolving her conflict. Accordingly, respondent's claim for indemnification was dismissed and respondent was cleared to be sworn in as a member of the Board.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that the respondent no longer has a conflict and may be seated as a member of the Board. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter; respondent's claim for indemnification was dismissed and she is eligible to be sworn in as a Board member.

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

113-22
OAL Dkt. No. EDU 10256-21
Agency Dkt. No. 237-12/21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Milltown, Middlesex County,

Petitioner,

v.

Egnita Pardo,

Respondent.

The record of this matter and the Initial Decision[1] 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 respondent Egnita Pardo and petitioner Milltown Board of Education (Board or Milltown), as well as the Board's reply to the respondent's exceptions.

Milltown filed this matter seeking to preclude respondent from being sworn in as a Board member due to her interest in a claim against the school district. Respondent, who was elected to the Board in November 2021 and was due to be sworn in on January 4, 2022, had filed a notice of tort claim with her husband against the Board on behalf of her minor son in 2017. Respondent withdrew her notice of tort claim in December 2021; however, due to the nature of the claims, a notice of tort claim is no longer required in order for her son to file suit, and respondent had not released the claims.

[1] This matter was captioned as a "Revised Initial Decision" in order to correct an error in which this matter was inadvertently captioned as an "Order."

In deciding the Board's motion for emergent relief on December 29, 2021, the Administrative Law Judge (ALJ) found that respondent had a direct or indirect interest in an inchoate claim made by her minor child against the Board, which would preclude her from serving on the Board in accordance with *N.J.S.A.* 18A:12-2. The Commissioner granted emergent relief to the Board in an Order that precluded respondent from being sworn in as a Board member, and additionally precluded the Board from filling respondent's seat while this matter is pending. Respondent also filed a cross petition for indemnification, which the Commissioner determined would be decided as part of this matter. On January 3, 2022, respondent executed a release of her minor's claims, which was approved by the Superior Court in a friendly hearing on January 28, 2022.

In the Initial Decision, the ALJ found that respondent cured the conflict of interest by executing the release of claims, but also had a direct interest in a claim for reimbursement for costs and attorney's fees. The ALJ concluded that respondent was not entitled to indemnification because the Board's actions in seeking to preclude her from being sworn in were justified based on her conflict of interest in violation of *N.J.A.C.* 1:1-18.4, and respondent's expenditures in this matter and the Superior Court action were related to resolving her own conflict of interest. As such, the ALJ found that she could be sworn in as a member of the Board but dismissed her claim for indemnification.

In her exceptions, respondent contends that *N.J.S.A.* 18A:12-20 supports her claim for indemnification because she is an elected Board member who was forced to expend her own funds in the defense of this administrative action that arises out of her duties as a member of the Board. Respondent disagrees with the ALJ's findings that: she was not entitled to

indemnification because she was required to institute the Superior Court matter to cure her conflict; her expenditures in the administrative matter needed to be addressed before becoming a Board member; and board members-elect are not entitled to indemnification. Respondent points out that her claim for indemnification only involves this matter, and not the matter in Superior Court. Respondent further contends that whether the Board's actions were "proper" or whether her expenditures needed to be addressed are misguided arguments because the Board failed to inform her of her conflict until a month after her election and ignored good faith efforts to cure it, forcing her to defend against the administrative action.

Respondent also argues that the ALJ failed to consider or analyze the extensive case law presented that demonstrates that board members-elect who need to cure a conflict of interest prior to assuming office are entitled to indemnification of costs and fees. *See Jones v. Kolbeck*, 119 *N.J. Super.* 299 (App. Div. 1972); *Surada v. Jersey City Board of Education*, 167 *N.J. Super* 331 (Law Div. 1979); *Edgar Brown and Oliver Brown v. Board of Education of the City of Newark, Essex County*, Agency Dkt. No. 119-4/84, dated September 19, 1988. Additionally, respondent contends that the cases relied upon by the ALJ are inapplicable to this matter. Finally, respondent maintains that her claim for indemnification does not create an inconsistent interest that would disqualify her from Board membership pursuant to *N.J.S.A.* 18A:12-2. Accordingly, respondent asks the Commissioner to reject the Initial Decision as it pertains to her claim for indemnification, and award her with the attorneys' fees and costs associated with her defense of this matter.

In reply, the Board argues that the ALJ appropriately found that respondent is not entitled to indemnification. The Board maintains that *N.J.S.A.* 18A:12-20 unambiguously

applies to members of boards of education, such that the statute is limited to members who have been sworn in. The Board argues that respondent was not a sworn member of the Board; she was ineligible to take the oath of office; and her expenses were personal, not arising from board member duties. The Board also contends that members of a board are treated differently than board members-elect with respect to determining conflicts of interest because members-elect must meet the requirement that they have no inconsistent claims as a condition for assuming office as a board member, whereas certain conflicts may not require removal of a sitting member of a board. Respondent maintains that the cases respondent relies upon are inapplicable because they either involve board members who have already been sworn in or are otherwise distinguishable. Further, the Board argues that *Francesco Cordasco v. Board of Education of the Town of West New York, Hudson County*, 96 N.J.A.R.2d (EDU) 661, dated May 8, 1996, demonstrates that board members who are not sworn in are not entitled to indemnification. As such, the Board asks the Commissioner to adopt the Initial Decision. Additionally, the Board seeks guidance from the Commissioner regarding respondent's continued litigation of her claims for indemnification, including a potential appeal of this matter, which would be an inconsistent claim that is subject to disqualification or removal.[2]

Upon review, the Commissioner agrees with the ALJ that respondent no longer has a conflict and may be seated as a member of the Board. Pursuant to *N.J.S.A.* 18A:12-2, "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board . . . ." According to *N.J.S.A.* 18A:12-2.1, "Each member of a board of

[2] The Board filed exceptions because the ALJ did not consider its Opposition to the Cross-Motion for Summary Decision/Reply Brief, dated February 27, 2021. The Commissioner notes that the letter brief and exhibits are in the record.

education shall, before entering upon the duties of his office, take and subscribe: (1) An oath that he possesses the qualifications of membership prescribed by law . . . ." In this matter, respondent has executed a release of her claim against the Board and, accordingly, no longer has the conflict that disqualified her from taking the oath of office. As such, respondent may be sworn in as a member of the Board.[3]

With respect to respondent's claim for indemnification, the Commissioner finds that respondent is not entitled to recovery of the costs and fees incurred in this matter. *N.J.S.A.* 18A:12-20 provides:

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

It is established that legal fees in connection with the defense of a challenge to board membership fall within the purview of *N.J.S.A.* 18A:12-20. *Surada*, *supra,* 167 *N.J. Super* at 333-34 (citing *Jones*, *supra*, 119 *N.J. Super.* 299). In this matter, the question is whether the statute applies to those who are not yet sworn in as board members.

When evaluating a statute, the intent of the legislature can be gleaned from the plain meaning of the language. *Board of Education of the City of Sea Isle City v. Kennedy*, 196 *N.J.* 1, 12 (2008). The language of the statute indicates that indemnification is permitted when legal proceedings are initiated "against any person for any act or omission arising out of and in the

[3] It appears that respondent has already been sworn in as a member of the Board.

course of the performance of his duties as a member of a board of education." *N.J.S.A.* 18A:12-20. It is unambiguous that the protections against incurring costs and fees would only apply to board members when the matter arises out of in and the course of the performance of their role on the board, and not those who are not yet members of the board.

The Commissioner will nevertheless review the relevant case law cited by respondent. First, in *Jones v. Kolbeck*, 119 *N.J. Super.* 299 (App. Div. 1972), appellants sought the removal of board members because they were teachers in another school district. The Appellate Division found that respondents were not precluded from serving as board members and ordered their counsel fees to be paid because they were sued based on their board membership. Similarly, in *Surada v. Jersey City Board of Education*, 167 *N.J. Super* 331 (Law Div. 1979), three people were appointed to the Board by a lame duck mayor, and after taking office, the new mayor challenged their appointments. One of the members was successful in defending the challenge, while the other two were not. Regardless, the court found that they were rendering the services required of their office and were entitled to indemnification for the defense of the challenge to their membership.

Additionally, in *Board of Education of the Township of Barnegat, Ocean County v. Robert A. Houser*, Commissioner's Decision No. 306-07, dated July 30, 2007, Houser's wife had a pending Worker's Compensation case at the time of his election to the board, which would have precluded him from being qualified for office, but neither the board nor Houser addressed the inconsistent interest. He nevertheless took the oath of office, entered into the duties of membership, and served on the board for a year. The Commissioner found that both the Board and Houser were equally culpable in failing to identify the conflict, which was promptly cured.

Accordingly, in the interests of justice, the Commissioner deemed the Board's petition and the curing of the conflict *nunc pro tunc* – i.e., as if they had occurred prior to Houser's seating on the board – and found that Houser was entitled to indemnification of the costs of defending the board's action.

Finally, in *Edgar Brown and Oliver Brown v. Board of Education of the City of Newark, Essex County*, Agency Dkt. No. 119-4/84, dated September 19, 1988, the petitioners were elected to the Board and qualified for membership, but the Board acted illegally and denied their right to be sworn in. The Commissioner found that "[b]ut for the illegal action of the Board, there is no question that petitioners would be protected by *N.J.S.A.* 18A:12-20 for indemnification of legal fees and costs." The Commissioner further found that "it is not unreasonable to conclude that duly elected, qualified board members, prevented from assuming the duties of such membership by an illegal board action, are entitled, within the intendment of *N.J.S.A.* 18A:12-20, to the same protection of indemnification for defending a challenge to board membership as individuals who were sworn in and served as *de facto* board members but were subsequently disqualified."

The Commissioner finds that *Jones*, *Surada* and *Houser* all demonstrate that sitting board members are entitled to indemnification after their membership has been challenged – even when the conflict may have occurred prior to entering office – but fail to address whether the statute applies to those who are not yet sworn in as board members. While the board member in Houser should have been precluded from taking the oath of office due to his inconsistent interest, he nevertheless did take office and performed the duties as a board member, entitling him to indemnification.

The one case that granted indemnification to board members who had not taken the oath of office is distinguishable from the current matter and falls short of setting a precedent for all board members-elect because it is limited in circumstance. *Brown* allows those who are "duly elected, qualified board members, prevented from assuming the duties of such membership by an illegal board action" to be indemnified. In this matter, respondent was not qualified as a Board member until after her conflict was cured, which did not occur until after the date that she was originally scheduled to take the oath of office. Additionally, the Board in this matter did not take illegal action to block respondent from being sworn in. Instead, the Board sought approval through legal avenues to address respondent's conflict. As such, while the board members-elect in *Brown,* were entitled to indemnification, no such factual circumstance exists here to bring respondent under the intendment of the statute.

The Board cites to *Francesco Cordasco v. Board of Education of the Town of West New York, Hudson County*, 96 N.J.A.R.2d (EDU) 661, dated May 8, 1996, for the proposition that board members who have not entered office are not entitled to indemnification, but the Commissioner notes that the case is not persuasive. In that matter, a challenge arose against Cordasco's appointment to the Board by a lame duck mayor prior to his swearing in as a board member. The Commissioner found that Cordasco was not entitled to indemnification because he brought the legal action, rather than defending against one brought against him, which does not fall under *N.J.S.A.* 18A:12-20. The Commissioner noted that "[i]n view of this finding, it is not necessary to address the claim that petitioner never served as a board member." *Id.* at 665. As such, this matter does not provide guidance as to whether people who have never served as board members are entitled to indemnification.

The Commissioner finds that respondent is not entitled to indemnification because she was not a sworn board member who was serving in the position, nor was she qualified to become a Board member. According to *N.J.S.A.* 18A:12-2.1, "Each member of a board of education shall, before entering upon the duties of his office, take and subscribe: (1) An oath that he possesses the qualifications of membership prescribed by law . . . ." As respondent had an inconsistent interest disqualifying her from membership pursuant to *N.J.S.A.* 18A:12-2, she was unable to take the oath of office because she was unable to attest that she had the qualifications required for the office. As such, considering both the plain meaning of the statute, as well as the relevant case law, respondent is not entitled to indemnification as her defense of this administrative matter did not arise from her duties as a board member.[4]

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Respondent is eligible to be sworn in as a Board member, but her claim for indemnification is hereby dismissed.

IT IS SO ORDERED.[5]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 25, 2022
Date of Mailing: May 25, 2022

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[4] The Commissioner notes that this claim for indemnification cannot be a disqualifying interest as board members have a statutory right to seek indemnification. *N.J.S.A.* 18A:12-2.

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

REVISED INITIAL DECISION GRANTING SUMMARY DECISION MOTION, AND DENYING CROSS MOTION

OAL DKT. NO. EDU 10256-21S

AGENCY DKT. NO. 237-12/21

MILLTOWN BOARD OF EDUCATION,
MIDDLESEX COUNTY,
Petitioner,
EGNITA PARDO,
Respondent.

Aron Mandel, Esq., for petitioner (Busch Law Group, attorneys)

Nicholas J. Repici, Esq., and **Michael J. Reilly Esq.**, (Lenox, Socey, Formidoni, Giordano, Lang & Casey, attorneys,) for respondent, Egnita Pardo

Record Closed: February 23, 2022 Decided: February 28, 2022

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 3, 2022, petitioner, Borough of Milltown, Board of Education, Middlesex County, (Board) moved for summary disposition seeking to dismiss respondent, Egnita Pardo's, counterclaim for attorney fees. The matter initially transmitted to the Office of

Administrative Law (OAL) on December 17, 2021, for a ruling on the emergent application. Respondent was not seated because of an inchoate claim against the Board of Education. On February 23, 2022, respondent filed opposition and cross-moved for indemnification for costs, and attorney fees. The Cross Petition seeks legal fees and cost to defend the application, the latter Cross Petition was deferred to the Department of Education to resubmit, as appropriate, that application was resubmitted, and a determination of the right to reimbursement and whether the claim for reimbursement again creates a conflict depriving respondent from her seat. Oral argument was not provided the parties. The record with respect to the two motions for summary disposition closed on February 23, 2022.

FACTUAL DISCUSSION

The essential facts in this matter are not in dispute. The inchoate claim of respondent's issue has been resolved by an Order of the Superior Court, see Exhibit P and Q of petitioner's brief. The remaining claim is for the reimbursement in connection with the defense of respondent's been disputed.

Petitioner is a board of education which is duly organized under the Statutes of the State of New Jersey and is subject to the specific statutes covered in Title 18A of the New Jersey Statutes.

Pardo was elected to the Milltown Board of Education at the November 2021 School Election and is due to be sworn in at the upcoming Organization Meeting on January 4, 2022.

LEGAL DISCUSSION AND ANALYSIS

Just as an underaged candidate for political office is deprived of the ability to be sworn in. Here a candidate for the Board of Education is imputed with knowledge that a conflict of interest will deprive one of the abilities to be seated.

Conflicts of interest apply to membership, not candidacy, and that if a conflict may be cured prior to taking a seat, the successful candidate may be sworn in as a board member.

N.J.S.A. 18A:12-2, states as follows:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall hold the office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county.

Here, Pardo did not cure the conflict timely to be sworn in. It is now cured. Individual circumstances in each case are required to be examined to determine whether the claim is substantial and material so as to require disqualification. In the Matter of the Election of Dorothy Bayless to the Board of Education of Lawrence Township School District, 1974 S.L.D. 595, reversed, State Board 603.

Lack of conflicting interest is a qualification for board membership. See, Visotcky v. City Council of Garfield, 113 N.J. Super. 263 (App. Div. 1971). The interest which disqualifies is not necessarily a direct pecuniary interest, nor is the amount of such an interest of paramount importance; it is based on the moral rule that no man can serve two masters whose interest's conflict. Aldom v. Borough of Roseland, 42 N.J. Super. 495, 502 (App. Div. 1956). In Taliafero vs. Hawthorne Board of Education, 94 N.J.A.R. 2d (EDU) 197 wherein a board member's indirect interest in his wife's lawsuit against a board of education disqualified him from board membership.

In this matter, Pardo, has a direct claim in reimbursement for her costs and attorney fees. The Superior Court would not consider it and deferred it back to the Board of Education.

In Errington v. Mansfield Twp. Bd. of Educ., 100 N.J. Super. 130, 138 (App. Div. 1968). In a suit by a former mayor, the Appellate Division affirmed the dismissal of the claim for indemnification of attorney's fees, where "[t]he costs he incurred were for the defense of suits that challenged his entitlement to hold office and the regularity of his election." Matthews v. Atl. City, 196 N.J. Super. 338, 339- 40 (App. Div. 1984). The Matthews Court explained that indemnification was not permitted, because the plaintiff sought indemnification for "expenses [that] were not for costs incurred in the defense of legal attacks on his actions taken in the discharge of duties imposed or authorized by law." Id.

This matter is akin to the finding in Cordasco v. West New York Bd. of Educ., OAL

Dkt. No. EDU 5892-95; Agency Dkt. No. 145-5/95, 96 N.J.A.R.2d (EDU) 661 (Final Agency Decision May 8, 1996), this tribunal finds little support in the cases provided by respondent. The actions by Pardo in Superior Court she instituted to resolve her conflict. The actions of the Board were proper in denying Pardo the position as she had a conflict. Pardo's expenditures in both applications needed to be addressed before she could become a Board Member. The right to indemnification is designed to provide protection from actions taken while a Board Member. These expenditures do not fall in that category,

CONCLUSION

The Board has shown Pardo is not entitled to reimbursement of her costs and attorney fees.

The Board was justified in seeking direction not to seat Pardo to her position as a member of the Milltown Board of Education.

Pardo has not shown entitlement to indemnification as her actions and expenditures were related to resolving her conflict.

As this Order rejects Pardo's claim for reimbursement, she no longer has a conflict and may be seated as a Board Member.

This tribunal views the claim for indemnification as a ministerial claim by a Board Member. Ethically, she can take no part in consideration of that reimbursement. If the Commissioner of Education or the Appellate Division seeks to revise this Initial Decision, then the existing conflict of interest created by that reversal can be dealt with at that time.

Therefore, I **CONCLUDE** summary disposition be granted in favor of the Board, dismissing respondent's counterclaim for indemnification of attorney fees and cost.

I **CONCLUDE** that respondent should be sworn as a member of the board of education, as she no longer has a conflict of interest.

ORDER

Based upon the foregoing discussion, it is hereby **ORDERED** that respondent's cross-petition for indemnification is **DISMISSED**; and

It is **ORDERED** petitioner's motion for Summary Disposition is **GRANTED** in so far as it disposes of the Cross-Petition.

It is **ORDERED** Pardo be sworn in as a member of the Milltown 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.

February 28, 2022
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: February 28, 2022

Date Mailed to Parties: February 28, 2022

APPENDIX

LIST OF WITNESSES:

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS:

Emergent Relief

For Petitioner:

P-1 Request for Summary Disposition with attachments

For Respondent:

R-1 Respondent's motion for Summary Disposition with attachments

114-22

Agency Dkt. No. 38-3/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of Kathleen Douglass, Lower Cape May Regional School District, Cape May County.

For the Petitioner, Jeffrey P. Catalano, Esq.

For the Respondent, Kathleen Douglass

This matter was opened before the Commissioner of Education on March 11, 2022, through tenure charges of unbecoming conduct, insubordination, neglect of duty, job abandonment, incapacity and other just cause certified by Joseph Castellucci, Superintendent of the Lower Cape May Regional School District ("District"), together with supporting evidence against respondent, Kathleen Douglass, a tenured secretary in the District's employ. The District provided respondent with written notice of such certification by hand-delivery.

On March 14, 2022, the Commissioner directed the respondent via regular mail to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. In a correspondence dated March 29, 2022, the respondent provided a justification of her actions upon which the District's tenure charge allegations were based. By correspondence dated March 31, 2022, the Commissioner explained to the respondent that if she would like to dispute the tenure charges filed in this matter, the case would be referred to an Arbitrator to hear and decide this matter pursuant to *N.J.S.A.* 18A:6-16; further, the Commissioner sought confirmation from the respondent that she would like to proceed with

the assignment of the case to an Arbitrator. The respondent did not respond to the March 31, 2022 correspondence. By correspondence dated April 7, 2022, the Commissioner informed the respondent that a response to the March 31, 2022 correspondence had not been received, and that if no response was received by April 15, 2022, pursuant to *N.J.A.C.* 6A:3-5.3(c), the charges filed against her would be deemed admitted and the matter decided on a summary basis. The respondent did not respond to the April 15, 2022 correspondence.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent was employed by the District as a tenured secretary. The Statement of Evidence indicates that the respondent has refused to comply with Executive Order 253 and District Policy 1648.13, School Employee Vaccination Requirements ("Policy"). Executive Order 253 and the Policy require that all school workers provide proof that they are fully vaccinated or submit to weekly COVID-19 testing. The respondent has refused to submit to weekly testing or provide proof of vaccination, and has not reported to work since November 24, 2021.

Deeming the allegations to be admitted and noting that the respondent has failed to respond to multiple correspondences, the Commissioner finds that the District's charge of unbecoming conduct has been proven and overwhelmingly warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from her tenured position with the Lower Cape May Regional School District.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 25, 2022
Date of Mailing: May 25, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

119-22
OAL Dkt. No. EDU 09324-21
Agency Dkt. No. 207-11/21

New Jersey Commissioner of Education

Final Decision

L.B., on behalf of minor child, E.Y.,

Petitioner,

v.

Board of Education of the Monmouth Regional High School District, Monmouth County,

Respondent.

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

Upon review, the Commissioner agrees with the Administrative Law Judge's determination – for the reasons stated in the Initial Decision – that no issues remain in dispute and that the petition of appeal should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, J.D., S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 8, 2022
Date of Mailing: June 8, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

L.B. on behalf of E.Y.,

Petitioner,

v.

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

OAL DKT. NO. EDU 09324-21

AGENCY DKT. NO. 207-11/21

L.B., on behalf of E.Y., petitioner, pro se

Martin M. Barger, Esq., for respondent (Barger & Gaines, attorneys)

Record Closed: May 2, 2022 Decided: May 4, 2022

BEFORE **KIM C. BELIN**, ALJ:

STATEMENT OF THE CASE

This matter concerns the decision by the Acting Commissioner of the New Jersey Department of Education (Acting Commissioner). The November 30, 2021, decision modified the Administrative Law Judge's (ALJ) order which granted the petitioner's application for emergent relief returning E.Y. to the high school. The Acting Commissioner directed the respondent to determine, at the next regularly scheduled school board meeting, if E.Y.'s long-term suspension should continue, or if a meeting was not scheduled within ten days of the date of the decision, that a special meeting be scheduled to determine if E.Y.

should return to the general education program. In addition, the respondent was directed to ensure that E.Y. was provided. with the appropriate educational programs or services using home instruction services. The Acting Commissioner further directed that the matter continue at the OAL with such actions or proceedings that the parties and ALJ deemed necessary to bring the matter to closure.

PROCEDURAL HISTORY

On November 1, 2021, the petitioner filed a petition of appeal challenging respondent's determination that E.Y. engaged in behavior warranting temporary removal from the high school. On November 9, 2021, the Director of the Office of Controversies and Disputes within the Department of Education transmitted the petition and motion for emergent relief to the Office of Administrative Law (OAL). N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13; N.J.A.C. 1:1-8.2. Oral argument was held on the emergent application on November 12, 2021. An order was issued on November 15, 2021, granting emergent relief. On November 30, 2021, the Acting Commissioner issued a decision modifying the order and directing that the matter "continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure."

On April 7, 2022, the undersigned sent a letter to the parties requesting an update on whether E.Y.'s long-term suspension was continued and whether she had returned to the high school. In a letter dated April 8, 2022, counsel for respondent stated that E.Y. returned to the high school on November 15, 2021, and that E.Y. signed out of the school district on February 4, 2022. Petitioner did not respond to the email requests from my office on April 8, and April 13, 2022, to confirm counsel's statements and to clarify if petitioner wished to pursue her appeal or withdraw.

On April 25, 2022, a letter was emailed to the petitioner directing her to contact this office and advise whether she wished to pursue this matter and that if she did not respond by May 2, 2022, her appeal would be dismissed.

As of the date of this decision, the petitioner has not responded. Accordingly, the petition must be **DISMISSED** for failure to pursue a claim of action under N.J.A.C. 1:1-14.4.

ORDER

I **ORDER** that the petition be **DISMISSED.**

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

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

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

May 4, 2022
DATE

Kim C. Belin
KIM C. BELIN, ALJ

Date Received at Agency: May 4, 2022

Date Mailed to Parties: May 4, 2022

KCB/sm

122-22

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Pennsauken, Camden County,

Petitioner,

v.

Lovell Pugh-Bassett, Interim Executive County Superintendent, Board of Education of Haddon Township, Camden County, and A.A. on behalf of minor child, A.L.,

Respondents.

Synopsis

In this matter on remand, the Board of Education of the Township of Pennsauken (Pennsauken) appealed the determination of the respondents, Lovell Pugh-Bassett, Interim Executive County Superintendent (ECS), and the Haddon Township Board of Education (Haddon Township), that A.A. and her minor child are homeless. Pennsauken contended that A.A. and A.L. were domiciled in Pennsauken, as they had resided in the Pennsauken home of A.A.'s mother for more than eighteen months, and further argued that Pennsauken is therefore not financially responsible for tuition costs related to A.L.'s attendance in Haddon Township schools. In a Commissioner's decision issued on January 6, 2021, the Acting Commissioner determined that more information was necessary to determine whether the Pennsauken home of A.A.'s mother is fixed, regular and adequate such that A.L. is no longer homeless under state and federal law. Accordingly, the matter was remanded for further proceedings to determine this issue.

On remand, the ALJ found, *inter alia*, that: A.A. has been living in her mother's Pennsauken home with her daughter A.L. since 2017; A.A. is living there with A.L. and taking care of her mother who is disabled; the home is a fixed, regular, and adequate place to live with regular sleeping accommodations; A.A. and A.L. each have their own bedroom; A.A. and A.L. have access to all of the home's facilities, including the kitchen, bathroom, and living rooms; despite A.A.'s repeated insistence that the Pennsauken house is a temporary residence and she intends to return to Haddon Township, she has been living in the family home in since 2017. Accordingly, the ALJ concluded that A.A. and A.L. can no longer be considered homeless; that they have been domiciled in Pennsauken since 2018; that Pennsauken has no financial responsibility for A.L.'s attendance in Haddon Township schools; that A.L. should be placed in the Pennsauken Public School District, if A.A. so desires; and that the ECS's determination of homelessness should be reversed.

Upon review, the Commissioner concurred with the ALJ's determination that A.L. is no longer homeless as the Pennsauken home is a fixed, regular, and adequate residence which has become the family's permanent residence. The Commissioner ordered that Pennsauken is not responsible for A.L.'s education costs in Haddon Township, and A.L. shall be enrolled in Pennsauken schools for the 2022-2023 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.

122-22

OAL Dkt. No. EDU 00744-21
(EDU 16086-20 on remand)
Agency Dkt. No. 94-5/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Pennsauken, Camden County,

Petitioner,

v.

Lovell Pugh-Bassett, Interim Executive County Superintendent, Board of Education of Haddon Township, Camden County, and A.A., on behalf of minor child, A.L.,

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 respondent Interim Executive County Superintendent (ECS) Lovell Pugh-Bassett and respondent Haddon Township Board of Education (Haddon Township), and the reply thereto filed by petitioner Pennsauken Board of Education (Pennsauken). Respondent A.A. did not file exceptions or a reply.

A.A. and her minor child, A.L., resided in Haddon Township from 2012 through 2016, when they were evicted due to financial hardship. After temporarily living with a friend in Bellmawr, they moved into the home of A.A.'s mother home in Pennsauken in August or September of 2017. A.L. continued to attend school in Haddon Township. On March 28, 2019,

the ECS issued a determination that A.L. was homeless, as the family lost their apartment due to financial hardship and was residing with relatives out of necessity. Accordingly, the ECS found that Pennsauken was financially responsible for A.L.'s education, because A.L. had resided there for more than one year. Pennsauken filed an appeal challenging the homelessness determination, seeking for A.L. to be placed in Pennsauken's schools, if the family desired, and a finding that Pennsauken would not be financially responsible for A.L. to attend Haddon Township schools.

Following an Initial Decision finding that A.L. was not homeless, the Commissioner concluded that additional information was required and remanded the matter for further proceedings to determine whether the Pennsauken home was fixed, regular, and adequate, such that A.L. was no longer homeless. On remand, the ALJ found that the three individuals living in the home each have their own bedrooms and are not doubled up. Furthermore, A.A. and A.L. have access to all of the home's facilities, including the kitchen, bathroom, and living rooms. Accordingly, the ALJ concluded that the Pennsauken home is a fixed, regular, and adequate place to live and that A.L. can no longer be considered homeless.

In her exceptions, the ECS argues that A.A. and A.L. continue to be homeless. She notes that the family was evicted from their Haddon Township residence due to inability to pay rent, and that A.A. lacks the resources and ability – based on her level of income and prior felony convictions – to obtain employment that would allow her to sustain an independent residence, such that she is doubled up in Pennsauken out of necessity. The ECS also contends that A.A. intends to return to Haddon Township and is making an active effort to obtain an independent apartment but has been unsuccessful. According to the ECS, because the family has been living in Pennsauken for over one

year, they have established a domicile there, and Pennsauken should be responsible for the cost of A.L.'s education while A.L. continues to attend school in Haddon Township.

In its exceptions, Haddon Township argues that A.L. and A.A. are doubled up in Pennsauken, where they moved out of necessity. Haddon Township also contends that it has always been A.A.'s intention to move back to Haddon Township, so the Pennsauken home is not a permanent residence. Haddon Township contends that A.L. is domiciled in Pennsauken and that Pennsauken is therefore responsible for the costs of her education.

In reply, the Board argues that the ALJ's decision properly considered all of the evidence and should be adopted by the Commissioner. According to Pennsauken, the family is not doubled up, as A.A. and A.L. have their own bedrooms and unrestricted access to the entire home. Pennsauken also contends that A.A., her mother, and A.L. have become a cohesive family unit, such that the Pennsauken home has become fixed and regular. Pennsauken notes that A.A. was unable to produce any evidence of her efforts to move out of the Pennsauken home and argues that A.A.'s stated intent is insufficient to support a finding of homelessness.

Upon review, the Commissioner concurs with the ALJ's determination that A.L. is no longer homeless. Under the McKinney-Vento Act, homeless children are defined as "individuals who lack a fixed, regular and adequate nighttime residence," which includes "children sharing housing with other persons due to loss of their own housing, economic hardship, or a similar reason." 42 *U.S.C.A.* § 11434a. Similarly, under state law, homeless children are defined as "child[ren] or youth who lack[] a fixed, regular and adequate residence pursuant to *N.J.S.A.* 18A:7B-12 and *N.J.A.C.* 6A:17-2.2," which includes children living in the "residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own." *N.J.A.C.* 6A:17-1.2 and 2.2.

Thus, conducting a homelessness evaluation to determine whether a child's home is considered fixed, regular and adequate requires a fact-specific analysis and "cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality." *M. O'K. v. Board of Education of the Borough of Cresskill, et al*, Commissioner Decision No. 325-14, decided August 12, 2014 at 3, *aff'd*, A-0828-14T4 (App. Div., September 8, 2016). In conducting such a fact-specific inquiry, the Commissioner must consider the totality of the circumstances, as "[t]he reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant." *Ibid.*

The Commissioner has previously addressed the fact-specific nature of a homelessness inquiry. In *M. O'K., supra,* following the foreclosure of their home in Cresskill, the O'K family occupied the bottom floor of their relatives' house in Little Ferry, which consisted of one small bedroom and a common area, without a bathroom or kitchen. The parents and two of the children shared the bedroom, while their third child slept in the common area. At the time of the litigation, neither parent was employed, and the family's sole income consisted of Social Security Disability benefits. During the pendency of the litigation, the O'K family represented that they were actively searching for a house in Cresskill. The Commissioner found, and the Appellate Division affirmed, that the O'K family became homeless due to the foreclosure of their home in Cresskill, and although they had been deemed domiciled in Little Ferry as a result of their residence in the district for over one year, they continued to remain homeless due to their shared living conditions and the parents' economic hardship.

In contrast, in *State-Operated School District of the City of Camden, Camden County v. C. Ann Volk, Executive County Superintendent, New Jersey Department of Education, and E.H., on behalf of minor child, K.M.*, Commissioner Decision No. 172-17R, decided June 20, 2017, the family relocated from Voorhees to Camden due to economic hardship that prevented them from continuing their lease. In the Camden residence, the family was able to use the entire residence and was not relegated to a portion of the home that would otherwise be considered inadequate. E.H., the children's mother, argued that the residence was inadequate because the siblings had to share a room, which the Commissioner found was not uncommon. Furthermore, given E.H.'s ongoing employment at an annual salary of $65,000, the Commissioner was not persuaded that she was unable to find suitable housing in Voorhees, particularly in light of her testimony that she had stopped looking for apartments. The Commissioner found that the family was not residing in the Camden residence of out necessity and that it qualified as a "fixed, regular, and adequate" nighttime residence, such that the family was not homeless. *Ibid.*

Similar to *Volk*, in *J.G., on behalf of minor children, T.G. and C.G. v. Board of Education of the Township of Edison, et al,* Commissioner Decision No. 125-20, decided June 15, 2020, the G. family moved in with J.G.'s mother in Edison after being evicted from their home in Milltown. The family was able to use three of the four bedrooms, the kitchen, bathrooms, all common areas, and utilities in the Edison home. J.G. and his wife were both employed, with an income of $71,000 a year, but they did not pay rent or contribute to housing costs, other than food and a storage facility. While they stated that their intent was to move back to Milltown, there was no documentation of their search for a new home, and J.G. admitted that he had not

submitted a rental application in at least six months. The Commissioner found that, while J.G.'s intention may be to eventually move back to Milltown, the totality of the facts and circumstances demonstrate that the family is no longer homeless.

Homelessness, particularly in cases like the present matter, is best viewed in a continuum. *Volk, supra.* For instance, a family may move into a relative's home out of necessity and hardship, but over time, that home may become a regular residence.[1] *Ibid.* Here, the family's circumstances demonstrate that they all depend on each other in the manner of a traditional household unit, supporting the conclusion that A.A. and A.L.'s residence has become fixed in its current arrangement and location. In the Pennsauken home, A.A. acts as caregiver for her mother, who is disabled and who would need to hire help if A.A. did not assist with her activities of daily living. In turn, A.A. relies on her mother to pay for the family's living expenses. A.A. testified that if she moved out of the Pennsauken home, she would want to take her mother with her, demonstrating that the living arrangement of A.A., her mother, and A.L. residing in the same home has become fixed. Furthermore, there is no indication that the residence is inadequate. A.A. and A.L. enjoy the use of the entire Pennsauken home, including the kitchen, bathroom, and living rooms, and they each have their own bedroom. While A.A. indicated that she intends to return to Haddon Township, given that her mother would continue to live with her, that intention appears to be based solely on a preference for location

[1] For this reason, an ECS' determination that a child is homeless can be reasonable in light of the evidence she has at the time; however, such determination can be overturned based on evidence received during the course of the proceedings. *See Bd. of Educ. of the Borough of Hawthorne, Passaic Cty. v. Bd. of Educ. of the Borough of Prospect Park, Passaic Cty., and N.J. Dep't of Educ.,* Commissioner Decision No. 196-14, decided May 12, 2014. Here, the Commissioner finds that the ECS' determination that A.L. was homeless was reasonable based on the information she had at the time she made her decision, but that decision must nonetheless be overturned based on the evidence presented at hearing.

and not a need for additional space to avoid doubling up or to otherwise rectify any inadequacy in the Pennsauken home. Moreover, the ALJ found that there was no proof to support A.A.'s attempts to find housing in Haddon Township, and her stated intention is insufficient to support a finding of homelessness. Based on these facts, the Commissioner concludes that the Pennsauken home is a fixed, regular, and adequate residence, which has become the family's permanent residence, and A.L. is therefore no longer homeless.

Although the ALJ did not make a specific finding as to when A.L. was no longer homeless, the Commissioner finds that the Pennsauken home had become the family's permanent residence at the start of the 2018-2019 school year.[2]

Accordingly, the Commissioner orders that A.L. is no longer homeless and that Pennsauken is not responsible for the costs of her education in Haddon Township. A.L. shall be enrolled in the Pennsauken school district for the 2022-2023 school year.

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 16, 2022
Date of Mailing: June 20, 2022

[2] The family's relocation from October 2019 until April 2020 does not change this conclusion. At that time, A.A. was in jail and rehabilitation, and A.L. lived in Bellmawr, while A.A.'s mother had to leave her home to reside with A.A.'s brother in his home. However, the family was not homeless during this time. They had a permanent residence in the Pennsauken home, to which they intended to return once A.A. was released, and to which they did indeed return.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CORRECTED DECISION ON REMAND

OAL DKT. NO. EDU 00744-2021
AGENCY DKT. NO. 94-5/19
(On remand EDU 16086-2019)

BOARD OF EDUCATION, TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,

Petitioner,

v.

LOVELL PUGH-BASSETT, INTERIM EXECUTIVE COUNTY SUPERINTENDENT, BOARD OF EDUCATION HADDON TOWNSHIP, CAMDEN COUNTY AND A.A. ON BEHALF OF A.L.,

Respondents.

William C. Morlok, Esq., for petitioner, Board of Education, Township of Pennsuaken, (Parker McCay, P.C., attorneys)

Michael Stanton, Esq., for respondent, Haddon Township Board of Education (McCrosson and Stanton, P.C., attorneys)

Sadia Ahsanuddin, Deputy Attorney General, for respondent, Lovell Pugh-Bassett, Interim Executive County Superintendent, (Matthew J. Platkin Acting Attorney General of New Jersey, attorneys)

A.A., on behalf of A.L., respondent, pro se

Record Closed: February 28, 2022 Decided: March 24, 2022

BEFORE **CATHERINE A. TUOHY**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of the Township of Pennsauken (Pennsauken), challenges the homelessness determination by the county executive superintendent. Petitioner contends that A.A. and her minor child, A.L., are not homeless, but are domiciled in their school district, having lived with A.A.'s mother (and A.L.'s grandmother) in the township of Pennsauken for over one and a half years. At issue is whether A.A. and her minor child are homeless.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal by Pennsauken on May 6, 2019, (EDU 16086-2019.) The State's respondents; the New Jersey Department of Education (DOE) and Interim Executive County Superintendent, Lovell Pugh-Bassett (ECS or Dr. Pugh-Bassett) filed an answer on October 29, 2019. Respondent, Haddon Township Board of Education (Haddon Township), filed its answer on November 12, 2019. The matter was transmitted by the Department of Education Office of Controversies and Disputes to the Office of Administrative Law (OAL) as a contested matter where it was filed on November 13, 2019, pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. An initial telephone prehearing conference was conducted on January 9, 2020, and subsequent telephone conferences were conducted February 19, 2020, February 26, 2020, and March 11, 2020. A.A. did not appear for these conference calls. An initial hearing was scheduled for March 26, 2020, but was adjourned due to COVID-19. A follow-up telephone conference was conducted on June 12, 2020, at which time A.A. appeared and agreed to file an answer and provide discovery.

A.A., on behalf of her minor child A.L., filed an answer to the petition and provided answers to interrogatories and responses to requests to admit on July 6, 2020. A subsequent telephone conference was conducted on July 9, 2020, at which time all parties appeared. It was agreed that the matter was appropriate for summary decision as there were no material facts in dispute as evidenced by A.A.'s answer to the petition, answers to interrogatories and responses to requests to admit. Pennsauken filed a motion for summary decision dated July 14, 2020. The State respondents filed opposition to same and cross-moved for summary decision dated August 10, 2020. Pennsauken filed its reply and opposition to the cross-motion on August 17, 2020. There being no further submissions filed, the motion record closed on August 27, 2020.

An initial decision was rendered October 9, 2020, concluding that A.A. and A.L. are not homeless as they have resided at a fixed, regular and adequate place to live with regular sleeping accommodations for over twelve months in Pennsauken; that Pennsauken has no financial responsibility for A.L.'s attendance at Haddon Township schools; and A.L. should be placed in the Pennsauken Public School District, if A.A. so desires; and that the ECS' determination should be reversed.

Based on the foregoing, it was ordered that the motion for summary decision filed by Pennsauken was granted; the cross-motion for summary decision filed by the DOE and ECS was denied; and the March 28, 2019, determination by the ECS was reversed.

Exceptions to the initial decision were filed on behalf of the State respondents by letter brief, dated November 3, 2020. Pennsauken filed its reply to the State respondent's exceptions by letter brief, dated November 5, 2020. No exceptions were filed by respondent Haddon Township or respondent, A.A.

The acting commissioner of education, by final decision, dated January 6, 2021, denied Pennsauken's motion for summary decision and the ECS' cross motion for summary decision and remanded the matter to the OAL because she could not determine

from the present record whether the family is homeless and that further information was necessary to determine whether the home is fixed, regular and adequate such that A.L. is no longer homeless under state and federal law.

A telephone conference was conducted on March 4, 2021, at which time the parties were afforded time to conduct additional discovery in light of the commissioner's decision. Another telephone status conference was conducted on May 5, 2021, and a hearing date set for July 26, 2021. This hearing date was adjourned until August 23, 2021, with the consent of all the parties.

The hearing was conducted on August 23, 2021, via zoom audio/video technology, due to the continued suspension of in-person hearings at the OAL due to the COVID-19 pandemic. The record closed on February 28, 2022, following receipt of closing submissions from petitioner, the state respondents **and respondent, Haddon Township Board of Education**. No closing submissions were filed on behalf of respondent A.A.

FACTUAL DISCUSSIONS AND FINDINGS

Testimony

A.A. has one biological child, A.L. who is thirteen years old. She has also raised a twenty-three-year-old male, D.H.L. A.A. has a masters' degree in social work and worked in the social work field approximately ten years. She has been out of the field for ten years and last worked for Laurel Rehabilitation Agency that helped people with traumatic brain injury in approximately 2012 or 2013. She also worked for Ann Marie Sparks, another private agency that works with traumatic brain injuries. She worked there for approximately one year in 2014 as a case manager. To prepare for the hearing she spoke with the DAG about what would happen at the hearing. She was told to be honest but did not review any testimony with her. A.A. has received the Pennsauken exhibit binder. The back of the exhibit book has a picture of her mother's house, which is the white house on the right in the photograph. (Pennsauken Exhibit 2.) This is the house

she grew up in and has been residing in at Hillcrest Ave, Pennsauken. J-1 is her handwritten answer that she provided. A.A. has lived in the Pennsauken home until the time she was twenty-one and left and then returned there when she was thirty-nine. She is forty-three now. The Pennsauken home has three bedrooms, a bathroom, a kitchen, electricity, running water, a refrigerator, oven, and stove top. J-1 is A.A.'s handwritten answer to the petition.

The Pennsauken home has three bedrooms. In November 2016, her father passed away and she moved back to the Pennsauken house at the very end of 2016, or the beginning of 2017. In 2017, her mother had her own bedroom. No one was in her father's bedroom. A.A.'s daughter, A.L. and D.H.L. shared the third bedroom. At the present time, everyone has their own room. The third bedroom is occupied by her daughter, A.L. A.A. has her father's bedroom and her mother still has her own room. When A.A. had to leave in 2019, D.H.L. left the Pennsauken home permanently.

They are currently living in her mother's home. A.A. is not paying any rent because she cannot afford it. She does not contribute to any of the household bills. She has not bought food for the home on a regular basis. She might have on occasion brought in lunchmeat. She had been receiving food stamps but lost those benefits. Before her father passed away, he was caring for her mother, but he could not do much as he also was sick. A.A. currently helps her mother with shopping, showering, laundry, and all activities of daily living, as her mother is unable to live by herself. When A.A. was incarcerated and then in rehab for a time, her brother Art. A. took care of their mother at his house in Cinnaminson. Unless someone is with the grandmother, she is unable to live by herself. A.A. has been in the Pennsauken home for approximately four years aside from the time she was incarcerated and then in rehab.

In her answers to interrogatories, A.A. wrote in her handwriting that she has lived in the Pennsauken home from 2016 to the present. (J-2.) She is currently employed by Forman Mills and has also worked part-time delivering pizzas and at a campground. (J-4.) She was employed by Traitalia before she went away. A.A. has not provided any

documents in this case. She did not produce any rental applications or housing assistance applications. Everything was oral and she did not know to save anything even though there had been conference calls in this case since 2019. She is claiming she wanted to find a home in Haddon Township but did not save anything regarding her attempts to do so even though she knew this was matter was going to a hearing.

A.A. completed McKinney-Vento homeless paperwork in both Haddon Township and Pennsauken Township. (J-8–J-15.) Any time she did, she was asked if she needed McKinney-Vento assistance for A.L., such as transportation, tutoring, and counselling services. A.A. indicated that she was not in need of those services. When she went to Pennsauken to fill out their McKinney-Vento paperwork she was in contact with Mr. Fitzpatrick, who worked at A.L.'s school, Strawbridge Elementary School. He had advised A.A. not to fill out the Pennsauken paperwork. A.A. had met with Ms. Elliott, the homeless liaison for Pennsauken. Ms. Elliott extended an offer for A.L. to attend school in Pennsauken. A.A.'s goal was to continue A.L. at her same school, Strawbridge Elementary in Haddon Township. In the Haddon Township Homeless Students Parent Consultation and Educational Placement form, A.A. wrote in her own handwriting "I want A.L. to attend Strawbridge Elementary again!!!" (J-13, page DOE 036.)

Dr. Pugh- Bassett reviewed the situation to determine if she was homeless. (J-16, page DOE 039.) A.A. did not speak with anyone from Dr. Pugh Bassett's office. She did not provide any paperwork to Dr. Pugh-Bassett describing the living arrangements at the Pennsauken home. The only paperwork A.A. has submitted is the discovery that was requested.

In early 2017, A.A. moved into the Pennsauken home because she was evicted from her Haddon Crossings apartment for non-payment of rent. Her father passed away and he had been assisting her with the rent when she was residing in Haddon Township. After she was evicted, she was not able to rent another apartment because she could not afford it. She was working that summer at a campground and odd jobs cleaning to make some money. She did not have sufficient income to pay rent or utilities. After being

evicted from their Haddon Township residence, they resided for a couple of months in Belmar with A.A.'s fiancé's mother. A.A.'s family did not want to see her and her family on the street. She does not remember the exact date she moved into the Pennsauken home, but it was around the beginning of 2017. She did not have a bedroom when she first moved into Pennsauken home, she did not have a bedroom until she came back from rehab. A.L. got her own bedroom when her son moved out when she went away. A.A. stated that her mother stays in the living room a lot and her and A.L. stay upstairs. A.A.'s mother pays for everything because A.A. cannot afford to pay. Whatever A.A. makes goes towards A.L.'s needs such as clothes. A.A. makes twelve dollars per hour at Forman Mills and works twenty-five hours per week and she is paid bi-weekly.

A.A. is a recovering drug addict. She has two felony charges and was sent to jail October 15, 2019, for a month before going into an in- patient facility for two months and then a half-way house. She was discharged April 10, 2020. A.L. was in Belmar during this time. A.A.'s mother went to live with her son, A.A.'s brother, at his home. Her brother got the Pennsauken house ready for them and then they all came back to Pennsauken in mid-April 2020. In September 2020, A.A. got a job at Forman Mills. She had no job for five months between the time of her discharge in April 2020 and September 2020. She did not save any of her job applications. The obstacles she faced in obtaining employment were her two felony convictions for theft by deception and unlawful taking. She believed the only reason she got a job with Forman Mills is that they did not do a background check.

A.A. receives Medicaid. If her mother passed away, they would have no home. School is important to A.A. because it is the only stable thing in her daughter's life. She was looking for another place in Haddon Township but did not save any paperwork regarding her attempts to find an apartment in Haddon Township. She looked on-line, but she did not have any money. She cannot even get a loan. She has incurred debts

from her drug addiction in the amount of $80,000 including her student loans. She does not pay anything towards her debts and only pays for what A.L. needs.

Her ultimate plans are that she has another year left of drug court and then after two years she can start applying for social work jobs. In the meantime, she will stay at Forman Mills and climb the ladder. Her ultimate goal is to move out of her mother's home, but she has no money.

A.A. answered interrogatories indicating that her current address is the Hillcrest Ave., Pennsauken address where she resides with her mother and A.L. She indicated that she does not intend to live there permanently but wants to get her own place with A.L. and possibly take her mother with her. (J-2, #5.) In A.A.'s answers to requests for admissions, she indicated that she does not intend to permanently reside at the Pennsauken address. (J-3, #8.) A.A. indicated that "we don't like living in Pennsauken at all, but we are stuck here for now." (J-4, #7.)

A.A. has consistently stated that Pennsauken is a temporary residence, and she is living in Pennsauken as a necessity.

A.A.'s mother does not pay A.A. to take care of her. A.A.'s ultimate goal is to move back into Haddon Township. She would like to take her mother with her because her mother would have to be cared for by either her or her brother or health insurance. Her brother and his family took care of her mother when she was in jail.

A.A. noted that she was not in need of any McKinney-Vento services but if things changed, and she did she would contact them. (J-5, page DOE 019, question 4.) A.A. has never requested McKinney-Vento services in the last four years because she did not want to cause any trouble. A.A. and her daughter each have their own bedroom and they

have access to all parts of the house and all of the facilities including the kitchen, bathroom, and living room.

Rochelle Marie Meyers Elliott (Ms. Elliott) testified on behalf of Pennsauken. She was the homeless liaison for the district and is familiar with A.A. who came in and filled out McKinney-Vento paperwork. Ms. Elliott is currently the residency secretary for the school district. J-14 and J-15 are the papers that A.A. filled out when she came to the Pennsauken District. J-14 and J-15 were completed by A.A. in her handwriting. J-8, is the in-house summary form which Ms. Elliott completed after her interview with A.A. When Ms. Elliott gave A.A. enrollment paperwork to fill out, A.A. telephoned the homeless liaison from Haddon Township School District. Ms. Elliott made the determination that A.A. was not homeless based on the interview. It was determined that she was living back in her childhood home and was not planning on leaving anytime soon as they were taking care of mom. Ms. Elliott did not feel that A.A. was "doubled up" and the home seemed adequate with the appropriate number of bedrooms and sleeping arrangements. Ms. Elliott's determination is what lead to this matter being brought before the Executive County Superintendent, Ms. Pugh-Bassett. Ms. Elliott offered A.A. McKinney-Vento services which included resources such as transportation services, medical care, eyeglasses, those things would be provided. A.A. said she was not in need of any services and if she was, she would be in contact with them. (J-14.) To date, A.A. has not contacted Pennsauken for any McKinney-Vento services.

Ms. Elliott did not feel A.A. was homeless because she considered how many rooms were in the home, how many people in the home, are they sleeping on the floor or the couch and in speaking with A.A. there were adequate sleeping arrangements. A.A. was evicted because her father had passed away and he had paid half of her rent, so she had to go back to her home and after being there a year she was considered domiciled in Pennsauken. Ms. Elliott did not consider her resources because they were considering the sleeping arrangements. A.A.'s intentions were to go back to Haddon Township which

had been her intentions for many years, but her mother became ill and then she remained to take care of her mother.

The factors Ms. Elliott considered were the number of bedrooms and the sleeping arrangements. A.A. was evicted because her father had passed away and he was paying the rent. A.A. had been in Pennsauken for one year and then became domiciled in the district. Ms. Elliott would not consider A.A.'s resources because she is considering the sleeping arrangements. She did consider the intentions of A.A. that she wanted to return to Haddon Township, but her mother became ill and then she was there taking care of the mother in Pennsauken.

Dr. Lovell Pugh-Bassett recently became employed by Camden County College as the vice president of Institutional Effectiveness and Advancement. She has been in this position for two weeks. Prior thereto, she was the executive county superintendent of schools for Camden County and served as the liaison for the DOE and the local school districts. They provide technical assistance to school districts and various other supports to school districts including compliance issues. Her homeless liaison was Arenda Kelly who did most of the day-to-day work. Dr. Pugh Bassett does not usually get involved with a homelessness determination unless it rises to the level of requiring some type of mitigation with the school district. When Ms. Kelly is having difficulty working out a response to a dispute, she and Dr. Pugh-Bassett would review the regulation, discuss the case, and sometimes reach out to internal legal counsel for assistance.

The factors they take into account in making a determination of homelessness include looking strictly at the circumstances that caused the homelessness in the first place, either an eviction or a fire, and that as a result of those circumstances whether they are living in their current arrangement out of necessity. They do not look at the "soft" issues as to the nature of the living arrangements such as the makeup of the house, how many bedrooms there are in the house or the sleeping arrangements or whether there

are pictures on the wall or are they living with a family member. They are not given authority to consider those factors.

To determine which district is responsible to pay the tuition for a homeless student, they follow the domicile rule. The domicile rule is that the district where the child has been living for a year becomes the district of domicile and responsible for the education and transportation of the child. Depending on what the parent desires, the parent can enroll the child in that district, or the domicile district becomes responsible to pay for the child's attendance at their original school of enrollment before they became homeless.

In 2019, ECS, Dr. Pugh Bassett through her homeless liaison, Ms. Kelly, was asked to render a homeless determination regarding student A.L. The only information they had was the documentation that they had received that A.A. had submitted to Haddon Township. Haddon Township had reached out to Ms. Kelly about the question of A.A.'s being homeless and had submitted paperwork from their homeless liaison. (J-14.) Ms. Pugh-Bassett's office had also received paperwork from Pennsauken's homeless liaison in- take process (J-8), as well as various emails. The Gloucester County Special Services School District McKinney-Vento Regional Education Program form provides services for homeless students. (J-15.) She recalls reviewing the intake forms regarding homelessness including J-8, J-14 and J-15. From a review of these documents, Dr. Pugh-Bassett learned that A.A. indicated that they had been evicted from their home in Haddon Township and was living with her mother in Pennsauken out of necessity. A.A. indicated that she was doubling-up with family. (J-14.)

Dr. Pugh-Bassett made a determination that A.A. was homeless. A.A. was evicted and deemed homeless and they were living with A.A.'s mother out of necessity. Therefore, Pennsauken would be responsible for A.L.'s attending Haddon Township schools. By letter, dated March 28, 2019, to the Pennsauken School District, Dr. Pugh-Bassett stated that A.L. is McKinney-Vento eligible and Pennsauken is fiscally responsible for the student based on the fact that the family lost their apartment due to financial hardship and that the family is residing with friends/relatives out of necessity.

(J-16.) They also offered the opportunity to appeal and if any further questions to contact them.

When she looked at this case, she was not aware A.A. was providing care to her mother. She heard A.A. testify at this hearing. A.A.'s father passed away in November 2016 and A.A. moved into her mother's home to take care of her. They do not look into the circumstances of the living arrangements, only the paperwork submitted. They have not spoken to A.A. or reached out to her for more information. The DOE has not advised them to reach out to the family. They do not inquire as to the living arrangement or 'soft' indicators as a compliance agency, like the number of bedrooms. They do not have the authority to look into these factors or a template to consider these factors or the resources to investigate these factors. Although the statute requires that the home be fixed, regular and adequate, the DOE does not make those subjective determinations. The primary focus of the DOE is on the continuity of education. Since the DOE does not look at soft indicators, they would not know if the homeless family were in a small apartment or in a mansion. They do not determine how homeless they are, just whether they are homeless. When Dr. Pugh-Bassett wrote her determination of homelessness letter (J-16), she was not aware of any of these "soft" indicators.

Arenda Kelly- Fleming is employed by the NJDOE Camden County Office of Education as an education planning specialist and has been since 2009. Under the direction of the executive county superintendent, they provide technical assistance and are responsible for ensuring that the forty-four public and charter schools in the county are compliant with state and federal regulations. She also has responsibilities for making homelessness determinations. If a district or parent calls their offices and needs information about McKinney-Vento Eligibility, they will provide guidance and resources if there is a dispute and they will determine if a student is McKinney-Vento eligible. To arrive at a homelessness determination, they would review all of the information provided to their office and see if they require more information and then she will take the information into the county executive superintendent to meet and review the information. They look at what the family situation is, whether they are displaced from their home, any

economic hardship and what type of living arrangement they are in. The district of origin for the first year pays for the tuition and transportation of the homeless student. After the first year, the district where the homeless student is residing is then responsible for payment of tuition and transportation cost to still attend the district of origin.

In 2019, she received an inquiry regarding student A.L. The parent sent in a letter and the school district was having trouble contacting the parent and they wished help from their office. They had the McKinney-Vento forms, the district's form the parents fill out and a letter form the parent. The basics of the case were that they were displaced from their home and moved in with a relative. The executive superintendent had enough information to make a decision that they were still McKinney-Vento eligible.

Anthony Joseph Fitzpatrick is currently employed by Delsea Regional and Elk Township School District since August 18, 2021. Prior to that time, he was employed by the Haddon Township School District February 3, 2017, until August 18, 2021. He was the district supervisor of instruction from June 3, 2017, until June 30, 2019, and then an elementary school principal from July 1, 2019, until August 17, 2021. As supervisor of instruction he was the McKinney-Vento liaison as well as the district residency coordinator. His responsibilities included advocating for their homeless families who were experiencing various educational needs, transportation needs, and free lunches. He would try to provide basic material needs for their homeless families.

He is familiar with A.A. through the annual check on the families to see if they are still experiencing homelessness. He made the determination that they were still McKinney-Vento eligible in the summer of 2017, which was the first determination he made before the beginning of the 2017-2018 school year. After one year, Pennsauken became the district of domicile, but Haddon remained the district of enrollment. J-9 was the letter he sent to Pennsauken to inform them that the family was legally domiciled in their district for one year and at that point the responsibility to educate the child became the district responsible financially to pay for their education and bill them for tuition. They did in fact bill Pennsauken, but the bill did not get paid to his knowledge. Pennsauken

conducted a residency investigation and made a determination that the child was not homeless.

In December 2018, he recalled a telephone call with A.A. who was at the registrar's office in Pennsauken and Pennsauken was trying to get her to enroll the child in Pennsauken. The enrollment record should stay with Haddon Township if she was McKinney-Vento eligible. He believes he did speak to someone from Pennsauken who he believed he advised that the child was not supposed to be enrolled in Pennsauken but remain enrolled in Haddon Township, as long as they continued being doubled up out of necessity. He investigated and met the child's mother and asked questions regarding employment, the reason they went homeless to assess stability of living situation and the intention to move back to Haddon Township. After the investigation he determined the child was still doubled up out of necessity and was still McKinney-Vento eligible. This occurred in the fall of 2018, after the school year started and before the phone call in December and was around the same time as the formal appeal was filed with the County office. After the phone call of December 2018, he had no further contact with A.A. or Pennsauken. Haddon Township was responsible for 2017-2018 school year but from that point on it would be the responsibility of the Pennsauken School District.

He made two determinations in the summer and then in meeting with mom in the fall of 2018 after Pennsauken said they were not homeless. He did not do any reviews after 2018 since he was no longer the person who handled these matters. In the fall of 2018, Pennsauken's investigation revealed that A.A. was in the Pennsauken home caring for her mother in her mother's home. That was not something that was part of his assessment.

Discussion

Although A.A. has repeatedly maintained that the Pennsauken residence is only temporary and her intent is to move back to Haddon Township, she has not offered any proof indicating either her efforts to locate and obtain housing in Haddon Township or of

seeking suitable full-time employment within the field of her masters' degree such that she could afford an apartment of her own. There was no documentary evidence submitted as to A.A.'s financial situation. A.A. is residing in her family home with her daughter A.L. and is taking care of her disabled mother. They are not doubled up as they are three people living in a single family three-bedroom home, each with their own bedroom. The Pennsauken home where she grew up in and is now residing with her daughter and caring for her mother is an adequate, regular, and fixed residence with suitable sleeping arrangements. No evidence has been offered by any party to the contrary.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, I **FIND** the following as **FACT**:

Respondent, A.A., and her minor child A.L., resided in Haddon Township from 2012 through 2016. Due to financial hardship, A.A. was evicted from her Haddon Township residence in 2016 and she and her daughter moved in temporarily with a friend in Bellmawr. In August or September 2017, A.A. and her daughter moved in with A.A.'s mother in her Pennsauken home and continue to reside there. At all times relevant herein, A.L. has attended school at Strawbridge Elementary in Haddon Township.

On September 13, 2017, A.A. completed a Haddon Township Homeless Students Parent Consultation and Educational Placement form indicating that the Pennsauken address was a temporary address and that her last district of residence was the Haddon Township address and her previous school attended was Strawbridge Elementary in Haddon Township. A.A. indicated on the form that her goal was to move back to Haddon Township so A.L. could finish out elementary school at Strawbridge Elementary. (J-11.) A.A. also filled out a McKinney-Vento Education Program registration form, dated September 13, 2017, but noted that she did not need any of those services, but if things changed, she would contact them. (J-12.)

On July 31, 2018, A.A. completed another Haddon Township Homeless Students Parent Consultation and Educational Placement form indicating that the Pennsauken address was still a temporary residence, and her last district of residence was in Haddon Township. She indicated that she wanted A.L. to attend Strawbridge Elementary again. (J-13.)

By letter, dated August 2, 2018, Anthony Fitzpatrick, Haddon Township supervisor of instruction wrote to Mitzi Giletto, the Pennsauken homeless education liaison and advised that A.L. will become a legal resident of Pennsauken on September 1, 2018, after one full year of being categorized as being homeless, based on the Egg Harbor v. Mainland decision that established that a homeless family is considered to be legally domiciled in a school district after being in that district for a year. (J-9.)

On December 17, 2018, A.A. met with the homeless liaison for Pennsauken, Rochelle Elliott, who completed a Pennsauken School District Family in Transition form – Family Information interview with A.A. The form indicated that the last school attended was Strawbridge Elementary and her last permanent address was her Haddon Township address. The handwritten notes on the form indicate that "Mom is back in her childhood home." Under the "Reason for being homeless" section of the form, there is a handwritten note "Father passed who was paying half of the rent which resulted in her being evicted. Since his passing her mom has become handicapped. She is the caregiver @ this time. She wants her dgt to complete Strawbridge." (J-8.)

A.A. also completed a Pennsauken School District Student Residency affidavit as to Homeless Status, dated December 17, 2018, and indicated that her current Pennsauken address was a temporary living arrangement due to loss of housing or economic hardship. A.A. indicated on the form that her last permanent address was the Haddon Township address and where the form indicated "Student's Present Living Situation", A.A. checked off "Doubling-Up with more than one family in a house or apartment for economic hardship/similar reason." A.A. indicated on the form that it was her wish that her child return to her previous school, Strawbridge Elementary in Haddon Township. (J-14.)

Also, during the meeting of December 17, 2018, A.A. completed another McKinney-Vento Regional Education Program intake form but wrote on the form that A.L. was in no need of additional services, but if anything changed, she would notify the Pennsauken liaison. (J-15.)

Rochelle Marie Meyers Elliott, the Pennsauken homeless liaison interviewed A.A. after A.A. completed paperwork when she came to the Pennsauken district. (J-14 and J-15.) Ms. Elliott prepared the in-house summary form. (J-8.) Ms. Elliott made the determination that A.A. was not homeless based on her interview. It was determined that A.A. was back living in her childhood home and was not planning on leaving anytime soon as she was taking care of her mother. Ms. Elliott did not feel that A.A. was 'doubled up' as the home seemed adequate with the appropriate number of bedrooms and sleeping arrangements. She would not consider A.A.'s resources because they were considering the sleeping arrangements. She did consider the intentions of A.A. that she wanted to return to Haddon Township, but her mother became ill and then she was there taking care of her mother in the Pennsauken home. Ms. Elliott's determination that the family was not homeless is what brought this matter before the ECS.

By letter, dated March 28, 2019, respondent ECS Pugh-Bassett, advised the Pennsauken superintendent that the DOE Camden County Office of Education had been contacted by A.A. to make a McKinney-Vento eligibility determination for A.L. Based on the criteria outlined at N.J.A.C. 6A:17-2.2, the county office determined that A.L. is McKinney-Vento eligible and that Pennsauken is fiscally responsible for the student based on the fact that the family lost their apartment due to financial hardship and that the family is residing with friends/relatives out-of-necessity. (J-16.)

ECS Pugh-Bassett did not take into consideration the adequacy of the living arrangements of the family when making her homeless determination. She did not consider how many bedrooms are in the house, the sleeping arrangements or whether they were in a small apartment or a mansion. These were "soft" factors that she does not consider. She

also did not know that A.A. was residing in her family home and taking care of her mother. The ECS strictly looks at the circumstances that caused the homelessness in the first place and whether they are living in their current arrangement out of necessity.

A.A. had previously lived in the Pennsauken home for over fifteen years of her life, as it was her family home. The Pennsauken home has three-bedrooms; a bathroom; a kitchen with a refrigerator, oven and stove top, running water, electricity and a television.

A.A. is living in the Pennsauken home with her daughter A.L. and taking care of her mother who is disabled. A.A. assists her mother with all of her activities of daily living.

A.A. has a master's degree in social work but is a recovering drug addict with two felony convictions. She went to jail October 15, 2019, for a month before going into an inpatient facility and then a half-way house until her discharge April 10, 2020. During this time, her mother moved in with her brother and A.L. was in Bellmawr. When A.A. was discharged, she returned back to her Pennsauken family home with her mother and A.L. where they continue to reside.

A.A., her mother, and A.L. are the only three people residing in the home and they each have their own bedroom. A.A. and A.L. have access to all parts of the house and all of the facilities. A.A. does not pay her mother rent or reimburse her for any household expenses.

A.A. has had various part time jobs and is currently working at Forman Mills, twenty-five hours per week and makes twelve dollars per hour. Whatever A.A. makes goes toward A.L.'s needs. There has been no documentation submitted as to A.A.'s financial status or employment searches or applications.

A.A. has not produced any rental applications, housing assistance applications, or any documents in furtherance of her claim that it was her intent to find a home in Haddon Township.

LEGAL ANALYSIS AND CONCLUSION

Although N.J.S.A. Const., Art. 8, section 4, paragraph 1 provides that free public education is a fundamental right under the New Jersey Constitution, it is well known that parents may not simply choose the school district that they wish their children to attend: the general rule is that school districts are responsible for providing a free education to children "domiciled" within the school district. N.J.S.A. 18A:38-1(a) states that public schools shall be free to any person over five and under twenty years of age who is domiciled within the school district. "A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district." N.J.A.C. 6A:22-3.1(a)(1).

Under the McKinney-Vento Homeless Education Assistance Improvement Act of 2001, 42 U.S.C.A. § 11431 et seq., state educational agencies must ensure that each homeless child and youth has equal access to the same public education as every other child and youth.

The protections offered to homeless students and their parents under the federal McKinney-Vento Act and New Jersey's corresponding state law represent an exception to otherwise applicable residency rules. In contrast to the basic premise that students must change schools when they leave a school district, the laws protecting homeless students generally allow parents the choice to keep their children enrolled in their original school district if the parents relocate to another school district as the result of being homeless. N.J.S.A. 18A:38-1(f); N.J.A.C. 6A:22-3.2(d). The district of residence for children whose parents 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(c).

Under the federal McKinney-Vento Act and New Jersey's corresponding law, the term "homeless" refers to individuals who lack a fixed, regular, and adequate residence. Federal law refers to the lack of an adequate "nighttime" residence. 42 U.S.C. Sec.11434a (referring to 42 U.S.C.A. Sec.11302(a)(1)); N.J.S.A. 18A:7B-12(c); N.J.A.C. 6A17-1.2.

N.J.A.C. 6A:17-2.2 states that:

> (a) A district board of education shall determine that a child is homeless for purposes of this subchapter when he or she resides in any of the following:
>
> 1. A publicly or privately operated shelter designed to provide temporary living accommodations, including:
>
> i. Hotels or motels;
> ii. Congregate shelters, including domestic violence and runaway shelters;
> iii. Transitional housing; and
> iv. Homes for adolescent mothers;
>
> 2. A public or private place not designated for or ordinarily used as a regular sleeping accommodation, including:
>
> i. Cars or other vehicles including mobile homes;
> ii. Tents or other temporary shelters;
> iii. Parks;
> iv. Abandoned buildings;
> v. Bus or train stations; or
> vi. Temporary shelters provided to migrant workers and their children on farm sites;
>
> 3. The residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own;

> 4. Substandard housing; or
>
> 5. Any temporary location wherein children and youth are awaiting foster care placement.
>
> [N.J.A.C. 6A:17-2.2.]

This subchapter and subsection, however, must be read, in conjunction with 42 U.S.C.A. § 11302(a)(1), which defines "homeless" for the McKinney-Vento Act, and N.J.S.A. 18A:7B-12(c), which defines "homeless" for school-funding purposes. Under the former, "homeless" means lacking "a fixed, regular, and adequate nighttime residence." Under the latter, "homeless" means temporarily lacking "a fixed, regular and adequate residence." Thus, both definitions have at their core the concept of a fixed, regular, and adequate place to live with regular sleeping accommodations.

This shared concept is not a coincidence, as the New Jersey regulatory scheme, looks to the federal regulatory scheme for its definition of terms. See N.J.A.C. 6A:17-2.1 ("Nothing in this subchapter shall limit the educational rights of homeless children and youth or school district responsibilities under Subtitle VII-B of the Stewart B. McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.".))

Financial responsibility of the district of residence terminates when the family is deemed "domiciled" in another district, which occurs when the family has lived in another district for a full year or longer. At this time, financial responsibility shifts to the school district in which the student now resides. N.J.S.A. 18A:38-1(d) 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 domiciled within the district for the purposes of this section.

Haddon Township, as the district of residence, was responsible for A.L.'s tuition when she first became homeless, and she continued to go to school there throughout the 2017-2018 school year. After residing in Pennsauken for more than one year, A.A. and A.L. were deemed domiciled in Pennsauken pursuant to N.J.S.A. 18A:38-1(d) and financial responsibility shifted to Pennsauken. Pennsauken welcomes A.L. to enroll in school in their district but disputes the fact that she is homeless and therefore entitled to continue in Haddon Township at Pennsauken's expense. Respondents argue that A.A. and A.L. remain homeless and A.L. is entitled to continue school in Haddon Township at Pennsauken's expense since Pennsauken is now the district of domicile. Respondents argue that A.A. is living with her mother out of necessity since she lacks the financial ability to obtain an apartment of her own. Respondents do not address the fact that the Pennsauken home is a fixed, regular, and adequate place to live which is the focus of a homelessness determination. Petitioner submits that A.A. and A.L. are living in A.A.'s family home and taking care of her disabled mother. The Pennsauken home has three bedrooms, a living room, a kitchen, bathroom facilities, heat, and electricity. A.A. and her daughter each have their own bedroom and have the use of all household facilities. They have resided in the Pennsauken home continually since 2017 (aside from when A.A. was incarcerated) until the present time, which indicates that this residence is fixed and regular as well as adequate.

The ECS' determination that A.L. is McKinney-Vento eligible and that Pennsauken is fiscally responsible for the student was based on the fact that the family lost their apartment due to financial hardship and that the family is residing with friends/relatives out-of-necessity. There was no other analysis undertaken with regards to homelessness. It does not appear that any consideration was given to the fact that A.A. is currently residing in her family home and is the caregiver to her disabled mother. The ECS admitted that they do not consider "soft" factors such as the adequacy of the Pennsauken home or the length of time A.A. has lived there.

The determination of whether a student is considered "homeless", triggering the protections for homeless students available under the law, is fact sensitive. In M. O'K.

and S. O'K., A. O'K. and C. O'K. v. Bd. Of Educ. of the Borough of Cresskill and Bd. Of Educ. of the Borough of Little Ferry, OAL No. 14830-13, Agency No. 214-9/13 (N.J. Comm'r of Educ. Aug. 12, 2014); aff'd, 2016 WL, 4699166 (N.J. Sup. Ct. App. Div. Sept. 8, 2016, the school district argued that the students who lived with their parents in the grandparents' home were no longer "homeless" where they had lived there for over a year. The family prevailed in their argument that they were still "homeless" in part because five people occupied the bottom floor of the house which had no shower, sink or kitchen. This was found to be less than a regular and adequate nighttime residence. This is distinguishable from the facts in this case as A.A. and A.L. each have their own bedroom and full access to all of the household facilities.

More recently, an administrative law judge (ALJ) wrote that "homelessness is best viewed in a continuum." State-Operated Sch. Dist. of Camden v. Volk, EDU 4521-16, Initial Decision (March 22, 2017), modified, Comm'r (June 20, 2017), at *11, http://njlaw.rutgers.edu/collections/oal/. In that case, the ALJ thoroughly examined whether a family in a borderline situation was homeless and considered the totality of the circumstances. Among the factors the ALJ considered were intent, fixed location, regular use, and adequacy. The ALJ determined that the family intended to stay in their current living situation because they stopped looking for another place to live; that the location was fixed and that the use was regular because the family had lived in the same place for several years; and that their living situation was adequate because the children had a designated sleeping area and access to a kitchen and bathroom facilities, despite the sharing of rooms and limited space. To the extent that homeless status is identified as one without a "fixed, regular and adequate" living place, given the very lengthy period of residence, the adequacy of the living place and the regularity of occupation, the ALJ found that the child did live in a "fixed, regular, and adequate residence" and concluded that she was not homeless. See also L.C. on behalf of her Minor Child B.C. v. Bd of Educ. of the Twp. of Branchburg, Somerset County, 96 N.J.A.R. 2d(EDU)1003 (Commissioner found that "while her living arrangements with her brother [in his apartment] may not be permanent in the sense that she may wish to eventually return to Branchburg, the

evidence shows them to have become sufficiently fixed, regular, and adequate so as to preclude a finding of homelessness.")

Similar to Volk, in J.G., on behalf of minor children, T.G. and C.G. v. Board of education of the Township of Edison, et al, Commissioner's Decision No. 125-20, decided June 15, 2020, the G. family was evicted from their home in Milltown and moved in with J.G.'s mother in Edison. The family had the use of three of the four bedrooms, the kitchen, bathrooms, all common areas and utilities in the Edison home. Although both J.G. and his wife were employed, with an income of $71,000 a year, they did not pay rent or contribute to the housing costs, other than food and a storage facility. While they stated that their intent was to move back to Milltown, there was no documentation of their search for a new home. J.G. admitted that he had not submitted a rental application in at least six months. The Commissioner found that while J.G.'s intentions may be to eventually move back to Milltown, the totality of the facts and circumstances demonstrated that the family was no longer homeless.

The ECS' determination that A.L. is McKinney-Vento eligible and that Pennsauken is fiscally responsible for the student was based on the fact that the family lost their apartment due to financial hardship and that the family is residing with friends/relatives out-of-necessity. There was no other analysis undertaken with regards to homelessness. It does not appear that any consideration was given to the fact that A.A. is currently residing in her family home and is the caregiver to her disabled mother. The ECS did not undertake the fact sensitive inquiry as to the adequacy of the Pennsauken home or the length of time A.A. has lived there.

A.A. has been living in her mother's Pennsauken home with her daughter A.L. since 2017. The Pennsauken home is A.A.'s family home and she had previously resided there for fifteen years. A.A. is currently living there with A.L. and taking care of her mother who is disabled. The home is a fixed, regular, and adequate place to live with regular sleeping accommodations. A.A. and A.L. each have their own bedroom. Although A.A. has repeatedly indicated this is a temporary residence and she intends to return to Haddon Township, she has been living in her family home in Pennsauken since 2017.

A.A. has offered no proofs to support her attempts to find housing in Haddon Township. Although A.A. may say she does not intend for Pennsauken to be her permanent residence, she has resigned herself to living in Pennsauken for the time being because of her financial situation and the fact that she is taking care of her mother. Even after A.A. was forced to temporarily leave her Pennsauken home when she was in jail and then rehab, the Pennsauken home is the home they all returned to when A.A. was discharged in April 2020. Even if initially, she was considered homeless after being evicted from her Haddon Township apartment in 2016, she has resided in Pennsauken for more than one year in a fixed, regular, and adequate home and can no longer be considered homeless as both the federal and New Jersey definitions of homelessness, have at its core, the lack of a fixed, regular, and adequate nighttime residence. The Pennsauken home has three bedrooms and the three individuals residing there, A.A., A.A.'s mother, and A.L. each have their own bedroom. There is no "doubling up" as A.A. and A.L. live in the Pennsauken home with A.A.'s mother/A.L.'s grandmother. They have access to all of the homes' facilities including the kitchen, bathroom and living rooms unlike the family of five in M.O'K. who occupied the bottom floor of a house with no shower, sink, or kitchen. The Pennsauken home is a fixed, regular, and adequate place to live with adequate sleeping accommodations.

While A.A..'s intentions may be to eventually move back to Haddon Township, A.A. has not produced any rental applications, housing assistance applications, or any documents in furtherance of her claim that it was her intent to find a home in Haddon township.

The totality of the facts and circumstances demonstrate that A.A. and A.L. are no longer homeless.

For the reasons stated, I **CONCLUDE** that A.A. and A.L. are not homeless and that they have been domiciled in Pennsauken since September 2018; that Pennsauken has no financial responsibility for A.L.'s attendance at Haddon Township schools; and A.L. should be placed in the Pennsauken Public School District, if A.A. so desires. I

further **CONCLUDE** that the ECS' determination of homelessness should be **REVERSED.**

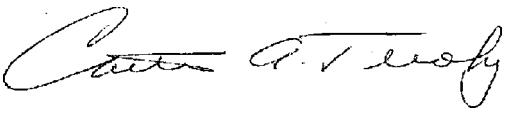
ORDER

Based on the foregoing, it is hereby **ORDERED** that the relief requested in the petition is **GRANTED** and that the March 28, 2019, determination by the ECS is **REVERSED.**

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

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

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



March 24, 2022
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: emailed 3/24/22

Date Mailed to Parties: emailed 3/24/22

CAT/gd/tat

APPENDIX

LIST OF WITNESSES

For Petitioner

Rochelle Marie Meyers Elliott

For Respondents:

A.A.
Lovell Pugh-Bassett
Arenda Kelly-Fleming
Anthony Joseph Fitzpatrick

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits

J-1 A.A. Answer to petition of appeal

J-2 A.A. Answers to first set of interrogatories, July 6, 2020

J-3 A.A. Answers to first request for admissions, July 6, 2020

J-4 A.A. Answers to second set of interrogatories, April 13, 2021

J-5 A.A. Answers to second request for admissions, April 13, 2021

J-6 A.A. Answers to second requests for production of documents, April 13, 2021

J-7 A.A. Answers to third set of interrogatories

J-8 Pennsauken School District Family in Transition form – Family Information, December 17, 2018

J-9 August 2, 2018, letter from Anthony Fitzpatrick

J-10 Agreement for Homeless Student Attendance on Tuition Basis, 2018-2019 School Year

J-11 Haddon Township Homeless Students Parent Consultation and Educational Placement form, September 13, 2017

J-12 Gloucester County Special Services School District, McKinney-Vento Education Program form, September 13, 2017

J-13 Haddon Township Homeless Students Parent Consultation and Educational Placement form, July 31, 2018

J-14 Pennsauken School District Student Residency Affidavit as to Homeless Status, December 17, 2018

J-15 Gloucester County Special Services School District, McKinney-Vento Regional Education Program form, December 17, 2018

J-16 Interim Executive County Superintendent Lovell Pugh-Bassett's Determination, March 28, 2019

Petitioner's Exhibits

P-1 Petition

P-2 Pictures of A.A.'s residence

123-22

New Jersey Commissioner of Education

Final Decision

Teresa-Anne Lucas,

Petitioner,

v.

Board of Education of the Township of Willingboro, Burlington County,

Respondent.

Synopsis

Petitioner, who has been continuously employed by the respondent Board since 1997, asserted that her tenure rights were violated when the Board failed to place her in the position of Director of Special Services after her position as Director of Early Childhood was eliminated in June 2020. Instead, the Board appointed a non-tenured employee to that position and reassigned petitioner to a position as a principal. The parties filed cross motions for summary decision, which were denied by the ALJ because of factual disputes, and a hearing was held in October 2021.

The ALJ found, *inter alia*, that: petitioner has earned tenure as a director, and her tenure protection extends to other director-level positions, notwithstanding the absence of prior service in those positions; petitioner satisfied all mandatory qualifications for the position of Director of Special Services, as well as an optional qualification involving experience with special education administration or supervision; petitioner demonstrated that she had experience in special education, obtained when she served as an administrator and a principal in respondent's school district. The ALJ concluded that petitioner's tenure rights entitled her to appointment as the Director of Special Services over a non-tenured employee and ordered that she be placed in the position of Director of Special Services immediately with all salary, benefits and other emoluments to which she is entitled, retroactive to the date the current Director of Special Services was appointed.

Upon review, the Commissioner, *inter alia,* concurred with the findings and conclusion of the ALJ that petitioner did achieve tenure as a director and that her tenure protection extends to all other positions for which she is qualified by virtue of her administrator and principal endorsements, even if she has not served in those positions. Further, the Commissioner concurred that petitioner was qualified for the position of Director of Special Services at the time her former Director position was eliminated and is entitled to appointment as Director of Special Services effective July 1, 2020.

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

123-22
OAL Dkt. No. EDU 08601-20
Agency Dkt. No. 169-8/20

New Jersey Commissioner of Education

Final Decision

Teresa-Anne Lucas,

Petitioner,

v.

Board of Education of the Township of Willingboro, Burlington County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto, have been reviewed and considered.

Petitioner holds an administrative certificate with school administrator, principal, and supervisor endorsements, and an instructional certificate with a Teacher of Psychology endorsement. Petitioner's position as the Director of Early Childhood Education in the Willingboro school district was eliminated in July 2020, and she was reassigned to a position as a principal. She filed a petition of appeal, alleging that the Board had violated her tenure rights by failing to assign her to the position of Director of Special Services and instead appointing a non-tenured employee to that position. Following cross-motions for summary decision, the Administrative Law Judge (ALJ) concluded that petitioner had earned tenure as a director[1] and that her tenure protection extended

[1] Tenure was earned during petitioner's prior service in the Director of Special Projects position. Petitioner then served as assistant superintendent before being appointed to the Director of Early Childhood Education position.

to other director-level positions, notwithstanding the absence of petitioner's prior service in those positions. However, the ALJ denied the motions for summary decision because facts were in dispute, and a hearing was held to develop the record. Thereafter, the ALJ found that petitioner satisfied all of the mandatory qualifications for the position of Director of Special Services, as well as the optional qualification concerning experience with special education administration or supervision. The ALJ rejected the Board's argument that petitioner was ineligible for the position of Director of Special Services because she does not possess an adequate knowledge of special education law and practice, finding that a specific degree of experience and substantive knowledge was not a job requirement and that the Board had not demonstrated that it was a necessary prerequisite. The ALJ further noted that petitioner did demonstrate that she had experience in special education, obtained when she served as an administrator and principal. Accordingly, the ALJ concluded that petitioner's tenure rights entitled her to appointment as the Director of Special Services over a non-tenured employee.

In its exceptions, which reiterate arguments made below, the Board argues that petitioner does not have the experience in special education that would allow her to successfully perform the duties of a Director of Special Services, while the individual who is employed in that position does have experience and has been successful in the position since he was appointed. The Board contends that the State Board of Education's decision[2] in *Nicholas Duva v. State-Operated School District of the City of Jersey City, Hudson Cty.*, State Board Decision No. 56-99, decided March 6, 2002, was incorrectly decided. According to the Board, tenure accrued as a Director of Special Projects should not extend to any other director position.

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[2] The Board erroneously attributes the decision to the Commissioner but, as noted herein, the decision was issued by the State Board of Education, which heard appeals of Commissioner decisions prior to July 7, 2008.

In reply, petitioner primarily relies on her arguments below, noting that respondent's arguments regarding a subjective preference for any other non-tenured individual are irrelevant to the tenure analysis mandated by precedent and relied upon by the ALJ to correctly conclude that petitioner is entitled to the Director of Special Services position.

Upon review, the Commissioner concurs with the ALJ that petitioner achieved tenure as a director, and her tenure protection extends to all other positions for which she is qualified by virtue of her administrator and principal endorsements, even if she has not served in those positions.[3] It is well settled that an "educator who has attained tenure by virtue of the requisite service in a specific position will have tenure with respect to all positions under the particular certificate. Tenure under any one endorsement entitles an educator to tenure under all endorsements obtained under his or her certificate. Thus, an educator with tenure in any endorsement that he or she possesses can, in effect, extend or transfer that tenure to other endorsements that are subsumed under the same certificate." *Dennery v. Bd. of Educ. of the Passaic Cty. Regional High School District #1, Passaic Cty.*, 131 *N.J.* 626, 634 (1993) (citations omitted).

There are three types of certificates issued by the Department of Education: instructional, educational services, and administrative. *N.J.A.C.* 6A:9B-5.3. For instructional and educational services certificates, case law makes clear that tenure transfers between endorsements under the same certificate.

Regarding the instructional certificate, "a tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a [reduction in force (RIF)] as against a non-tenured applicant with the same certification." *Capodilupo v. Bd. of Educ. of the Twp.*

[3] This conclusion does not apply to any of the positions enumerated in *N.J.S.A.* 18A:28-5, which require service in those positions for tenure to accrue, as explained herein. The record does reflect that petitioner earned tenure as an assistant principal and principal based on her prior service in those positions, but her tenure in those positions is not at issue in this matter and is irrelevant to the analysis herein.

of West Orange, Essex Cty., 218 *N.J. Super.* 510, 515 (App. Div. 1987). This principle applies even when the tenured teacher has no experience in the position he or she is seeking, and even when the non-tenured teacher does have experience in the position. *Id.* at 513.

Regarding the educational services certificate, in *Ellicott v. Bd. of Educ. of the Twp. of Frankford, Sussex Cty.*, 251 *N.J. Super.* 342 (App. Div. 1991), the board of education argued that the reasoning of *Capodilupo* should not apply to staff members holding an educational services certificate because the endorsements under that certificate constituted separate categories of jobs rather than subject areas, as is the case with instructional certificate endorsements. The Appellate Division concluded that the tenure laws do not make a distinction between categories of certification and, therefore, a tenured employee holding an educational services certificate was entitled to preference in a RIF against a non-tenured employee for a position that required an educational services certificate. *Id.* at 350. In so doing, the Appellate Division noted that the State Board of Education, applying its expertise, grouped the various endorsements of the educational services certificate together "for sound administrative and educational reasons." *Ibid.* Furthermore, the Appellate Division stated that "any differences among the endorsements, in the context of tenure rights, become less significant since the teaching staff member asserting a tenure right under the certification must still qualify for the particular position by securing the pertinent endorsement." *Ibid.* The Appellate Division therefore concluded that an employee who held both speech-language specialist and learning disabilities teacher-consultant (LDTC) endorsements could transfer tenure earned while serving as a speech-language specialist to an LDTC position. *Ibid.*

In the context of an administrative certificate,[4] there is a statutory limitation on the transferability of tenure. Pursuant to *N.J.S.A.* 18A:28-5, tenure in any of the administrative or supervisory positions enumerated in the statute – principal, other than administrative principal, assistant principal, vice-principal, and assistant superintendent – accrues only by employment in that administrative or supervisory position. Accordingly, an employee cannot transfer tenure rights to an enumerated position unless he or she has served in that enumerated position, even if the employee has the appropriate endorsement for the position. *Nelson v. Bd. of Educ. of the Twp. of Old Bridge, Middlesex County*, 148 *N.J.* 358 (Mar. 1997) (holding that an employee who achieved tenure as a supervisor and also possessed a principal endorsement had no claim to a principal position following a RIF because he had never served as a principal).

However, with regard to unenumerated positions, the State Board of Education (State Board) has extended the reasoning of the Appellate Division in *Capodilupo* and *Ellicott* to allow tenure to transfer between unenumerated positions requiring an administrative certificate. In *Duva*, *supra*, the petitioner's position of Director of Planning/Evaluations/Grants was abolished and he was not reemployed in another supervisory position that was held by a non-tenured individual. The State Board found that neither "director" nor "supervisor" was a position enumerated in *N.J.S.A.* 18A:28-5[5] and that "[g]iven the plain language of the statute and the applicable precedent, there is no basis to hold that these assignments constitute 'separately tenurable positions.'" *Id.* at 11. The State Board concluded:

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[4] The endorsements that are issued under the administrative certificate are school administrator, principal, supervisor, and school business administrator. *N.J.A.C.* 6A:9B-12.3.

[5] The State Board noted that although director and supervisor were added to the list of expressly enumerated positions when *N.J.S.A.* 18A:28-5 was amended to clarify that enumerated positions are separately tenurable, they were deleted prior to the final passage of the bill. *Id.* at 11, n.3.

> [P]etitioner's tenure protection extended to all assignments under his Administrative Certificate for which he held the appropriate endorsement, except for those positions specifically enumerated in *N.J.S.A.* 18A:28-5. . . Hence, upon abolishment of his director's assignment, the petitioner was entitled to be employed in assignments requiring a supervisor endorsement in preference to any non-tenured individuals.

Duva, *supra*, at 17-18.

While the Board characterizes the *Duva* decision as a "creative statutory interpretation" and asserts its disagreement with its holding, the Commissioner finds no basis to overturn the holding. First, a plain reading of the statute, as well as its legislative history, demonstrates that the only limitation on the transferability of tenure is for enumerated positions. *N.J.S.A.* 18A:28-5 contains a clear list of the positions which require actual service before tenure can accrue. "Director" is not one of the positions, and the Commissioner declines to impose a limitation that is not written into the statute. Furthermore, the removal of "director" and "supervisor" from the list of separately-tenurable positions enumerated in *N.J.S.A.* 18A:28-5 during the course of the bill's passage strongly suggests the Legislature's intent for tenure to be transferable between different director or supervisor positions.

Second, a long line of cases regarding the tenure laws supports the conclusion that tenure may transfer between unenumerated administrative positions. The Tenure Act, *N.J.S.A.* 18A:28-1 *et seq.*, "should be liberally construed to achieve its beneficent ends." *Spiewak v. Board of Education of Rutherford*, 90 *N.J.* 63, 74 (1982). In *Dennery*, *supra*, the Court stated, "Endorsements under a single certificate represent a related combination of qualifications, reflecting the common or related skills that are required for the satisfactory performance of educational responsibilities under that certificate." 131 *N.J.* at 637. This principle applies equally to the endorsements issued under the administrative certificate as to those issued under the instructional and educational services certificates. Furthermore, as the Appellate Division noted in *Ellicott*, *supra*, the tenure laws do not

make a distinction among the categories of certification. 251 *N.J. Super.* at 350. Accordingly, the Commissioner concludes that there is no basis to allow tenure to transfer under the instructional and educational services certificates, but not to unenumerated positions under the administrative certificate.

Finally, the Commissioner finds that the authorizations conferred by the school administrator and principal endorsements are not limited by subject area. Pursuant to *N.J.A.C.* 6A:9B-12.3, an individual holding a school administrator or principal endorsement[6] is authorized to provide educational leadership by directing the formulation and implementation of goals, plans, policies, and budgets. They have authority regarding personnel actions, evaluations, operations, and programs. These functions are largely administrative in nature, rather than being based in a particular subject area. By obtaining one of these endorsements, an individual demonstrates that she is qualified to perform all of the administrative functions for which that endorsement is required.[7] Accordingly, there is no basis to limit petitioner's ability to transfer her tenure as a director to other unenumerated positions for which she has earned the appropriate endorsement.

The Commissioner further concurs with the ALJ that petitioner was qualified for the position of Director of Special Services. The Commissioner has previously held that "a supervisor endorsement is generic and authorizes the holder to supervise any subject matter and any grade level." *Galbraith v. Bd. of Educ. of the Lenape Regional High School District, Burlington Cty.*, 1996

[6] The primary distinction between these endorsements is the level of responsibility that is authorized. The school administrator endorsement authorizes activities at the district level, while the principal endorsement authorizes activities at the level of a school or a unit within a school or district.

[7] The endorsements themselves establish the parameters of the employee's qualifications. As the Appellate Division noted in *Ellicott*, "the teaching staff member asserting a tenure right under the certification must still qualify for the particular position by securing the pertinent endorsement." 251 *N.J. Super.* at 350. For example, petitioner does not possess a business administrator endorsement, and therefore is not qualified to fill any position requiring a business administrator endorsement.

N.J. Agen. LEXIS 91, at*54. Furthermore, while a board of education may establish additional instructional certification requirements for a supervisory position, "absent a showing that an instructional certificate is necessary to perform the duties of the position at issue, such requirements cannot sidestep the educator's tenure rights." *Id.* at *54-55. *See also Annecchino v. Bd. of Educ. of the Twp. of Irvington, Essex Cty.*, Commissioner Decision No. 267-14, decided June 24, 2014 (holding that a tenured supervisor had a greater right to a supervisory position than non-tenured supervisors, even though the non-tenured supervisors had knowledge and experience in the subjects they were supervising, while the tenured supervisor did not).[8] Here, the Board did not require the Director of Special Services to hold an endorsement as a Teacher of Students with Disabilities or any other instructional endorsement, nor does the Commissioner find such a requirement necessary for the position. Instead, the Board only indicated that experience in the area of special education administration or supervision was "preferred." Therefore, as petitioner is in possession of both a school administrator endorsement and a principal endorsement, either of which fulfills the endorsement requirement for the position, the Commissioner concludes that she is qualified for it.[9] When petitioner's position as Director of Early Childhood Education was abolished, she was entitled to be employed as Director of Special Services over non-tenured employees.

[8] Both *Galbraith* and *Annecchino* involved tenured supervisors, rather than directors. However, as neither "supervisor" nor "director" is enumerated in *N.J.S.A.* 18A:28-5, the Commissioner finds that the analyses used in those decisions are applicable to this matter.

[9] Although this conclusion is sufficient to establish petitioner's right to the position, the Commissioner further concurs with the ALJ that petitioner has met all of the other qualifications listed in the job description, including having successful experience in special education administration or supervision. The ALJ thoroughly detailed petitioner's testimony regarding her prior experience and found that testimony to be credible. The Commissioner finds no reason to disturb that finding.

Accordingly, petitioner is entitled to appointment as Director of Special Services effective July 1, 2020, with all salary, benefits, and emoluments of that position, subject to mitigation. If any disputes arise regarding the calculation of back pay or other related issues, including the issue of membership dues that was raised before the ALJ following the close of the record, a new petition may be filed.

IT IS SO ORDERED.[10]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 16, 2022
Date of Mailing: June 16, 2022

[10] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08601-20
AGENCY DKT. NO. 169-8/20

TERESA-ANNE LUCAS,
Petitioner,
v.
BOARD OF EDUCATION OF THE,
TOWNSHIP OF WILLINGBORO,
BURLINGTON COUNTY,
Respondent.

Maria M. Lepore, Esq., for petitioner

Eric L. Harrison, Esq. for respondent (Methfessel & Werbel, attorneys)

Record Closed: February 14, 2022 Decided: May 4, 2022

BEFORE **JUDITH LIEBERMAN**, ALJ

STATEMENT OF THE CASE

Petitioner, Teresa-Anne Lucas, asserts respondent, Board of Education of the Township of Willingboro, Burlington County (Board), violated her tenure rights when it did not place her in the position of Director of Special Services after her position as Director of Early Childhood was eliminated.

PROCEDURAL HISTORY

Petitioner filed an appeal on August 5, 2020. The New Jersey Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 10, 2020, as a contested case. N.J.S.A. 52:14B-1 to-15; N.J.S.A. 52:14F-1 to-13.

During the first status conference, conducted October 20, 2020, counsel sought leave to file cross-motions for summary decision after discovery was completed. A briefing schedule established that all moving and reply briefs would be submitted by February 2, 2021. Two extensions of the brief submission deadlines were requested and approved, and all briefs were received by March 12, 2021. On April 29, 2021, respondent was asked to clarify a statement in its reply. It responded to this request on May 11, 2021, and the record for the cross-motions thus closed on May 11, 2021.

On May 21, 2021, I issued an Order partially granting petitioner's motion. The Order provided:

> The fundamental issue here is whether petitioner's tenure status requires the Board appoint her to another supervisor position to which a non-tenured but otherwise qualified individual was appointed. The cases cited above established, and I **CONCLUDE**, that her tenure protection shall extend to other supervisor positions, notwithstanding the absence of prior service in those positions.

The Order was clarified in an August 24, 2021, Letter Order, which provided:

> Clarification of this statement was required because, here, petitioner sought appointment to a director-level position. She contended that, having obtained tenure in the position of director within the respondent district, she should have been reassigned to a director position when her prior director-level position was eliminated. The Order, in its entirety, addressed this issue. Thus, during the status conference, it was clarified

> that the Order addressed petitioner's tenure rights with respect to director-level positions.

The May 21, 2021, Order addressed the issue that remained to be decided:

> The parties, however, raised an issue that cannot be resolved by way of this motion. Respondent contends that other factors, such as petitioner's experience with special education, are relevant. While it is unclear whether petitioner concedes that this analysis is even required, she seems to acknowledge that it may be relevant. In her brief, she noted that she did not seek appointment to another director position for which she "does not claim to possess the required expertise for purposes of this motion." Pet. Brf. at 3, f.n. 3. She also addressed her qualifications at length. Id. at 5. While petitioner may have intended to merely underscore that she sought a position for which she was qualified and opted to not pursue an alternate position for which she was eligible, this analysis cannot be made by way of a summary decision motion. The record indicates that petitioner previously held positions that required at least some degree of responsibility with respect to special education. By way of example, her curriculum vitae represents that, in her current position of Director of Early Childhood, she is responsible for the development, implementation and monitoring of program plan budgets. J-H. It also represents that, in this position, she monitors, supervises and coordinates child study team referrals. Ibid. While Director of Special Projects, she prepared and administered "centralized state and federal project budgets[.]" Ibid. However, the parties assert that these facts are in dispute and a record has not been developed in this regard. Consequently, I **CONCLUDE** that summary judgment is inappropriate at this time.

A hearing on this remaining issue was held on October 2, 2021. The record remained open for the submission of briefs after the parties received the hearing transcript. Briefs were initially due on January 31, 2022. An extension was granted in response to petitioner's request. All briefs were received by February 14, 2022, and the record closed that day. An extension of time for the issuance of the Initial Decision was granted on March 28, 2022.

FACTUAL DISCUSSION AND FINDINGS

The parties stipulated to the following. I, therefore, **FIND** the following as **FACT**:

1. Petitioner has been continuously employed by the Board since September 1997.

2. Petitioner held the following positions in the District:

    a. Teacher of Psychology (September 1997 – August 2002).
    b. Assistant Principal (August 2002 – December 2004).
    c. Principal (December 2004 – June 2013).
    d. Director of Special Projects (June 2013 – December 2016).
    e. Assistant Superintendent – Chief of Schools (December 2016–June 2018).
    f. Director Early Childhood Education (July 2018 – June 2020).
    g. Principal (July 1, 2020 to present).

3. Subsequently, petitioner became tenured in the following positions:

    a. Teacher of Psychology;
    b. Assistant Principal;
    c. Principal; and
    d. Director of Special Projects.

4. On or about May 14, 2020, the superintendent notified petitioner that her position as Director of Early Childhood would be eliminated, effective July 1, 2020, and that she would be reassigned to the position of Principal at the Early Childhood Center at Garfield East.

5. Subsequently, petitioner, through her undersigned counsel, notified the District, through its counsel, that petitioner contends that she has tenure in the position of director within the District and, as such, she contends her tenure rights require that she be placed in the vacant position of Director of Special Services.

6. The District subsequently appointed another individual to the position of Director of Special Services.

7. The individual currently holding the position of Director of Special Services does not have tenure in any position in the District.

8. Petitioner began performing her duties as a Principal on July 1, 2020, as she was directed by the District.

9. Petitioner did not experience a reduction in compensation beginning July 1, 2020.

10. Petitioner holds the following standard certificates issued by the New Jersey Department of Education:

    a. School Administrator;
    b. Principal;
    c. Supervisor; and
    d. Teacher of Psychology.

The following is undisputed. I, therefore, **FIND** it as **FACT**. The job description for director of special service lists the following qualifications:

1. New Jersey School Administrator or Principal Certificate
2. Regular or special education teaching experience.
3. Master's Degree; Doctoral Degree preferred.
4. Successful experience in special education administration or supervision preferred.
5. Required criminal history background check, physical proof of U.S. citizenship or legal resident alien status.
6. Shall possess knowledge of budget development and fiscal review.
7. Strong interpersonal and communication skills.

[R-10.]

The job description provides that the "function" is "To provide leadership and direction for the delivery and maintenance of a comprehensive program of special services which

includes child study team and related services, in-class support services, and medical and health services." Ibid.

ADDITIONAL FACTUAL FINDINGS

Testimony

For Petitioner:

Petitioner **Theresa-Anne Lucas** testified that, as assistant principal, she was assigned to regular and special education students. She met with child study teams and case managers on a biweekly basis to be familiar with the students' needs; evaluate whether those needs were being met; and ensure that the classrooms were properly equipped.

She was required to successfully participate in the Principal Residency Program, a one-year, mentored program that was required for a standard certificate. She had a provisional certificate while she participated in the program. The program involved training and participation in "required experiences." P-6 at 16. One was "pupil personnel services," which referred to special education. Ibid. She met with guidance counselors; worked with child study teams (CSTs); and attended CST meetings. P-6 at 19. She reviewed departmental budgets and identified budget priorities; reviewed extracurricular activities' budgets; and identified methods to raise funds to support student activities. P-6 at 20. She worked closely with the chairs of two departments to develop their budgets after evaluating their staffing, resources, and other needs. She also worked with the school banker to address the budgets of extracurricular activities and reported to the comptroller who monitored spending. She also facilitated, with the Board policy committee, the rewriting the school discipline policy, also called the code of conduct.

Petitioner also attended a professional development program about the Individuals With Disabilities Act (IDEA) in New Jersey. P-6 at 19. She monitored changes to special education law and reviewed them with the Board's policy committee and director of special services to identify where policy changes should be made. In line with this, they examined a new program that, with appropriate supports, would enable more students to stay in the District. Petitioner's mentor, who signed the Principal Residency Program Formative Evaluation Form, wrote that petitioner exhibited "no areas of weakness and [she] is extremely competent in all areas of the principalship." R-6 at 17. All other individuals who were required to approve her training and qualifications signed the form, including District-level personnel. P-6 at 20.

As director of special projects, petitioner was responsible for early childhood for disabled preschool students, who were "part of the special education department." T[1] 29:3-4. Her supervisor, Dr. Dale Talbert, reviewed her performance as director of special projects for the 2014-2015 school year. P-4. Petitioner received "excellent" evaluations for all skill areas except for "staffing" for which the rating was "at standard."[2] Id. at 2. Petitioner believed the rating for staffing was appropriate because she was new to the position and "there were a number of areas that we needed to address . . . and I felt that I wanted to build the program and grow myself[.]" T 27:22 to 28:1.

Petitioner was rated "excellent" in the "business acumen/organizational knowledge" category. Her responsibilities included:

> The development and oversight of the preschool education grant, the Perkins Grant[,] . . . school-wide plans developed by each individual school and following through to make sure that the funding was . . . used by each school in accordance with the school-wide plan and to make sure that we avoided supplanting and that the funding for supplemental resources were used . . . for improving our instruction and instructional

[1] T refers to the transcript of the October 2, 2021, hearing. It is followed by the referenced page and line numbers.
[2] The evaluation included a "self-assessment." P-4 at 2. Because this was the first time this evaluation form was used, petitioner and Dr. Talbert "worked in the document together and discussed it." T 27:14-15.

> support and programs for our students. Part of that included working with the director of special services at the time to make sure that we were creating programs on an equal playing ground for special education students, that we were building our instructional programs in terms of whether it's technology or a variety of instructional support resources that they were in line with the regular education programs and to make sure that the teachers in special education were receiving the same resources and the same professional development . . . at the same level with regular education. It was looking at the inclusion classes in early childhood for special education and making sure the inclusion classes were receiving the same . . . resources and they were balanced with regular education as well.
>
> [T 29:5 to 30:8.]

She was also responsible for No Child Left Behind (NCLB), which is now called Every Student Succeeds Act (ESSA). She advised parents of their rights under NCLB and the "supplemental resources and services that could be provided to children." T 30:22-23. She worked with the director of special education in reviewing individualized education plans (IEPs) for pre-K through third grade students, to "make sure that we had the resources available within the classrooms." T 31:5-6.

Petitioner was rated "excellent" for "customer focus," which was a key element of the position. It required responding to the needs of students, by "understanding where they are versus what the state requirements are for where they need to be and helping them to move towards that goal." T 32:10-13. For parents, it meant "understanding their perspective and their needs for their children[;] . . . helping them to understand instruction and programs and the supports[;]" and referring them to appropriate personnel for further assistance. T 32:13-20. Petitioner also served her staff and district administrators to "build capacity so I can help them grow professionally." T 32:8-9. With respect to special education students, her responsibilities included responding to corrective action plans; working with the director of special education to ensure that students are in the least restrictive environment; and facilitating mainstreaming of children in regular education classes where appropriate. She met with the child study team "when we had situations

with early childhood children in regards to their placement and what was actually agreed upon with the parents for their IEP." T 35:15-18.

"Strategic insight," for which petitioner received an "excellent" rating, involved "think[ing] outside the box." T 35:24-25. This included using alternative methods to address children's needs and help them engage in the learning process. For example, use of playground designs that address fine motor skills and help develop social and emotional skills, which was implemented during the 2017-2018 school year. Also, "sensory rooms" can be used by students who need an opportunity to have "time away just to transition." T 36:8-9.

The "vision and purpose" skill category, also rated "excellent," involved evaluation of the "overarching goal" for all students and implementation of methods to help them achieve long term success and "be equipped with . . . 21st century learning skills." T 37:21-22. This required that staff and students expand their use of technology. In 2013, as director of special projects, petitioner provided all classes, special education and otherwise, with iPads and other technologies have also been incorporated, such as interactive technology that is used by non-verbal special education students. The technology provides feedback to the students and provides visual and auditory stimulation.

With respect to the "values and ethics" skill category, also rated "excellent," petitioner discussed her commitment to her school district. She chose to work in Willingboro, her home community, and dedicated her career to the District. As an administrator, she conveyed to her staff her belief that "we should not be treating any child with any less than we would want for our own. They are our children that the parents are entrusting to us[.]" T 39:18-21. The skill also requires an "understanding that . . . everyone learns differently." T 39:25 to 40:1. Personnel and students "can have equal levels of experience, but we're all in different places at that time, so it's respecting that, it's knowing that I have to go that extra mile to make sure that I'm meeting those needs." T 40:2-6. In line with this, she had "ongoing professional dialogue(s)" with her staff

"because it's not a one woman show and it has to be an inclusive process if we're going to be successful, so I value what my staff brings to the table, what each child brings with them and the parents as well[.]" T 40:6-11.

Petitioner also received an "excellent" rating for the "Action" rating category. She evaluated programs and worked with the director of special services, principals and assistant principals, for pre-K through twelfth grade, to learn each programs' needs. For example, the District's English as a Second Language (ESL) program required review in response to a State audit that found students were enrolled in the program longer than the desired number of years. Recognizing that these students required additional time, there was an analysis of the way the program would be conducted, such as teacher training and technology and other tools that would "increase their chances for success." T 42:6. For special education, she collaborated with the director of special services to allocate funds based on preschool disabled students' needs and procure the necessary resources. They also ensured that the special education teaches had the professional development, tools and support they needed. She also addressed appropriate life skills services, and other areas of assistance, for students through twenty-one years old who had cognitive impairment.

The "innovation" skill set, also rated "excellent," involved creating a learning environment for the students, including those in special education, which helped them to interact with their peers and "expand their interest in learning." T 45:25. This is important because of the students' social and emotional challenges. Non-traditional settings are used to facilitate this. With respect to the "staffing" and "developing people" categories, both rated "excellent," petitioner was required to know staff members' individual strengths and challenges and to collaborate to support and address their strengths and weaknesses. A positive work culture is established through this type of peer collaboration.

Petitioner was required to oversee the budget to ensure compliance with NCLB requirements. This involved monthly meetings with the deputy superintendent,

comptroller and a consultant. She received an "excellent" rating with respect to NCLB. She also reviewed individual school's budgets to ensure that they were aligned with the State plan and provided for appropriate support programs. In conjunction with the New Jersey Quality Single Accountability Continuum (NJQSAC), petitioner served as the auditor of instruction for all regular and special education programs. Among other things, this involved updating the special education curriculum, incorporation of special education reading programs and teacher training.

"2014/2015 Performance Highlights" referenced petitioner's work on budgetary and fiscal issues. It included, "Continued to work with WHS Principal and Assistant Principal and District Comptroller to identify and develop a budget for 2015-2016 courses[.]" P-4 at 10. Also, "Increased effectiveness of spending, communication with schools and implementation of individual Schoolwide Plans[.]" Ibid.

In May 2015, petitioner received training about the Americans With Disabilities Amendment Act of 2008 ("ADA") and Section 504 of the Rehabilitation Act ("Rehabilitation Act"). P-5. The amendment changed how the ADA was applied so that people would have less difficulty proving that they are disabled. The Rehabilitation Act addressed the need for accommodations for students with health needs. Both laws are relevant to special education students, whose disabilities and health issues impact their learning.

Petitioner was appointed assistant superintendent in December 2016. The Superintendent of the Easton Regional School District served as her mentor, which was required for a certificate of eligibility. Together, they met with the Superintendent's business administrator and superintendents from other districts on a quarterly basis. In 2018, petitioner successfully completed training sessions provided by the Superintendent's Academy, a prerequisite to receipt of her standard certificate. The Academy addressed multiple issue areas including board of education dynamics and relations, financial resources and business operations, personnel management including staff hiring, evaluation and development, improving student performance through

collaborative labor management partnerships, staff and community relations, "special populations, equity and excellent" and strategic planning. R-11 at 34.

Her training in "special populations, equity and excellence" was "extensive." T 85:23. It addressed the ADA, students with 504 plans pursuant to the Rehabilitation Act, the IDEA and students with IEPs, the CST and its duties, the intervention and referral services team that supports students and addresses their needs, extraordinary aid available for special education, communication with and support of parents; and parents' rights.

As assistant superintendent, petitioner was responsible for the operations of all of the schools, including principals' evaluations, supervisors, instruction and programming. She was involved with "realignment of instructional" time, which referred to identifying and providing addition services to at-risk children, special education eligible and otherwise, who needed extra support. She was also involved with the professional development evaluative tool that was used for school counselors and child study team members. She also worked with the director of special services and program administrator to address standardized testing accommodations required for students with IEPs and she reviewed IEPs to determine where needs existed.

Petitioner worked with the ESSA grant administrator and director of special projects to monitor grant expenditures at each school. This required ensuring that the "expenditures were aligned with the school wide plans . . . that they weren't supplanting and that we were expending" funds prior to the deadline. T 77:14-17.

In February 2018, petitioner was evaluated in her capacity as assistant superintendent for the 2017-2018, school year. P-7. The same rubric that was used for her 2015 evaluation was used. Again, the self-evaluation was performed collaboratively with Dr. Talbert and she received a rating of "excellent" for all categories. Her evaluation for the 2017-2018 school year summarized her strengths, in part, as:

> Knowledge and in-depth understanding of the District, school administrators and program needs, as evidenced by (1) development of common instructional schedules and realignment of instructional time to include intervention and enrichment for students at the middle and elementary schools; (2) Planned professional development for Principals, Assistant Principals and teachers at all grade levels[.].
>
> [P-7 at 28.]

She received "excellent" ratings with respect to interpersonal and presentational skills, as evidenced by her "effective conveyance of program, information/data to school administrators and parents, in addition to the positive rapport with parents, faculty, staff and colleagues[.]" P-7 at 29. She also received "excellent" ratings for "strong research and communication skills[.]" Ibid.

When the 2017-2018 evaluation was issued, petitioner was working to schedule budget roundtable discussions with principals, the comptroller and department heads. The discussions would address each school's needs and budgets in advance of presentation of the final proposed budgets to the business administrator.

Petitioner currently she works with special education programs and is responsible for "meeting those needs and working with individuals in the department of special services and to make sure that our programs are properly aligned with the student IEPs and we're meeting their needs." T 90:6-11.

Petitioner explained that she meets the requirements listed in the job description for director of special services. R-10. She holds both required certificates: School Administrator and Principal; taught psychology to regular and special education students; holds a master's degree and is close to obtaining her doctoral degree.

With respect to the requirement of "successful experience in special education or supervision preferred," petitioner "had a significant number of years working with child study teams" as a principal, director of special projects "and then [as] assistant

superintendent with oversight for operations." T 88:10-15. Petitioner noted, however, that the job description did not specify that this experience was mandatory.

Petitioner satisfied the requirement that she "shall possess knowledge of budget development and fiscal reviews." R-10 at 31. She has "practical experience in both" areas from having worked in a variety of District administrative positions and also while administering grants for the Newark Housing Authority. T 89:4. She highlighted that her strong interpersonal and communication skills were rated excellent in her evaluations. She reported to the superintendent and their designee while serving as principal, director of special projects, assistant superintendent and in her current position.

Petitioner enumerated her experience with respect to each of the position's specific job duties:[3]

1. Having served as a principal for pre-K through twelfth grade, she met with the case manager and members of the child study team a few times each week to monitor their programs; review resources; and determine whether students' needs are being met, including supports, related services and medical and health requirements.

2. As director of special projects and assistant superintendent, petitioner coordinated special services among departments. As assistant superintendent, she was "responsible for all operations." T 92:2.

3. Petitioner was a member of the superintendent's cabinet from 2013 through 2020. As assistant superintendent, she was responsible for supervising principals. She was involved with all components of operations including planning, supervision and budget development. This included special

[3] The duties are listed on the job description at R-10. They are numbered 1 through 33 and are incorporated here by reference to R-10.

education as auditor for NJQSAC, which involved reporting concerning curriculum budget shortfalls, including for special services.

4. As assistant superintendent, her daily role involved oversight of special education programs. She collaborated with the principals in reviewing the "effectiveness of teaching and learning what was taking place on a regular basis and meeting . . . with the program administrator" and the director of special projects. T 93:18-21. As principal, she collaborated with child study teams "in regards to student programs and needs[.]" T 93:23-24. This work was done with all departments, including student guidance counseling.

5. While she did not develop procedures for identification, referral, evaluation, classification, and placement of educationally handicapped pupils in accordance with state and federal regulations and timelines "in depth," she worked with the director of special services on the referral process because too many students were referred with a "progressive process in place[.]" T 94:12-16. They needed to ensure "that schools were trained appropriately for the intervention and referral service process . . . [and] we weren't just arbitrarily referring a student[.]" T 94:16-18. For preschool students, they established the "preschool intervention and referral team" and incorporated monthly meetings with parents to address needs for additional supports. T 94:24.

6. Petitioner organized, staffed, supervised, managed and evaluated clerical and support functions of the office of special services every year since she became an administrator.

7. As assistant superintendent in charge of operations, she worked with the family liaison to homebound students. She ensured that teachers and necessary services were provided for home instruction and hospitalized students. She did this for regular and special education students.

8. Petitioner developed procedures to maintain, update and safeguard pupil records every year since she became an administrator.

9. Petitioner maintained an inventory of purchased equipment every year since she became an administrator, particularly as a principal, for all classrooms, including special education.

10. As a member of the superintendent's cabinet, she was responsible for working with the Board policy committee and curriculum and instruction committee. She would review and present policy and legal change recommendations to the committees. The recommendations would next be made to the superintendent and presented to the Board of Education.

11. As assistant superintendent, petitioner monitored the students in special education with an eye toward retaining them in-district. With the director of special services, she reviewed "the actual needs of the student and have that dialogue as to whether or not it's really warranted to send them out of district, what's best suited for them[.] . . . [T]hat was an ongoing part of my responsibilities." T 99:17-22.

12. She did not have a lot of experience with SEMI, which concerns Medicaid.

13. She monitored special education services and reviewed student progress, including IEP compliance, while assistant superintendent, as discussed above.

14. Recognizing that special education personnel may be involved with evaluations, reevaluations and case management meetings, schedules must be coordinated to ensure teacher coverage.

15. Continuous staff development is and was a regular obligation of petitioner's current and past positions. As assistant superintendent, she was involved with monthly professional development meetings with principals; planned "ongoing professional development with staff based on staffing needs and student

needs;" and professional development was incorporated into the monthly faculty meetings. T 101:16-18.

16. Petitioner has experience selecting special education and special services staff. At the time of the hearing, she was in the process of interviewing special education teachers, autism teachers and others. While director of early education, she served on the director of special services' hiring committee.

17. Petitioner previously discussed her experience with departments' budgetary requirements.

18. While petitioner has been involved in the supervision and evaluation process for special education, she has not "done the formal supervision." T 103:3. It was a collaborative process when she was a member of the superintendent's cabinet.

19. As principal and assistant superintendent, petitioner planned, organized and presided over meetings with special services staff.

20. Petitioner worked on the procedural handbooks, including the 2017 code of conduct, while serving in all her positions.

21. As a member of the Board of Education's curriculum instruction committee, she reviewed and approved recommendations for improvements to regular and special education curriculum.

22. She submitted monthly reports on multiple subjects, including but not limited to grants, NCLB and ESL, to her supervisors and staff. She initiated "monthly operations meetings for principals with department heads to work with them and provide reporting[.]" T 107:3-5.

23. Petitioner previously discussed her experience with interviewing prospective special services staff.

24. Petitioner worked with "child study teams over the years as a principal" to understand their caseloads. She reviewed this with the program administrator or director of special services "to understand how we were balancing and meeting the needs of students and . . . based on work assignments . . . that were there." T 107:16-24.

25. Petitioner previously discussed her experience ensuring effective planning and communication.

26. Petitioner previously discussed her experience supervising and coordinating ordering and use of materials for the special services area.

27. Petitioner reviews multiple publications for and by educators, such as those published by the Association for Supervision and Curriculum Development and New Jersey Association of School Administrators. She is aware of professional development opportunities.

28. Petitioner previously discussed her experience with budget preparation and monitoring.

29. Petitioner has evaluated staff every year since she became a school administrator. She has collaborated with the director of special services in this regard.

30. All administrators are required to ensure implementation of State and federal regulations, including those requiring free and appropriate education and age appropriate instruction for early childhood students,

31. As director of special projects and early childhood, petitioner prepared applications for federal and state aid, including the preschool expansion grant. She worked on the preschool program plan update, which led to additional funding, and Perkins Grants for technical education.

32. Petitioner attends professional development workshops required by the superintendent, including those addressing social and emotional learning for children who attended school remotely. She also continues to work toward her doctorate.

On cross-examination, petitioner was asked several questions concerning the provision of special education. She acknowledged that she has not written an IEP; however, she "sat in on the IEP process." T 143:4. When asked how she would evaluate whether case managers are writing appropriate IEPs, petitioner replied that she would consult the statute and regulations that govern special education, which are in her office.

> As a seasoned school administrator, you can't possibly know every code under 6A or 18A[.] . . . [Y]ou know that there has to be a balance between regular ed and special ed. You know that there has to be the least restrictive environment. You know that the criteria that has to be set that a child can't just be classified at will, we have to go through the process of the intervention and referral services team and so on, so you follow all of these components and you know the basic guidelines that are there, but if I want to be specific to a code . . . I would open that book, I would look at the code and then have a conversation with my staff.
>
> . . .
>
> I am proficient as an administrator because I know my job and I know it well, which also includes all the components[.] [S]o for the basics of the dos and the don'ts and what should and should not be done in the best interest of the child and the duty of care that I have to each child that enters my building, I know it and I know it well. If it's something outside of that scope I am not . . . embarrassed to say that, yes, I would flip open the code to double check. Like I know in an autistic kindergarten class I shouldn't have more than six children, but guidelines change all the time, so if I have a child study team member saying I can add number seven in there with an additional paraprofessional, I'm going to check in that case just to make sure nothing has changed and I have other checks in place that I would do beyond that[.]
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> [T 157:24 to 159:12.]

In response to several substantive questions about special education, petitioner testified that she would need to research the law and regulations for guidance. These included when scoring would support the classification of specific learning disability; the "discrepancy model" in the context of learning disability classifications; all criteria for eligibility for special education and related services; and "Naples placements." She also provided substantive responses to questions about specific special education issues. For example, she discussed the process for manifestation determinations when a child exhibits behaviors that result in suspension or removal. The child study team and others must meet "to determine if the child's behaviors that they are exhibiting is part of the child's diagnosis of what's written in the IEP. That will determine how you can proceed with the child." T 134:12-15. She knows when parental consent is required to take an action, including issuance of annual IEP reviews, and that the District can file a due process petition under certain circumstances to take action without consent. She is familiar with the "intervention model" for classification and explained that students are categorized "based on their needs or however they test[.]" T 121:13-14. "[R]esponse to intervention refers to helping students based on what is accessed for the specific skill level and identifying interventions for that individual student in order to meet their needs." T 121:14-18. While she is not an expert on student testing, she is familiar with how the testing process is implemented and evaluated by the CST and other professionals to determine a student's qualification for a disability classification. She "worked with directors of special services and program administrators of special services and so on for a number of years and . . . a child's classification [is] based on the overall scoring[.]" T 122:21-25.

Petitioner was not familiar with a Department of Education memorandum that addressed failures to provide all IEP-required services due to COVID-19 restrictions. She explained, "it's not an area that I supervised, so it wouldn't be sent to me," T 140:3-4. However, she noted that the District is obligated to provide the services mandated by IEPs and it "did extremely well despite the challenges that we were faced with[,]" including

the corrective action plans that were in place when the director of special services was appointed. T 136:6-8.

Petitioner noted that she is responsible for evaluating "special education teachers to determine if they're effective in their classroom[s]." T 155:22-23. If she were appointed director of special services, she would use the methodology she currently uses to evaluate special education teachers. She utilizes a guidebook and rubric developed under the guidance of Dr. Hackett that provides the criteria for evaluation of all staff. She explained, "I don't have to be a math expert to evaluate a math teacher. I know what good instruction looks like. I can go into that classroom with the appropriate rubrics and the guidelines that the state sets forth through the Danielson model and determine whether the instruction is effective." T 156:20-156:25.

On redirect examination, petitioner testified that, as director of special services, she would be able to consult with the attorneys retained by the District. The position did not require a law degree, memorization of or familiarity with the law, or certification as a school psychologist, guidance counselor or learning disabled teacher. She clarified that IEPs are tailored to each student, based on their individual abilities. They include "goals and objectives that are specific to that student's abilities and projected timetable for growth." T 165:16-18. Multiple students with the identical classifications could have different IEPs and accommodations.

For respondent:

Dr. Neely Hackett has been the District Superintendent of Schools since April 2020. Shortly after she began working as superintendent, Director of Special Services Dr. Melody Alegria advised that she intended to leave the District. Dr. Hackett understood that almost 20 percent of the District's students were in special education and there were "many corrective action plans dealing with non-compliance with IEPs, due dates and parent consent, services, there were about three to four major court cases where parents were asking for thousands and thousands of dollars[.]" T 170:11-16. Parents were

dissatisfied with the program and its curriculum and the department was "separated from everyone else" with respect to staff interviews and supply procurement. T 170:18. They did not "engage in the overall climate of the district" or "let everyone know that these are our kids and not their kids[.]" 170:23-25. This was a "major problem" and improvement was a "herculean task." T 171:1, 175:12.

The position was posted immediately. Dr. Hackett assembled a diverse interview team of experienced staff members who "knew the culture of the district and who were expert in their particular areas[.]" T 171:22-24. The business administrator, the human resources director, three principals from elementary and high schools and petitioner were on the team.

Dr. James Nesmith was selected because he had experience as a supervisor of student services. Dr. Hackett "believe[d] that he knew how to run a department [and] that he would be familiar with running a special services department[.]" T 173:16-18. The skill sets listed on his resume indicated that "he had experience in working with child study team members and dealing with the coordination of curriculum and professional development." T 173:20-23, R-29. Also, Dr. Nesmith worked as a school social worker for approximately ten years, which indicated that he has experience working on a child study team, being a case manager, and developing and implementing IEPs. He, thus, would also "have familiarity with the law and timelines regarding the IEP process, which was one of the major issues in Willingboro that we were not meeting the legal requirements for IEPs." T 174:9-13.

Since becoming director of special services, Dr. Nesmith addressed every corrective action plan and the State has advised that the "corrective action measures" have been met. T 175:17-18. He also resolved a majority of the pending litigation, many without requiring monetary payments, and suggested creating a new teacher trainer position. Teachers have received training about students who do not engage in the New Jersey Student Leaning Standards and the laws and timelines. Training concerning the laws and timelines was necessary because staff could not rely upon the attorney hired by

the District for daily matters. Also, a special education manual was developed—previously, there was not a single manual that explained the law and timelines—and a specific evaluation protocol was developed for the first time for child study team members.

Dr. Nesmith's knowledge of procedures, the law, timelines and mandates enabled him to take the above steps and then to direct his staff to "improve on those corrective action plans[.]" T 178:20-23. He had to "delegate and inform and educate to made sure we were all on the same page[.]" T 178:24-25.

Dr. Hackett acknowledged that Dr. Nesmith did not have a standard certification as a school administrator. She did not know whether he had a standard certification as a principal. She was aware that "whatever certifications he needs for this particular job, he has the provisional and he has to go through the one year mentoring program." T 181:21-23. Dr. Hackett did not know if he obtained standard certificates by the day of the hearing.

Dr. Hackett proposed that petitioner's position should be eliminated for budgetary reasons. Although Dr. Hackett had "listen and learn meetings" with petitioner, she did not have much in the way of interactions with petitioner. T 184:24.

Dr. Hackett appreciates petitioner's experience. However, given the problems with the District's special services department, "there's no room for a learning curve." T 179:24-25.

Document Review

Dr. Nesmith's resume does not list experience as a regular or special education teacher. Rather, he worked as a school social worker from 2001 through 2011 and as Supervisor of Student Support Services from 2012 until he was hired by the District. The resume lists no other work experience. R-9. His resume indicated that he had principal and administrator certificates of eligibility. R-9.

Additional Factual Findings

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in 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). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. 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 addition to considering each witness' interest in the outcome of the matter, I observed their demeanor, tone, and physical actions. I also considered the accuracy of their recollection; their ability to know and recall relevant facts and information; the reasonableness of their testimony; their demeanor, willingness, or reluctance to testify; their candor or evasiveness; any inconsistent or contradictory statements; and the inherent believability of their testimony.

I had the ability to observe the demeanor, tone, and physical actions of the witnesses during the hearing. Both testified clearly, directly and professionally. Each sought to provide thorough answers to questions and full explanations for their decisions and actions. Neither was hesitant or evasive. I find their testimony to be credible.

Based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** the following as **FACT**:

The Job Description for Director of Special Services lists seven qualifications for the position. Qualifications number one, two, five, six and seven are mandatory. Qualification number three provides that a master's degree is required while a doctorate degree is "preferred." Qualification number four provides that "successful experience in special education administration or supervision is preferred." Thus, the latter two qualifications are not mandatory.

Based upon petitioner's credible testimony, her performance reviews and other documentation of her training and experience, I further **FIND** as **FACT** that petitioner satisfies the five remaining mandatory qualifications:

- She holds New Jersey School Administrator and Principal Standard Certificates.
- She has experience with regular education, having taught psychology. She holds a New Jersey Standard Certification as teacher of psychology.
- She has undergone the required criminal history background check and provided proof of citizenship.
- In her prior positions, she engaged in budget development and fiscal review. Her performance reviews document that she received excellent scores with respect to her work in this regard.
- Her performance reviews highlight her exemplary interpersonal and communication skills.

As noted, petitioner holds a master's degree and the job description does not require a doctorate degree.

While special education administration or supervision is only preferred, the evidence in the record supports a finding that petitioner has had an administrative and supervisory role with respect to special education. For example, as principal, director of special projects and assistant superintendent, she engaged with and supervised child study teams. As director of special projects, she was responsible for early childhood for

disabled preschool students who were involved with special education. She was also involved with special education teachers' professional development. She worked with the director of special services to address funding for special education students' needs and for life skills programs for cognitively impaired students. She has received training in relevant areas of the law including the IDEA, Rehabilitation Act and ADA. While this evidence does not permit a finding that petitioner is fluent in the area of special education, neither fluency nor experience at a high level is a prerequisite. I, therefore, **FIND** as **FACT** that petitioner satisfied all the mandatory qualifications for the position of Director of Special Services as well as the optional qualification concerning successful experience in special education administration or supervision.

I further **FIND** as **FACT** that Dr. Nesmith did not possess a New Jersey School Administrator or Principal Standard Certificate at the time he was appointed. He also does not have experience as a teacher of regular or special education.

LEGAL ANALYSIS AND CONCLUSION

The law governing tenure was discussed at length in the Order partially granting summary decision. It is restated here. The purpose of the teaching staff tenure laws, N.J.S.A. 18A:28-1 to -18, 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)). Our courts have held that "the widest range should be given to the applicability of the [tenure statutes] law." Sullivan v. McOsker, 84 N.J.L. 380, 385 (E. & A. 1913). See also Barnes v. Bd. of Educ. of Jersey City, 85 N.J. Super. 42, 45 (App. Div. 1964). "[B]ecause of its remedial purpose, the Tenure Act should be liberally construed to achieve its beneficent ends." Spiewak v. Bd. of Educ., 90 N.J. 63, 74-75 (1982). The employee has the burden of proving an entitlement to tenure protection. Canfield v. Pine Hill Bd. of Educ., 51 N.J. 400 (1968), rev'd on dissent 97 N.J. Super. 483, 493 (App. Div. 1967).

N.J.S.A. 18A:28-5 governs the requirements for tenure. It provides in pertinent part:

> [t]he services of all teaching staff members employed . . . in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses including school nurse supervisors, head school nurses, chief school nurses, school nurse coordinators, and any other nurse performing school nursing services, school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners . . . 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:
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> (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (3) The equivalent of more than three academic years within a period of any four consecutive academic years.

Section (c) of the above statute provides that "tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position and nothing herein shall limit or restrict tenure rights

which were or may have been acquired pursuant to N.J.S.A. 18A:28–6[4] in a position in which the individual actually served."

N.J.S.A. 18A:26-2 provides that teaching staff members shall hold a "valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law." N.J.A.C. 6A:9B-5.3 provides for three categories of educational certificates: instructional, administrative, and educational services. The regulations enumerate endorsements under each certificate and identify the categories of positions for which each endorsement is required. The endorsements under the administrative certificate are school administrator, principal, supervisor and school business administrator. N.J.A.C. 6A:9B-12.3.

New Jersey's courts and the State Board of Education have addressed tenure rights in the context of administrative and supervisory positions that are not enumerated in N.J.S.A. 18A:28-5. "Tenure is achieved in either one of the positions specifically designated N.J.S.A. 18A:28-5, which are separately tenurable, or in 'positions which require them to hold appropriate certificates.'" Perri v. Bd. of Educ. of the Twp. of Belleville, Essex County, 2008 N.J. AGEN LEXIS 380, *15, modified, Comm. of Education, 2008 N.J. AGEN LEXIS 1016 (September 10, 2008)(quoting Duva v. State Operated School District of the City of Jersey City, 2002 N.J. AGEN LEXIS 1373 (State Board of Education) (March 6, 2002)).

In Duva v. State Operated School District of the City of Jersey City, the petitioner held a director position, which required an administrative certificate with an endorsement as either a principal or supervisor. When his director position was abolished, he argued that "by virtue of his service of the position title of 'director' he had acquired tenure rights

[4] Concerning tenure upon transfer or promotion with consent of the employee.

entitling him to employment as a supervisor over any individuals who had not achieved tenure." 2002 N.J. AGEN LEXIS 1373 at *3. The State Board of Education found, "Since neither 'supervisor' nor 'director' are among the positions enumerated in N.J.S.A. 18A:28-5, the scope of petitioner's tenure protection under his Administrative Certificate extended to all assignments for which he was qualified by virtue of possessing a supervisor's endorsement. Hence, upon abolishment of his director's assignment, the petitioner was entitled to be employed in assignments requiring a supervisor's endorsement in preference to any non-tenured individuals." Id. at *28.[5] See also Nelson v. Bd. of Educ., 148 N.J. 358 (1997)(addressing the Legislature's intention to distinguish specifically enumerated position categories from those not listed with respect of the application of tenure rights).

In Galbraith v. Bd. of Educ. of the Lenape Regional High School District, Burlington County, 96 N.J.A.R.2d (EDU) 396, 1996 N.J. AGEN LEXIS 91 (Final Agency Decision January 12, 1996), a tenured supervisor who was subject to a reduction in force (RIF) claimed she should have been assigned to another supervisor position to which a non-tenured supervisor was appointed. The Commissioner of the Department of Education agreed that the tenured supervisor was entitled to the other supervisory position. He wrote:

> The law is well settled that a supervisor endorsement is generic and authorizes the holder to supervise any subject matter and any grade level. . . . Moreover, while there is nothing to prevent a local board from establishing additional instructional certification requirements, absent a showing that instructional certification is necessary to perform the duties of the position at issue, such requirements cannot sidestep the educator's tenure rights on a preferred eligibility list of supervisors. [Id. at *54-55.]

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[5] In so holding, the State Board of Education observed that, when N.J.S.A. 18A:28-5 was amended to require service in specifically-enumerated positions, it initially included director and supervisor positions in the amendment. However, these positions were deleted before the amendment was adopted, underscoring the Legislature's intention to not apply the service requirement to these positions. Id. at *16, fn.3.

See also Annecchino v. Board of Education of the Township of Irvington, Essex County, OAL Dkt. No. EDU 13415-12, adopted, Comm. of Education, 2014 N.J. AGEN LEXIS 173 (seniority analysis is inapplicable when tenured employee replaced by non-tenured employee after RIF; tenured employee had greater right to supervisory position than non-tenured positions); Herbert v. Board of Education of the Township of Middletown, Monmouth County, 1990 S.L.D. 1759 (State Board of Education July 25, 1989), A-318-90T1 (App. Div. Unpub. May 22, 1991); Rogers v. Board of Education of Highland Park, Middlesex County, OAL Dkt. No. Edu 5850-89, aff'd, State Board 1990 S.L.D. 691 (May 10, 1990)("having achieved tenure in the separately tenurable position of 'supervisor,' petitioner was entitled to tenure protection following a reduction in force in any supervisory assignment for which he was qualified by virtue of his certification as against individuals with no tenure as supervisors").

Here, petitioner seeks appointment to the position of director of special services. She contends that, having obtained tenure in the position of director within the respondent District, she should have been reassigned to the newly available director position when her prior director-level position was eliminated. I previously ordered that petitioner's tenure protection extends to other director-level positions, notwithstanding the absence of prior service in those positions. This order will not be revisited here.

Despite this determination, respondent contends that petitioner is ineligible for the position because she does not possess an adequate knowledge of special education law and practice. The evidence in the record suggests that she does not possess the degree of substantive knowledge that a person who has worked in the area on a full-time basis may have. However, a specific degree of experience and substantive knowledge is not a job requirement and respondent has not demonstrated that a prerequisite of this sort is necessary. Nonetheless, petitioner has demonstrated that she has experience in the special education area, which she obtained while serving as an administrator and principal.

It is noteworthy that the job description for director of special services highlights the importance of administrative and supervisory experience, given the requirement of a certificate in at least one of these areas. In Dennery, the Court discussed the significance of an administrator certificate. It explained that certificates "represent distinct and separate areas spanning the entire field of public education, and the different certificates relate to discrete and distinctive categories of functions, duties, and responsibilities of educators." 131 N.J. 626, 637. "The endorsements listed under the administrative certificate . . . relate to the administration or supervision of a school and its staff. Such endorsements include positions such as principal, superintendent and school administrator." Ibid.

Here, the District requires an administrator or principal certificate and not demonstration of experience in special education. It is thus reasonable to conclude that the District determined that the position requires and demands broad supervisory or administrative experience, and that it prioritized this over a specific area of expertise. It is undisputed that petitioner has ample experience as an administrator and principal and that her performance in these capacities was reviewed quite favorably.

For the foregoing reasons, I **CONCLUDE** that petitioner has established by a preponderance of the credible evidence that she satisfies each of the eligibility prerequisites for the director of special services position. She has also demonstrated that she has a degree of experience with special education as an administrator or supervisor, which is not a mandatory requirement for eligibility. Therefore, I **CONCLUDE** that petitioner's tenure entitled her to appointment to the director of special services position over the non-tenured appointee.

ORDER

For the foregoing reasons, I **ORDER** that petitioner be placed into the position of Director of Special Services immediately with all salary, benefits and other emoluments

to which she is entitled, retroactive to the date the current director of special services was appointed.[6]

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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] On April 8, 2022, after the record was closed, petitioner advised that respondent failed to pay her dues for membership in the New Jersey Association of School Administrators. In response, respondent reiterated that it did not reduce or change petitioner's compensation and benefits when she was placed in the principal position and it advised that it pays her dues for the professional association for which she is currently eligible, the New Jersey Principals and Supervisors Association. This issue was not addressed during the hearing and was raised after the initial decision was drafted. As this appears to be a matter that the parties can address and resolve as they evaluate the retroactive compensation and benefits to which petitioner is entitled, it is not necessary to reopen the record to address it.

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 4, 2022

DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: May 4, 2022

Date Mailed to Parties: May 4, 2022

mph

APPENDIX

Witnesses

For petitioner

Teresa-Anne Lucas

For respondent

None

List of Exhibits

For petitioner

P-1 Supervisor Standard Certificate

P-2 Teacher of Psychology Standard Certificate

P-3 Principal/Supervisor Certificate of Eligibility, Standard Certificate

P-4 2014-2015 Evaluation

P-5 Training Certificate of Completion

P-6 Principal residency Program Evaluation Form

P-7 Executive and Middle Management Level Evaluation Form

For respondent

R-1 Petition

R-2 Answer

R-3 Joint Stipulation of Facts from Motion for Summary Decision

R-4 Assistant Principal Job Description

R-5 Principal Job Description

R-6 Director of Special Projects Job Description

R-7 Assistant Superintendent – Chief of Schools Job Description

R-8 Director of Early Childhood Education Job Description

R-9 Resume of current Director of Special Services

R-10 Director of Special Services Job Description

R-11 Petitioner's curriculum vitae

R-12 Petitioner's responses to discovery requests

R-13 Respondent's responses to discovery requests

124-22
Agency Dkt. No. 40-3/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the
Teaching Certificates of Rosalie Dumas,
Board of Education of the Caldwell-West Caldwell
Regional School District, Essex County.

For petitioner, Douglas M. Silvestro, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on February 17, 2022, by way of an Order to Show Cause served by petitioner (Caldwell-West Caldwell Board of Education) upon respondent (Rosalie Dumas), requiring respondent to show cause why an order should not be entered suspending her teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for resigning without giving the notice required by law. By notice dated March 21, 2022, the Office of Controversies and Disputes (Office) acknowledged 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, on April 22, 2022, the Office sent respondent a second and final notice – via certified and regular mail – directing that she must 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 certified mail tracking indicates that the notice sent by certified mail was delivered on April 25, 2022. No answer to the Order to Show Cause has been filed as of this date.

The petition and supporting exhibits submitted by petitioner in this matter indicate that: respondent entered into a contract to work as a music teacher for the 2021-22 school year; and on November 17, 2021, respondent sent correspondence indicating that she was resigning, effective

immediately, providing less than 60 days' notice. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certificates are 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.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 16, 2022
Date of Mailing: June 16, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

125-22
Agency Dkt. No. 62-3/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Yvonne Chen, Board of Trustees of the Marion P. Thomas Charter School, Essex County.

For petitioner, Bernice Martina Jalloh, Esq.

For respondent, *pro se*

This matter was opened before the Commissioner of Education on February 18, 2022, by way of an Order to Show Cause served by petitioner (Marion P. Thomas Charter School) upon respondent (Yvonne Chen), requiring respondent to show cause why an order should not be entered suspending her teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for resigning without giving the notice required by law. By notice dated April 12, 2022, the Office of Controversies and Disputes (Office) acknowledged 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, on May 16, 2022, the Office sent respondent a second and final notice – via certified and regular mail – directing that she must 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. On May 25, 2022, respondent emailed the Office of Controversies and Disputes, indicating that she does not wish to contest the Order to Show Cause.

The petition and supporting exhibits submitted by petitioner in this matter indicate that: respondent entered into a contract for the 2021-22 school year that required 60-days' notice prior to termination; and on November 11, 2021, respondent sent correspondence indicating that she was

resigning, effective November 24, 2021, providing less than 60 days' notice. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certificates are 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.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 16, 2022
Date of Mailing: June 16, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

126-22E

OAL Dkt. No. EDU 03641-22
Agency Dkt. No. 101-5/22

New Jersey Commissioner of Education

Order on Emergent Relief

Board of Education of the Watchung Hills Regional High School District, Somerset County,

Petitioner,

v.

Roger A. Jinks, Executive County Superintendent, Somerset County, and New Jersey Department of Education,

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 petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *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 stated 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.

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 16, 2022
Date of Mailing: June 20, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 03641-22
AGENCY REF. NO. 101-5/22

BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,
Petitioner,
v.
ROGER A. JINKS, EXECUTIVE COUNTY SUPERINTENDENT, SOMERSET COUNTY, AND NEW JERSEY DEPARTMENT OF EDUCATION.
Respondent.

Marc H. Zitomer, Esq., for petitioner (Schenck, Price, Smith & King LLP, attorneys)

Hasibul Haque, Deputy Attorney General, for respondent (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Watchung Hills Regional High School District Board of Education (hereinafter referred to as "Board" or "petitioner"), seeks to have the Executive County Superintendent's reapportionment of Board of Education members stayed pending completion of a due process hearing, with the status quo maintained, that being Warren Township would continue to have four board members, Watchung Township two Board members, and Long Hill Township three Board members.

The within motion for emergent relief was filed by petitioner on May 6, 2022, with the New Jersey Department of Education (DOE), Office of Controversies and Disputes (OCD). The motion for emergent relief was transmitted to the Office of Administrative Law (OAL), where it was filed on May 9, 2022, as a contested matter. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. Due to the Covid-19 pandemic, an emergent hearing in this matter took place via Zoom on May 13, 2022, and the record closed.

FINDINGS OF FACT

Based on petitioner's Petition for Emergent Relief, respondent's brief, and the oral argument presented by both parties, and solely for the purpose of deciding this emergent appeal, I **FIND** the following to be the undisputed facts:

1. The Board operates the Watchung Hills Regional High School District, comprised of a regional high school with approximately 1,900 students, covering grades 9-12. The townships that form the regional district are Warren Township, Watchung Township and Long Hill Township. Students come from these three townships, plus Green Brook Township, pursuant to its send/receive contract with the Board.
2. The Board is made up of ten members: four board members from Warren Township, two from Watchung Township and three from Long Hill Township, plus one limited-voting member from Green Brook Township. The membership on the Board is apportioned

by the Department of Education's Office of Student Finances (OSF) according to the population of each respective township based upon the last published Federal Census Report, as set out in N.J.S.A. 18A:13-8.

3. On or about March 16, 2022, OSF advised Somerset County Executive County Superintendent of Schools (ECS), respondent Roger A. Jinks, that the seats on the Board were being reapportioned due to population changes shown in the 2020 Decennial Census, based on its use of the Equal Proportion Method of calculating board seats. This reapportionment was to apply to the next annual school election.
4. As a result of the reapportionment, Warren Township would gain an additional seat on the Board, and Long Hill Township would lose one seat. Prior to the reapportionment decision, one seat from Long Hill and two seats from Warren would have been on the November 2022 ballot; pursuant to the reapportionment, there would be no Long Hill seat on the ballot and three Warren seats on the ballot.
5. Per the 2010 Census, the population of Warren Township was 15,311, the population of Watchung Township was 5,801, the population of Long Hill Township was 8,702, and the population of all of the constituent districts combined was 29,814.
6. Petitioner, employing the Strict Population Method, calculated that Warren Township had 4.62 of the apportioned nine total board of education seats, Watchung Township had 1.75 of the nine total seats, and Long Hill Township had 2.63 of the nine seats.
7. According to the 2020 Census, Warren Township had 15,926 people, Watchung had 6,453 people, Long Hill had 8,634 people, and the population of all of the constituent districts combined was 31,013.
8. Petitioner, employing the Strict Population Method, calculated that Warren again had 4.62 of the nine total seats, Watchung had

1.87 of the nine total board of education seats, an increase of 0.12, and Long Hill had 2.51 of the seats.

ORAL ARGUMENT

For petitioner:

Marc H. Zitomer, Esq., presented petitioner's case, relying mostly on petitioner's Petition. Petitioner interpreted N.J.S.A. 18A:13-9 to mean that a current apportionment should remain in effect until a reapportionment becomes "necessary." In the within matter, respondent failed to prove why reapportionment was necessary. Reapportionment would not be necessary when a change in population was de minimus. The legislature intentionally added "necessary," and caselaw stood for the proposition that one must adhere to every word in a statute. Petitioner had a need for a full due process hearing with discovery, including interrogatories and an expert opinion on the reapportionment formula used by respondent.

The case of Board of Education of Rancocas Valley Regional High School Dist., Burlington County v. New Jersey State Board of Education, 364 N.J. Super. 623 (App. Div. 2003) (Rancocas Valley), cited by respondent, was not applicable to the within matter because it dealt with the interpretation of N.J.S.A. 18A: 13-8, which statute only applied where there were more than nine seats on the board of education, which was not the case here, as Green Brook was a tenth member but had only limited voting rights. N.J.S.A. 18A: 38-8.1 sets out which matters a contract township like Green Brook may vote on. For matters that Green Brook may not vote on, Warren Township would then have a majority vote on the nine-seat board.

Harm would be incurred because if Long Hill lost a seat, nobody would then appear on the ballot for them in November and, conversely, Warren would have three people on the ballot instead of two. If petitioner then succeeded at the full due process hearing and with the Commissioner's decision, it would be forced to hold a special election to correct the board makeup, and also risk the possible invalidation of actions taken by the restructured board prior to the Commissioner's final decision.

For respondent:

Hasibul Haque, Deputy Attorney General, presented respondent's case, relying mostly on its brief and certifications. The formula used by the ECS was the Equal Proportion Method, which was a mathematical formula where a person would input the population numbers and derive the number of board seats for each township. The Dupree Certification attached to respondent's brief contained the calculations. This was the same method employed pursuant to the results of the 2010 census. The case of Board of Educ. Of Northern Burlington Co. Regional Sch. Dis. V. New Jersey State Bd. of Educ., 372 N.J. Super. 341 (App. Div. 2004) was an example of a court upholding the use of the Equal Proportion Method for a board with nine or less seats.

There would be no irreparable harm to petitioner, as reapportionment fulfills a legislative intent. The ECS had no discretion in this matter, but rather had a duty to perform a reapportionment.

LEGAL ANALYSIS

The issue is whether the petitioner had proven by a preponderance of the evidence that it met the standard for emergent relief, and that it was entitled to a stay of respondent's reapportionment of the board of education pending a full due process hearing and decision from the Commissioner of Education.

Petitioner argued that the apportionment of seats on a school board should remain the same in successive school years, except where reapportionment is "necessary." It argued that respondent reapportioned seats for the annual school election scheduled for November 2022 due to one-tenth decrease in the apportioned seats for Long Hill Township, and that a reapportionment would not be necessary based upon such a "*de minimus*" decrease in the apportioned seats. Petitioner sought emergent relief because it was unlikely that the Board would receive a decision from the Commissioner on its underlying petition in a timely manner; a decision in its favor would then require the Board to remove the extra Warren Township Board member elected in the November election and hold a special election to elect a new Long Hill Township Board member. Petitioner

asserted that a special election would cost a great deal of time and money, and would negatively affect the continuity of the Board's functions and possibly the validity of any Board votes taken during the interim time period.

N.J.S.A. 18A:6-9 authorizes the Commissioner of Education to consider controversies regarding school boards. OAL is the appropriate venue for hearing an appeal of a finding related to a school board, and therefore OCD properly forwarded this matter to OAL for this emergent appeal to be heard.

Pursuant to N.J.A.C. 6A: 3-1.6 and the case of Crowe v. DeGioia, 90 N.J. 126 (1982), a petitioner must show by a preponderance of the evidence that four prongs/prerequisites have all been met in petitioner's favor in order to be eligible for emergent relief. A petitioner bears the burden of proving the four prongs for emergent relief. B.W. ex rel. D.W. v. Lenape Reg'l High Sch. Dist., OAL Dkt. No. EDS 06933-05, Agency Ref. No. 2006-10522E, at 8 (N.J. Adm); see also J.G. ex rel. Q.B. v. Bd. of Educ. of Lakewood, OAL Dkt. No. EDU 10073-03, Agency Dkt. No. 466-12/03, at 6 (N.J. Adm); R.D. ex rel. C.D. v. Willingboro Bd. of Educ., 95 N.J.A.R.2d 190, at 2. Each of the four factors must be clearly and convincingly demonstrated. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013); see also Y.T., o/b/o L.R. v. Bd. of Educ. of the Twp. of Willingboro, Burlington Cnty., 2015 N.J. AGEN 446 (Nov. 19, 2015). Injunctive relief is an exceptional remedy that must be exercised sparingly, with great care, and only to prevent damage of an urgent necessity. Mays v. Penza, 179 N.J. Super. 175, 179-80 (Law Div. 1980).

Per N.J.A.C. 6A: 3-1.6 and Crowe, emergent relief may be granted if the judge determines from the proofs that the following four prongs have been met:

i. The petitioner will suffer irreparable harm if the requested relief is not granted;

ii. The legal right underlying the petitioner's claim is settled;

iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

iv. When the equities 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.

1. The petitioner will suffer irreparable harm if the requested relief is not granted.

To award emergent relief, the requested remedy must be necessary to prevent "substantial, immediate and irreparable harm." Subcarrier Communications, Inc. v. Daycomm, Inc., 299 N.J. Super. 634, 638 (1997). The type of harm present must not be able to be addressed by legal or equitable remedy following a hearing. Emergent relief must be the only way of protecting the petitioners from harm. Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797 (3d Cir. 1988); Waterman v. Verniero, 12 F.Supp.2d 364 (D.N.J. 1998).

The Board's next election was scheduled for November 8, 2022, with nominating petitions due to the district business administrator by July 25, 2022. Petitioner stated that if the reappropriation were to take effect, the Board would be required to reject the Long Hill Township Board member nominating petitions for the open seat, which it would normally accept, and accept only the Warren Township nominating petitions, before the Board received a final decision on its underlying petition. Similarly, the Long Hill Township board member whose term was expiring would not be able to seek re-election.

If the Board ultimately prevailed on its underlying petition, it would then have to hold a special election to elect someone from Long Hill Township, and would have to remove the Warren Township member after their term had already begun. Petitioner asserted that this new board composition could also call into question the validity of any Board votes/action taken during that time. A special election would result in a significant expenditure of time and money, and would be unfair to the individual elected at the November 2022 election. Another by-product of this scenario would be that Warren Township would gain a majority vote on the Board for any matters on which the tenth Board member (Green Brook, based on its send-receive relationship) was unable to vote.

Petitioner also claimed that the reappropriation could serve as a deterrent to other schools wishing to consolidate with the High School District Board, creating a potentially "chilling effect" on future expansion of the regional District, which petitioner asserted would be contrary to the spirit and intent of recent New Jersey legislation supporting the creation of meaningful and implementable plans to form or expand regional school districts, pursuant to N.J.S.A. 18A:13-47.1 et seq.

Petitioner also added that respondent would suffer no irreparable harm, as the board would function in exactly the same manner as it had for the last fifty years pending a final decision on this matter. If successful in the due process hearing and Commissioner's decision, the Board would simply put into effect respondent's reapportionment at the next school election, and no harm will have been caused to respondent. However, lack of harm to the respondent was not a prong of the Crowe test, although it might be a consideration in the later balancing of the equities.

Respondent offered the more persuasive argument, when it asserted that the Board's claim that the reallocation of seats might hinder other schools from wishing to consolidate with the High School District Board did not meet the definition of irreparable harm. Respondent argued that irreparable harm must inherently be imminent, concrete, non-speculative, and must occur in the near and not distant future, citing Y.T., 2015 N.J. AGEN 446 (citing Subcarrier Commc'ns, 229 N.J. Super. at 638; Waste Mgmt. of N.J., 399 N.J. Super. at 519-20, 535. See also In re Resolution of State Comm'n of Investigation, 108 N.J. 35, 46 (1987) (holding that "where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." (quoting Eccles v. Peoples Bank, 33 U.S. 426, 431 (1948)).

Respondent further argued that petitioner's claim that some harm may occur because it might incur monetary expenses due to having to hold a special election did not satisfying the Crowe standard, as money damages are not the type of harm contemplated in a Crowe analysis. Crowe, 90 N.J. at 132-33; see also Instant Air Freight Co., 882 F.2d 797.

The claim that this reapportionment would result in Warren Township gaining a majority vote on the Board for matters for which the tenth Board member (via a send-receive relationship) was unable to vote did not indicate irreparable harm; it would merely be the consequence of an official fulfilling a legislative function, that being analyzing census data for the purpose of apportioning seats on a board of education.

Accordingly, I **CONCLUDE** that petitioner failed to show that this first prong of the Crowe test for emergent relief had been met in its favor.

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.

Both parties argued the second and third prongs of the Crowe test together.

Petitioner made a valid argument that might lead to success in a full due process hearing: respondent based its reapportionment on N.J.S.A. 18A:13-9 and N.J.S.A. 18A:8-29, which state that an "apportionment **shall continue in effect unless and until** a reapportionment shall become **necessary** by reason of the receipt by the Governor of the next federal census or the enlargement of the regional district by the admission of one or more local districts." [emphasis added by petitioner.] Respondent failed to provide any evidence that this reapportionment was necessary, except in arguing that it was required to fulfill its statutory responsibilities. Rather, respondent focused on the language therein which stated that immediately after the receipt by the Governor of a new census the county superintendent shall reapportion the members accordingly, emphasizing the word "shall." This disagreement over whether reapportionment was inherently necessary when a census indicated population changes, or whether a superintendent must specifically state and prove a specific need for reapportionment due to the results of a census, are issues best argued in a full due process hearing. Relying on a dictionary definition of "necessary" did not carry the same legal weight as statutory definitions or caselaw, and therefore petitioner's argument, while it could be effective in a full hearing, did not prove that petitioner had the benefit of settled law or prove a likelihood of success in a due process hearing.

Respondent argued that petitioner did not at any time dispute the numbers in the census, or the ECS's calculations using the Equal Proportion Method. Respondent also argued that the ECS was bound by N.J.S.A. 18A:13-8 and -9 to conduct the reapportionment after the 2020 census was issued, applying the formula set forth in N.J.S.A. 18A:13-9, with no discretion to do otherwise. These are both matters best parsed through in a full due process hearing.

Respondent's more persuasive argument was that petitioner objected to its use of the Equal Proportion Method, preferring instead to utilize the Strict Population Method, but that respondent had the discretion to employ either method, and the Equal Proportion Method was legally acceptable. No evidence was produced to show which method had been used fifty years ago when the current board composition was set, but respondent did indicate that the Equal Proportion Method was used most recently, after the 2010 census.

Respondent cited to a case analogous to the within matter, which showed that the law was more settled in favor of respondent rather than petitioner. In the afore-referenced Board of Education of Rancocas Valley Regional High School Dist., Burlington County v. New Jersey State Board of Education, 364 N.J. Super. 623 (App. Div. 2003), the board of education, in receipt of the 2000 census results, performed a reapportionment which resulted in the removal of one of Mount Holly Township's seats and the addition of one seat to Eastampton Township. The board argued that the ECS used the wrong apportionment formula, that being the Equal Proportion Method instead of the Strict Population Method. The Commissioner of Education held that the Equal Proportion Method was legally permissible, and dismissed the appeal. The State Board of Education affirmed the decision, as did the Appellate Division.

Petitioner argued that Rancocas Valley was not analogous to the within matter, because that court was addressing N.J.S.A. 18A:13-8, which petitioner stated dealt only with school boards with more than nine seats.

N.J.S.A.18A:13-8 states:

The board of education of a regional district shall consist of nine members unless it consists of more than nine constituent districts, in which case the membership shall be the same as the number of constituent districts, plus one. Except as otherwise provided pursuant to section 1 or section 3 of P.L.2017, c.45 (C.18A:13-34a or C.18A:13-46.1), if there are nine or less constituent districts, the members of the board of education of the regional district shall be apportioned by the executive county superintendent or executive county superintendents of the county or counties in which the constituent districts are situate, among said districts as nearly as may be according to the number of their inhabitants except that each constituent district shall have at least one member.

In making the apportionment of the membership of a regional board of education among the several school districts uniting to create a regional school district having nine or less constituent districts, as required by section 18A:13-36, there shall be subtracted from the number of inhabitants of a constituent school district, as shown by the last federal census officially promulgated in this State as reported by the Secretary of State pursuant to section 1 of P.L.2021, c.198 (C.52:4-1.6), the number of such inhabitants who according to the records of the Federal Bureau of the Census were patients in any State or federal hospital, or who are military personnel stationed at, or civilians residing within the limits of, any United States Army, Navy or Air Force installation, located in such constituent school district.

Except as otherwise provided pursuant to section 1 or section 3 of P.L.2017, c.45 (C.18A:13-34a or C.18A:13-46.1), if there are more than nine constituent districts, the members on the board shall be apportioned among the constituent districts and the weight of their votes in all proceedings of the board shall be determined by the appropriate executive county superintendent or superintendents through the following procedure:

a. The number of inhabitants of each constituent district shall be determined as shown by the last federal census officially promulgated in this State as reported by the Secretary of State pursuant to section 1 of P.L.2021, c.198 (C.52:4-1.6). **b.** A representative ratio shall be calculated by adding the number of inhabitants of all constituent districts and dividing the sum by the board size. **c.** All constituent districts shall be listed in ascending order of their number of inhabitants. If the first constituent district in said list has a number of inhabitants which is less than the representative ratio, it shall be combined with the constituent district contiguous to it having the smallest number of inhabitants. This process shall be repeated for each successively larger constituent district or combination of constituent districts until all remaining constituent districts or combinations of constituent districts shall have a number of inhabitants equal to, or exceeding the representative ratio. The districts formed in this manner shall be known as representative districts. **d.** There shall be established a priority list according to the method of equal proportions for the apportionment of the members of the regional district board of education among the representative districts. **e.** The members of the regional district board of education shall be apportioned among the representative districts according to the method of equal proportions, and where a representative district is composed of more than one constituent district, members shall be elected at large from within

> the representative district. **f.** The number of inhabitants of each representative district shall be divided by the number of members assigned to that district to find the number of inhabitants per member. **g.** The vote to be cast by each member of the regional district board of education in all proceedings of the board shall be determined by dividing the number of inhabitants per member in the representative district from which the member is elected by the representative ratio for the regional district, and rounding off the quotient to the nearest tenth of a full vote. Wherever any statute or bylaw of the board requires decision in any matter by vote of a majority of the board members, or of the members present, this shall be interpreted as meaning a majority of the weighted votes of all members, or of the members present, as the case may be. **h.** Whenever the above reapportionment procedure is used for a regional district having more than nine constituent districts, the terms of office of all incumbent board of education members shall terminate on the day on which the annual organization meeting of the board is held pursuant to N.J.S.18A:13-12 following certification by the executive county superintendent of the representative districts and the number of members to be elected from each; provided, that if the reapportionment results in any representative district retaining its former boundaries and the same number of board members, that the members elected from such a district shall serve the full term for which they were elected. All other board members shall be elected in an election to be held on the date of the annual school election at least 60 days following certification by the executive county superintendent for initial terms of office to be designated in advance by the executive county superintendent so that, as nearly as possible, one-third of the board shall be elected in each future year, to serve for three-year terms, and where a representative district has more than one member, their terms of office shall terminate in different years. If any constituent district is a consolidated district, or a district composed of two or more municipalities, and
> **a.** The original district is a limited purpose regional district and such constituent district has such population that it is entitled to have apportioned to it a number of members equal to or greater than the number of districts making up such constituent district, or **b.** The regional district is an all purpose district, the membership of the regional board of education from such district shall be apportioned, and from time to time reapportioned, and the members from the district shall be elected, as their respective terms expire, in the same manner as though each of the municipalities making up such constituent district were constituent districts of the regional district.

It therefore appears that N.J.S.A.18A:13-8 deals with boards of all sizes, whether nine or less, or nine or more seats. It applied to both the Rancocas Valley District situation with more than nine seats, as well as the within matter, where there are nine seats related to District schools. It requires the Equal Proportion Method for boards of nine or more seats, but does not prohibit use of either Equal Proportion Method or Strict Population Method for boards of nine or fewer seats. Petitioner's objection to the relevance of Rancocas Valley was further diminished by the fact that there were actually ten seats on its board of education, with Green Brook Township as the tenth member. Additionally,

Board of Educ. Of Northern Burlington Co., cited above, was an example of a court upholding the use of the Equal Proportion Method for a board with nine or less seats.

The citation of one or two reapportionment cases would not be truly determinative as to whether the law is settled in one party's favor; presumably the parties would offer more examples of caselaw that confirmed their positions in the course of a full due process hearing. But based on the evidence proffered for purposes of this emergent petition, the law appeared more settled in favor of respondent, not petitioner, and there was no clear likelihood of success on the merits at a full due process hearing in favor of petitioner.

Accordingly, I **CONCLUDE** that petitioner failed to show that the second and third prongs of the Crowe test for emergent relief had been met in favor of the petitioner.

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In balancing the equities, petitioner reiterated the above-stated harm it claimed it would suffer if no stay of reapportionment was issued herein, which has already been found not to meet the definition of irreparable harm. Respondent reiterated its claim that petitioner would suffer no irreparable harm, without asserting that respondent would suffer any harm. Accordingly, the balancing of the equities did not favor either party, and thus did not clearly favor petitioner. Having already concluded that petitioner failed to meet the first three prongs of the Crowe test, there would be no need to analyze the fourth prong any further.

Therefore, I **CONCLUDE** that petitioner failed to show by a preponderance of the evidence that it met all four prongs of the Crowe test for emergent relief. I **CONCLUDE** that petitioner failed to prove that it was entitled to emergent relief in this matter.

ORDER

The petitioner's 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 16, 2022
DATE

JEFFREY N. RABIN, ALJ

JNR/dw

APPENDIX

BRIEFS/EXHIBITS

For petitioner:

Petitioner's Petition of Appeal, dated May 6, 2022

For respondent:

Respondent's Brief and Certifications, dated May 12, 2022

127-22

New Jersey Commissioner of Education

Final Decision

Michael Skowronski,

Petitioner,

v.

Board of Education of the Township of East Greenwich, Gloucester County,

Respondent.

Synopsis

Petitioner appealed the denial of indemnification for legal fees and costs pursuant to *N.J.S.A.* 18A:12-20 for expenses incurred in defending a complaint filed with the School Ethics Commission (Commission) that alleged violations of the School Ethics Code. Petitioner maintains that the Board's refusal to indemnify him is a breach of its statutory obligations under *N.J.S.A.* 18A:12-20. The Board asserts that petitioner's conduct was outside of his duties as a Board member, and statutory indemnification is required only with regard to conduct "arising out of and in the course of the performance of his duties as a member of a board of education." Petitioner was previously found to have violated the School Ethics Act (Act) when he sent an email to his fellow Board members that included confidential information and was inadvertently copied to a member of the public. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact here, and the matter is ripe for summary decision; the issue of indemnification of members of boards of education against the cost of legal proceedings is governed by *N.J.S.A.* 18A:12-20, which provides for indemnification when a legal action against a board member arises out of and in the course of the performance of their duties as a member of the board; here, the petitioner sent an email using his Board email account in direct response to an email from the Board president which involved a current matter before the Board; and such email exchange was deemed to be part of the Board's deliberative process. The ALJ concluded that petitioner's conduct arose out of and in performance of his duties as a member of the Board; accordingly, petitioner is entitled to indemnification consistent with *N.J.S.A.* 18A:12-20. The petitioner's motion for summary decision was granted and the opposing motion was denied.

Upon review, the Commissioner, *inter alia,* concurred with the ALJ that the petitioner is entitled to indemnification under *N.J.S.A.* 18A:12-20. Accordingly, the Commissioner granted petitioner's motion for summary decision, and ordered the Board to reimburse the petitioner for reasonable legal fees and costs in connection with the within 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.

127-22
OAL Dkt. No. EDU 05603-21
Agency Dkt. No. 92-6/21

New Jersey Commissioner of Education

Final Decision

Michael Skowronski,

Petitioner,

v.

Board of Education of the Township of East Greenwich, Gloucester County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto, have been reviewed and considered.

Petitioner was previously found to have violated the School Ethics Act when he sent an email to his fellow Board members that included confidential information and, due to the use of the "reply all" function, inadvertently copied a member of the public on the email. *Lynch v. Skowronski*, Commissioner Decision No. 284-20SEC, decided December 15, 2020. Thereafter, petitioner sought indemnification from the Board for the legal fees and costs incurred in defending the matter before the School Ethics Commission. Following cross-motions for summary decision, the Administrative Law Judge (ALJ) found that petitioner had sent an email using his Board email account, in direct response to an email from the Board president, regarding a current matter before the Board. The ALJ noted that the Commissioner's previous

decision had found the email to be part of the Board's deliberative process. Accordingly, the ALJ concluded that petitioner's conduct arose out of and in the performance of his duties as a member of the Board, and that petitioner therefore was entitled to indemnification.

In its exceptions, the Board argues that the ALJ failed to apply case law regarding the three factors that determine whether indemnification is appropriate. The Board contends that when petitioner disclosed a confidential email to a member of the public, he lacked any authority from the Board to do so, and therefore his actions did not arise out of or in the course of his duties as a board member. According to the Board, whether the email was part of the Board's deliberative process is not determinative.

In reply, petitioner argues that the cases cited by the Board do not require the ALJ to address all three factors, and that *N.J.S.A.* 18A:12-20 only requires a board member to demonstrate that the act or omission arose out of and was in the course of performance of his duties as a board member. Petitioner contends that the ALJ properly addressed this requirement, and properly concluded that his conduct did occur in the course of performing his duties as a member of the Board.

Upon review, the Commissioner concurs with the ALJ that petitioner is entitled to indemnification. The Appellate Division has stated that "a liberal approach is taken in applying the [indemnification] statute so as not to inhibit a board member from freely expressing himself or herself and acting for the public good without fear of economic loss." *Quick v. Bd. of Educ. of the Twp. of Old Bridge, Middlesex Cty.*, 308 *N.J. Super.* 338, 342 (App. Div. 1998) (internal quotations and citations omitted). In requests for indemnification related to matters before the School Ethics Commission, "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." *Matthews v. Bd. of Educ. of the City of Englewood, Bergen Cty.*, Commissioner Decision No. 120-10, decided April 15, 2010.

Here, as the ALJ found, petitioner was responding to an email from the Board president, using his Board email account, regarding the Board's handling of an issue raised by a member of the public. Petitioner's act of sending an email to his fellow Board members, related to Board business, arose out of and in the course of performing his duties as a member of the board. The finding in *Lynch v. Skowronski* that petitioner disclosed confidential information to a member of the public does not alter that conclusion. "The outcome of the action is irrelevant. The statute protects both successful and unsuccessful litigants." *Quick*, *supra*, 308 *N.J. Super.* at 343. Notably, *N.J.S.A.* 18A:12-20 was amended to include administrative proceedings in the same bill that imposed the Code of Ethics. *L.* 2001, *c.* 178. Under standard principles of statutory construction, the Commissioner presumes that the Legislature, in enacting the bill, intended that board members could potentially be indemnified for conduct that was found to be in violation of the Code of Ethics. Therefore, the fact that petitioner was found to have disclosed confidential information does not preclude an award of indemnification. [1]

The Board contends that ALJ was required to address three factors regarding petitioner's conduct: whether the board expressly granted the authority to the member to act, whether a majority of the board informally authorized the act, and whether the act arose out of an

[1] In *Lynch v. Skowronski*, it was necessary for the Commissioner to determine whether the email was confidential. In making that determination, the Commissioner concluded that the email was part of the Board's deliberative process. While the deliberative process privilege arises from cases involving the Open Public Records Act, a law that was not applicable to the review of a School Ethics Act matter, the Commissioner nonetheless found those analyses to be instructive as a framework for assessing the confidentiality of the email. Here, it is not necessary to reach the issue of deliberative process, as the issue is whether petitioner's conduct arose out of and in the course of performing his duties as a member of the board, and not whether the information contained in the email was confidential.

in the course of the performance of the members duties. In support of this proposition, the Board cites to the Initial Decision in *Montagna v. Bd. of Educ. of the Twp. of Belleville,* 97 *N.J.A.R.* (EDU) 46, OAL Dkt. No. EDU 7007-94, February 14, 1995, adopted and modified by Commissioner, March 29, 1995. First, the Commissioner notes that an Initial Decision is not binding precedent. Moreover, neither the ALJ's decision nor the decision herein is inconsistent with *Montagna.* In summarizing the factors to be considered when deciding a claim for indemnification, the ALJ in *Montagna* did not indicate – nor does any other case law indicate – that all three factors must be satisfied for indemnification to be awarded. Indeed, it is unlikely that all three factors could be satisfied for the same act, as one of the factors is whether the act was expressly authorized by the board, while another factor is whether the act was informally authorized by the board, and the existence of one type of authorization likely excludes the other.

Furthermore, a review of case law demonstrates that indemnification can be ordered when neither express nor informal authorization exists, as long as the conduct arose out of and in the course of performing the board member's duties.[2] The Appellate Division has held that the phrase "in the performance of their duties" cannot be construed so narrowly as to "exclude all tortious conduct by a board member, because it is never a 'duty' of a board member to commit a tort. . . .[or] all invalid resolutions because it is not a 'duty' of a board member to pass

[2] Accordingly, the factors listed by the ALJ in *Montagna* cannot be mandatory criteria but are rather possible ways in which a board member can demonstrate that his actions warrant indemnification.

an invalid resolution." *Errington v. Mansfield Twp. Bd. of Educ.*, 100 *N.J. Super.* 130, 137 (App. Div. 1968).[3]

In *Errington*, one board member's action in publishing an open letter attacking a critic of board policy was found to be personal in nature, rather than arising out of and in the course of performance of her duties as a member of the board; she was therefore not entitled to indemnification for the costs of defending a libel suit related to the open letter. *Id.* at 135. However, when the other members of the board voted to approve a resolution to engage counsel to defend the writer of the letter, their action arose out of and during the course of the performance of their duties as board members, even though the resolution was invalid, and they were "legally mistaken in their belief that the resolution could be validly adopted." *Id.* at 137. Clearly, the members of the Mansfield Board of Education had neither express nor informal authorization to vote on an invalid resolution. However, they voted on that resolution in the course of performing their duties, and indemnification was therefore appropriate.

In *Quick*, a board member was recused from voting on a matter due to a conflict but wanted to attend closed session meetings discussing the matter. The board filed suit and obtained an order enjoining Quick from attending closed session meetings, and Quick sought indemnification for the costs of defending herself in that action. *Quick*, *supra*, 308 *N.J. Super.* at 340. The *Quick* case involves a more obvious lack of authorization than the *Errington* case, where arguably the board members were at least in agreement that their actions were lawful, despite their mistake in reaching that conclusion. In *Quick*, the board so strongly disagreed

[3] *See also Powers v. Union City Bd. of Educ.*, 124 *N.J. Super.* 590, 595 (Law. Div. 1973), *aff'd*, 127 *N.J. Super.* 294 (App. Div. 1974) (the fact that an alleged criminal act was "obviously beyond the prescribed duties of a board member does not in itself immunize the board from the statutory liability [of indemnification]; for such a construction would exclude all criminal conduct and frustrate the express intent of the legislature. . . . Conduct may fall within the scope of a defendant's duties even if it is unlawful.")

with Quick's belief that she was entitled to attend the closed session meetings that it filed suit against her. There can be no greater demonstration that a board member's actions were not authorized, either expressly or informally. Nonetheless, because participating in meetings is part of a board member's duties, the Appellate Division found that indemnification was appropriate. *Id.* at 343-44.

Even the *Montagna* decision itself does not require all three factors to be satisfied for indemnification to be awarded. *Montagna* involved a defamation suit, based on statements made by the board president during an appearance on television. The ALJ found that the "sole purpose of the panel was to discuss the district's cutback of courtesy busing. This duty could be carried out by any board member and no express or informal authorization by the board was required. Indeed, there is no obligation or requirement that ministerial functions be preapproved by the [board of education]." *Montagna*, *supra*. Concluding that the president's appearance was in good faith, in direct response to allegations made against the board, and not personal in nature, the ALJ awarded indemnification.

Here, petitioner did not have either express or informal authorization to disclose confidential information. However, the third factor listed by the ALJ in *Montagna* is whether the act arose out of and in the course of the performance of the member's duties, which mimics the statutory requirement of *N.J.S.A.* 18A:12-20. The disclosure occurred when petitioner sent an email related to Board business. Petitioner's email was not personal in nature, nor is there any indication of bad faith. The ALJ concluded, and the Commissioner agrees, that the petitioner's act arose out of and in the course of the performance of his duties

as a member of the Board, as discussing matters of concern to the board is certainly part of a board member's duties.

Accordingly, petitioner's motion for summary decision is granted. The Board is ordered to reimburse petitioner for reasonable legal fees and costs in connection with this matter.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 16, 2022
Date of Mailing: June 16, 2022

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05603-21
AGENCY DKT. NO. 92-6/21

MICHAEL SKOWRONSKI,
Petitioner,
v.
TOWNSHIP OF EAST GREENWICH
BOARD OF EDUCATION,
GLOUCESTER COUNTY,
Respondent.

Benjamin W. Spang, Esq., for petitioner Michael Skowronski (Dilworth Paxson LLP, attorneys)

Stephen J. Edelstein, Esq., for respondent Township of East Greenwich Board of Education (Weiner Law Group, attorneys)

Record Closed: April 11, 2022 Decided: May 5, 2022

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

Petitioner Michael Skowronski (Skowronski) appeals the denial of indemnification by respondent Township of East Greenwich Board of Education (Board) pursuant to

N.J.S.A. 18A:12-20 for legal fees and costs incurred in defending a complaint filed with the School Ethics Commission (Commission) alleging violations of the School Ethics Code. Petitioner maintains that the Board's refusal to indemnify him is a breach of its statutory obligations under N.J.S.A. 18A:12-20. The Board maintains that petitioner's conduct was outside of Skowronski's duties as a Board member, and statutory indemnification is required only with regard to conduct "arising out of and in the course of the performance of his duties as a member of a board of education."

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL), where it was received on July 2, 2021, and filed for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing conference was conducted, after which the parties agreed to and requested time to file motions for summary decision on the issue of whether the Board of Education should indemnify petitioner for legal fees and costs incurred in defending this action. The last submission was received on April 11, 2022 and the record closed.

DISCUSSION AND FINDINGS OF FACT

The underlying case in which petitioner seeks indemnification began when Dr. James J. Lynch, the Board superintendent, filed a three-count complaint with the Commission alleging that Skowronski violated provisions of the School Ethics Code, as well as the New Jersey Open Public Meetings Act. On March 14, 2019, Skowronski filed a motion with the Commission to dismiss the Board's complaint in lieu of an answer. In a decision dated June 20, 2019, the Commission granted Skowronski's motion in part, dismissing Counts 1 and 2 of the complaint, but denied Skowronski's motion with respect to Count 3, which alleges a violation of the State Ethics Code, N.J.S.A. 18A:12-24.1(g), for sending an email on January 22, 2019, to fellow members of the Board and copying a non-Board member. N.J.S.A. 18A:12-24.1(g) pertains to the duty of the Board member to hold matters confidential that if disclosed would needlessly injure individuals or the schools. The remaining count of Skowronski's complaint was transmitted to the OAL, where it was filed on July 25, 2019, under docket number EEC 10213-19. In an Initial

Decision dated February 2, 2020, the Administrative Law Judge (ALJ) concluded that Dr. Lynch failed to prove that Skowronski had violated N.J.S.A. 18A:12-24.1(g). In its May 19, 2020, decision, the Commission adopted the ALJ's factual findings, but found that Skowronski had violated N.J.S.A. 18A:12-24.1(g) and recommended a penalty of reprimand. The New Jersey Commissioner of Education (Commissioner) determined that the Commission's decision was supported by sufficient credible evidence, and that Skowronski had failed to establish that the decision was arbitrary, capricious, or contrary to law. Lynch v. Skowronski, East Greenwich Township Board of Education, Gloucester County, #284-20SEC, Comm'r Decision (December 15, 2020), https://www.nj.gov/education/legal/; N.J.A.C. 6A:4-1.1(a).

For this appeal, the parties submitted a joint statement of facts, and stipulated to the following:

1. Dr. James J. Lynch was the superintendent of the East Greenwich Board of Education in January 2019.

2. Michael Skowronski began service as a member of the Board on or about January 2, 2019.

3. On or about January 15, 2019, the Board and all of its members received a letter via email from Lisa Christopher, a teacher employed by the East Greenwich School District who is also a parent to a student in the district (the Christopher Letter). J-A.

4. The Christopher Letter raised concerns regarding the school district's response to a police incident in a neighboring township, as well as concerns that Ms. Christopher had with an interaction with the district's superintendent, Dr. Lynch.

5. On January 16, 2019, the president of the Board, Lyn McGravey, responded to the email and copied the entire Board, stating that the Board would collectively review and discuss the concerns raised in Ms. Christopher's letter. J-B.

6. On January 16, 2019, the Board held a regularly scheduled meeting. Mr. Skowronski motioned for an executive session (the Executive Session), wherein, according to the public minutes, the Board convened to discuss "personnel" and an "employee's communication concerning the District's response to the incident at the UPS in Logan Township."

7. On January 19, 2019, Ms. McGravey sent an email to Ms. Christopher (the "Board Response Email") and copied the entire Board. In the Board Response Email, Ms. McGravey informed Ms. Christopher that the Board discussed the concerns raised in the Christopher Letter during the Executive Session held on January 16, 2019. J-C.

8. After receiving the Board Response Email, Ms. Christopher sent another email to the Board on January 19, 2019 (the "Second Christopher Letter"), wherein she again raised concerns about her interaction with Dr. Lynch and the Board's handling of it. J-D.

9. On January 22, 2019, Ms. McGravey responded to the Second Christopher Letter via email. J-E.

10. On January 22, 2019, Ms. Christopher responded via email to Ms. McGravey, copying the entire Board, and indicated that she felt that the Board had not addressed her concerns. J-F.

11. On January 22, 2019, Mr. Skowronski sent an email (the Skowronski Email) to the Board regarding the correspondence received from Ms. Christopher. J-G.

12. The Skowronski Email was sent to the entire Board and to Ms. Christopher.

13. On or about February 20, 2019, Dr. Lynch filed an Amended Complaint against Skowronski alleging violations of N.J.S.A. 18A:12-24.1(a) and N.J.S.A. 18A:12-24.1(g) based on events that took place in January 2019. J-H.

14. Mr. Skowronski filed a motion to dismiss the Amended Complaint, which was granted in part by the Commission on June 19, 2019. J-I.

15. After dismissing portions of the Amended Complaint, the sole remaining count alleged a violation of N.J.S.A. 18A:12-24.1(g), in which Mr. Skowronski "wrote an email to the entire board with a copy to a member of the public in which there are negative comments on District personnel, specifically the superintendent." J-H, J-I.

16. The Commission held that "[i]f Complainant can additionally prove that certain/specific information in the email message was confidential (e.g., specific issues/matters discussed in executive session that were not yet public) and can cite to the authority/basis for the confidential nature of the information, Complainant may be able to establish a violation of N.J.S.A. 18A:12-24.1(g)." J-I.

17. The Amended Complaint was referred to the OAL as a contested case.

18. On March 6, 2019, Benjamin W. Spang, Esq., on behalf of Mr. Skowronski, demanded indemnification from the East Greenwich Board of Education for legal fees and costs incurred in the defense of the Amended Complaint. J-J.

19. On March 11, 2019, Board counsel Stephen J. Edelstein, Esq., responded to Mr. Spang that "the request will be considered at the conclusion of the matter." J-K.

20. On February 25, 2020, the Initial Decision in Lynch v. Skowronski, East Greenwich Township Board of Education, Gloucester County, EEC 10213-19, Initial Decision (February 25, 2020), https://njlaw.rutgers.edu/collections/oal/, was issued. J-L.

21. The ALJ found that Mr. Skowronski had not violated N.J.S.A. 18A:12-24.1(g) and issued an Initial Decision dismissing the ethics complaints lodged by Dr. James Lynch against Michael Skowronski. The Initial Decision was filed with the Commission for consideration.

22. The Commission issued a Final Decision on May 19, 2020. J-M.

23. The Commission determined that Mr. Skowronski had violated N.J.S.A. 18A:12-24.1(g) and recommended a penalty of reprimand.

24. Mr. Skowronski filed an appeal to the Commissioner under docket number 284-20SEC. On December 15, 2020, the Acting Commissioner of Education affirmed both the Commission's Decision and the recommended penalty that the Commission imposed. J-N.

25. Mr. Skowronski filed a motion for reconsideration based upon what he alleged were mistakes of fact and law by the Acting Commissioner. The Acting Commissioner refused to reconsider her decision and denied the motion for reconsideration.

26. Mr. Skowronski did not appeal further.

27. On February 25, 2021, Mr. Skowronski, through counsel, again demanded indemnification. J-O.

28. On March 22, 2021, counsel for the Board advised counsel for Mr. Skowronski that the Board of Education had denied the demand for indemnification. J-P.

29. On July 2, 2021, [ ] the instant matter was filed.

I adopt the joint statement of facts as the **FACTS** of this matter, and I further **FIND**:

The Skowronski Email regarding the Board president's January 22, 2019, email was sent to all the members of the Board and was inadvertently copied to a member of the public due to the use of the "reply all" function. The Skowronski Email response stated the following:

> Good morning fellow board members. I did see Lyn's most recent response, but in regards to Ms. Christopher's letters . . . . This whole situation has weighed heavily on me since our last meeting. And I thought long and hard as to whether I

should send my own email in these past few days. Since we received this second communication, I feel compelled to suggest we revisit this, or "re-handle" this, if not only via email as a group. And **PLEASE**, indicate to me what I may be missing here . . . . But I do not feel we really addressed this (and the very specific concerns outlined) adequately. I don't think having Dr. Lynch handle a complaint about Dr. Lynch is how we really want to handle this. Again, **PLEASE** indicate to me what I may be missing here. Maybe there is an aspect of this situation I am not understanding or aware of. But the concerns in the communications are serious, and specific. I believe the 4 main points are (harassment, safety, communication, and fear of retaliation), but her communication additionally includes the following:

First letter:
- Was called out of her classroom
- Singled out and was called to the office
- Children dismissed without officers' present
- No officer at entrance of building
- Dr. Lynch doesn't question them about their jobs
- No community member, parent, or employee should be made to feel wrong for questioning the safety
- Email should have been sent informing parents & staff we were aware

Second letter:
- Communication as a whole seems to be an underlying problem in our district
- Why couldn't an email still go out to alleviate any concerns?
- Board thinks it's acceptable for the superintendent to not only berate a parent for expressing a concern but to also tell that parent they shouldn't question his authority and for the superintendent to intimidate them at work
- I was under the impression that as a parent and a taxpayer I have a right to ask questions
- I was very uncomfortable writing the first letter
- Fear of retaliation for herself, children, and family
- Putting my faith in the East Greenwich Board of Education

Employers are nervous when faced with safety, discrimination, and harassment complaints, and so should we [sic]. Such complaints lead to workplace tension, government investigations, and costly legal battles. If the complaint is mishandled, even if unintentionally, we may unwittingly put ourselves and our stakeholders at risk.

> If we take the complaint seriously however, we can reduce the likelihood of a lawsuit and even improve employee/parent/guardian relations in the process. I would suggest either "ricing" those we need to talk to, not in a "you're in trouble" sort of way, but rather in a due-diligence sort of way. Alternatively, we can look at it as an opportunity to review or discuss best practices in-house. Not in an accusatory manner, but as an exercise in how we must treat these situations, our staff, and to mitigate risk.
>
> We answered Ms. Christopher's original message saying we discussed it as a board. But I don't know that it would have even happened had I not called the ES, and that both worries and saddens me . . . . I feel we have a fiduciary responsibility to address these specific concerns as a group, including Dr. Lynch. Ms. Christopher is correct, changes aren't made by keeping silent and sweeping things under the carpet. This seemed poignant to me in light of the MLK Holiday yesterday.
>
> I attached some best practice suggestions from NOLO to this email if anyone wants to take a look.
>
> I look forward to hearing others' opinions on this as well.
>
> Thank you all!
> -Mike

LEGAL ANALYSIS AND CONCLUSIONS

While the Uniform Administrative Procedure Rules (UAPR) governing motions, N.J.A.C. 1:1-12.1 to -12.7, do not specifically limit the types of motions that may be made in administrative hearings or otherwise preclude a "motion to dismiss," the more common method for resolving a case on the papers without a plenary hearing is by a motion for summary decision pursuant to N.J.A.C. 1:1-12.5.

Under N.J.A.C. 1:1-12.5, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he 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).

However, a motion for summary decision shall be denied if, by responding affidavit, an adverse party "set[s] forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

This standard is substantially similar to that governing a civil motion for summary judgment under New Jersey Court Rule 4:46-2. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010); Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995). Summary judgment is analyzed in accordance with the principles established by the Supreme Court in Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995):

> [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 . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Citation omitted.]

See also Nat'l Transfer, Inc. v. N.J. Dep't of Envtl. Prot., 347 N.J. Super. 401, 408–09 (App. Div. 2002).

The issue here is whether the Board is obligated to indemnify a Board member for legal fees and costs in the legal defense against school-ethics allegations brought against him by the District superintendent.

N.J.S.A. 18A:12-20 governs the issue of indemnification of members of boards of education against the cost of defense of legal proceedings brought against them. It states:

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

Shortly after the statute's enactment, the court in Errington v. Mansfield Township Board of Education, 100 N.J. Super. 130, 138 (App. Div. 1968), explained:

> The purpose of the . . . statute is to make manifest the implied power of boards of education to provide for the legal defense of a member of the board who is sued individually for some action taken by him in furtherance of his prescribed duties. Those duties are prescribed by statute, by the rules and regulations of the board itself and of those who supervise its activities, and by resolutions of the board authorizing specific action to be taken.

Deciding whether an act or omission arises out of or in the course of performance of duties requires an examination of the time, place, and subject matter of the act or omission. Matthews v. Atlantic City, 196 N.J. Super. 145, 150 (Law Div.), aff'd, 196 N.J. Super. 338 (App. Div. 1984); Matthews v. Bd. of Educ. of Engelwood, #120-10, Comm'r Decision (April 15, 2010), https://www.nj.gov/education/legal/ (citing Bower v. Bd. of Educ. of E. Orange, 149 N.J. 416 (1997)); see also Montagna v. Bd. of Educ. of Belleville, 1995 N.J. AGEN LEXIS 929 (March 29, 1995).

The Commissioner determined that the Skowronski Email of January 22, 2019, which was sent to the members of the Board as well as copied to a non-Board member, violated the School Ethics Act at N.J.S.A. 18A:12-24.1(g). That statute reads:

> A school board member shall abide by the following Code of Ethics for School Board Members:
>
> . . . .
>
> g. 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.
>
> [N.J.S.A. 18A:12-24.1(g).]

The Commissioner found that "[t]he plain language of the regulation provides that a violation occurs when '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' is disclosed. N.J.A.C. 6A:28-6.4(a)(7)." Lynch v. Skowronski, #284-20SEC, Comm'r Decision (December 15, 2020), at *3, https://www.nj.gov/education/legal/.

The Board asserts that petitioner cannot be indemnified from the cost of his defense because he violated the School Ethics Act, which by its very nature shows that petitioner acted on his own, without authority express or implied, to disclose confidential information. Stated simply, a violation of the ethics code is inconsistent with his duties as a Board member. The Board further asserts that offering his personal opinions and insights into his beliefs regarding a complaint from a community member is outside the scope of his Board duties.

The petitioner asserts that the Board erroneously focuses on the outcome of the conduct—the disclosure of confidential information—when instead the focus should be on the actual conduct, the context and content of the email. The email that Skowronski sent was "actively being discussed" before the Board.

In a civil context, the indemnification statute is construed liberally to promote a diversity of views on educational issues and policy and encourage members of local boards of education to express their views freely, without fear or intimidation. Castriotta v. Bd. of Educ. of Roxbury, 427 N.J. Super. 592, 602 (App. Div. 2012) (citing Quick v. Bd. of Educ. of Old Bridge, 308 N.J. Super. 338, 342, 343 (App. Div. 1998)). Unlike in criminal proceedings, a board member in the civil context is entitled to indemnification regardless of the outcome of the proceedings against the board member even if the board member's underlying conduct violated the School Ethics Act. See Matthews v. Bd. of Educ. of Engelwood, #120-10, Comm'r Decision (April 15, 2010), https://www.nj.gov/education/legal/.

The Board relies upon board members' actions in Errington, 81 N.J. Super. 414, and Gunther v. Board of Education of Howell, #337-05, Comm'r Decision (September 16, 2005), aff'd, State Board #42-05 (January 4, 2006), https://www.nj.gov/education/legal/, aff'd, No. A-2582-05T3 (App. Div. Nov. 21, 2006), to assert that Skowronski's legal fees and costs should not be indemnified by the Board. The cases do not apply. The board member's underlying conduct that violated the ethics act in Errington involved an allegedly defamatory open letter to the local newspaper to "defend her reputation" that was purely personal and outside her board duties. In Gunther, the board member, who was also an officer for the municipality's police department, was alleged to have obtained certain police reports and confidential information and disseminated these to members of the board of education without board knowledge or authorization, in direct violation of a specific board policy. The Commissioner determined that the board member's alleged conduct in the civil suit brought against him neither arose out of the performance of his board duties nor occurred in the course of performing those duties, so that he was not entitled to be defended against such allegations at public expense.

Here, Skowronski's conduct that resulted in a civil administrative action for violation of the School Ethics Act was sending an email that was: in direct response to the Board president's email; sent on the Board email account; and regarding a current matter before the Board. Indeed, the basis for the Commissioner's decision was that the Skowronski Email is part of the deliberative-process privilege, as it "bears all the hallmarks of

deliberative material. Specifically, the sent email was pre-decisional, and deliberative in nature." The Commissioner stated:

> The deliberative process privilege may be invoked to protect information or documents from disclosure when "the information sought is part of the process leading to formulation of an agency's policy decision" and it has the "ability to reflect or to expose the deliberative aspects of that process." Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 295 (2009).
>
> [Lynch v. Skowronski, #284-20SEC, Comm'r Decision (December 15, 2020), at *3, https://www.nj.gov/education/legal/.]

The privilege is necessary to ensure free and uninhibited communication within governmental agencies so they can reach the best possible decisions. Educ. Law Ctr., 198 N.J. at 286. The Commissioner's determination demonstrates that Skowronski was engaging in the deliberative process, when he wrote a lengthy email response to the Board president's email setting forth "these types of tentative thoughts, suggestions, and questions [that] are part and parcel of the Board's overall deliberative process." Lynch v. Skowronski, #284-20SEC, Comm'r Decision (December 15, 2020), at *4, https://www.nj.gov/education/legal/.

Having considered the parties' submissions, I **CONCLUDE** that there are no genuine issues of material fact and, therefore, summary decision is appropriate.

I **CONCLUDE** that Skowronski's conduct that resulted in the filing by the District superintendent of a School Ethics Act violation arose out of and in the performance of his duties as a member of the Board of Education.

I further **CONCLUDE** that conduct that resulted in the violation of the School Ethics Act may be indemnified.

I further **CONCLUDE** that Skowronski is entitled to be indemnified consistent with N.J.S.A. 18A:12-20.

Therefore, I **CONCLUDE** that the petitioner's motion for summary decision should be **GRANTED** and the Board's motion for summary decision should be **DENIED**.

ORDER

I hereby **ORDER** that petitioner's motion for summary decision is **GRANTED** and the respondent's motion for summary decision is **DENIED**. Respondent is **ORDERED** to reimburse petitioner for reasonable legal fees and costs in connection with the defense of this action.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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, 2022 — Mary Ann Bogan
DATE — **MARY ANN BOGAN**, ALJ

Date Received at Agency: May 5, 2022

Date Mailed to Parties: May 5, 2022

MAB/nmn

APPENDIX

Joint Exhibits

J-A Christopher Letter, dated January 15, 2019

J-B Board response email to Christopher, dated January 16, 2019

J-C Board response email, dated January 19, 2019

J-D Second Christopher Letter, dated January 19, 2019

J-E Response email to Christopher, dated January 22, 2019

J-F Christopher's response email to Board January 22, 2019

J-G Skowronski Email dated, January 22, 2019

J-H Amended Complaint against Skowronski filed on February 20, 2019

J-I Commission Decision, dated June 19, 2019

J-J Demand letter for indemnification, dated March 6, 2019

J-K Board's response to demand letter, dated March 11, 2019

J-L Initial Decision in Lynch v. Skowronski, East Greenwich Township Board of Education, Gloucester County, EEC 10213-19 (February 25, 2020)

J-M Final Commission Decision, dated May 19, 2020

J-N Commissioner's Decision, dated December 15, 2020

J-O Demand letter for indemnification, dated February 25, 2021

J-P Letter denying demand for indemnification, dated March 22, 2021

128-22
OAL Dkt. No. EDU 07317-19
Agency Dkt. No. 86-4/19

New Jersey Commissioner of Education

Final Decision

Janet Van Syckle,

Petitioner,

v.

Board of Education of the West Essex Regional School District, Essex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered.

Petitioner, a retired guidance counselor, sought an order requiring the Board to offer her the option to maintain health insurance coverage through the district's health insurance plan. The Administrative Law Judge (ALJ) found that the collective bargaining agreement between the Board and the West Essex Education Association did not contain any provision for health insurance coverage for retirees. The ALJ also found that the Board did not participate in the State Employee Health Benefits Plan, but instead provided health insurance coverage through a contract with Horizon Blue Cross/Blue Shield of New Jersey (Horizon), and the contract did not provide for coverage for retirees. Accordingly, the ALJ concluded that the Board was not required to offer petitioner continued coverage.

In her exceptions, which reiterate arguments made below, petitioner argues that the Board is required by *N.J.S.A.* 18A:16-18 and *N.J.S.A.* 18A:16-19 to provide for continued health insurance coverage after retirement of any school employee, at the employee's own expense. According to petitioner, the fact that the Horizon contract does not provide for retiree coverage is irrelevant because the statutes require the Board to offer her retiree coverage.

Upon review, the Commissioner concurs with the ALJ that the Board was not required to offer petitioner continued coverage following her retirement. *N.J.S.A.* 18A:16-18 provides, "The continuance of coverage after retirement of any employee shall be provided at such rates and under the conditions as shall be prescribed in the contract subject, however, to the requirements set forth in [*N.J.S.A.* 18A:16-19]." *N.J.S.A.* 18A:16-19 requires retirees to pay the entire cost of coverage and caps the cost at no more than 25% greater than the cost the individual would pay if actively employed.[1] Petitioner interprets these provisions to mean that the Board must enter into a contract that provides for retiree coverage, as long as the employee covers the cost. However, petitioner disregards *N.J.S.A.* 18A:16-16, which provides that insurance coverage "shall cease . . . upon cessation of active full-time employment . . . subject to such provision as may be made in any contract made by the local board of education . . . for continuance of coverage after retirement." (emphasis added). The plain language of this provision demonstrates that health insurance coverage is not provided to retirees unless a board of education contracts for such coverage. If the Commissioner accepted the petitioner's interpretation of *N.J.S.A.* 18A:16-18 and held that boards of education are required to provide

[1] *N.J.S.A.* 18A:16-19 also allows a board to assume the entire cost of coverage for an employee who retires after 25 years of service, a provision that is not applicable here because petitioner had not reached 25 years of service at the time of her retirement.

retiree coverage, the portion of *N.J.S.A.* 18A:16-16 providing that a board may contract for retiree coverage would be rendered void – an outcome that is inconsistent with standard principles of statutory interpretation. On the other hand, the ALJ's interpretation allows for the statutes to be harmonized. A board of education may contract for retiree coverage (*N.J.S.A.* 18A:16-16); when it does so, the conditions of the coverage are governed by the terms of the board's contract with the insurance company (*N.J.S.A.* 18A:16-18), as long as the cost to the retiree does not exceed 25% more than the cost if actively employed (*N.J.S.A.* 18A:16-19).

While petitioner cites to *Miller v. Bd. of Educ. of the Southern Regional High School*, 95 N.J.A.R. 2d (EDU) 253, State Board of Education, June 7, 1995, for the proposition that *N.J.S.A.* 18A:16-18 expressly provides for the continuation of coverage after retirement of any employee, the Commissioner does not find this argument persuasive. The issue presented in *Miller* concerned the timing of a teacher's retirement, which became effective on the day after the teacher's employment with the district was terminated due to a reduction in force. The State Board of Education concluded that the teacher did not have to retire prior to her final contractual day of employment in order to be eligible for retiree coverage. In doing so, the State Board of Education stated, "*N.J.S.A.* 18A:16-18 expressly provides for 'the continuance of coverage after retirement of any employee . . .'." Petitioner's reading of the case would end there. However, the next sentence states, "There are no restrictions or qualifications placed on 'retirement.'" This language demonstrates that the State Board was analyzing the portion of the statute relevant to its determination of whether the teacher qualified as a retiree of the district, not making a blanket statement requiring all boards to provide coverage for all retirees, as petitioner contends. Moreover, *N.J.S.A.* 18A:16-18 was applicable to the analysis in *Miller*

because the district had a contract that provided for retiree coverage.[2] Here, there is no such contract, and the Commissioner declines to extend the holding in *Miller* under those circumstances.

Because *N.J.S.A.* 18A:16-16 makes retiree coverage an option, rather than a requirement, the Board properly exercised its discretion to enter into a contract that did not provide for retiree coverage. With no provision in the contract for retiree coverage, the Board was not required to offer petitioner retiree coverage and did not violate *N.J.S.A.* 18A:16-18. Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 23, 2022
Date of Mailing: June 23, 2022

[2] The decisions in *Miller* identify terms in the district's collective bargaining agreement allowing retirees to continue coverage. While the "contract" referred to in *N.J.S.A.* 18A:16-16 and *N.J.S.A.* 18A:16-18 is the contract between the district and its health insurance provider, not the collective bargaining agreement, the Commissioner presumes that the district met its obligation under the collective bargaining agreement to provide for such coverage by entering into a health insurance contract offering that option, as there was no argument that the district had failed to meet that obligation or that the health insurance contract precluded coverage for retirees.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07317-19
AGENCY DKT. NO. 86-4/19

JANET VAN SYCKLE,
Petitioner,
v.
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,
Respondent.

Jason E. Sokolowski, Esq., for petitioner (Zazzali, Fagella, Nowack, Kleinbaum & Friedman, attorneys)

Eric L. Harrison,[1] Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: November 22, 2021 Decided: March 30, 2022

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

[1] Brent R. Polhman, Esq. (Methfessel & Werbel, attorneys) appeared on the first hearing date.

STATEMENT OF THE CASE

Petitioner Janet Van Syckle seeks, inter alia, an order requiring respondent Board of Education of the West Essex Regional School District, Essex County, to offer her, as a retiree, the option to maintain health-insurance coverage through the District's health-insurance plan.

PROCEDURAL HISTORY

On April 29, 2019, petitioner filed with the New Jersey Department of Education (Department) a Petition of Appeal (Petition) requesting that the Commissioner enter an order: directing respondent to rescind its present policy of not offering retirees the option to remain in the school district's health-insurance plan at retirement and receive continued health insurance at retirees' own expense; ordering that respondent must comply with the requirements of N.J.S.A. 18A:16-18 by offering petitioner, as retiree, the option to maintain health-insurance coverage through the school district's health-insurance plan at petitioner's own expense at rates in accordance with N.J.S.A. 18A:16-19; providing petitioner with all benefits and emoluments, and making petitioner whole for all benefits and monies lost as the result of respondent's improper actions; and for all such other relief as the Commissioner deems appropriate. On May 17, 2019, respondent filed its answer to the Petition.

The Department transmitted the case to the Office of Administrative Law (OAL) 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. The case was filed at the Office of Administrative Law (OAL) on May 29, 2019.

Initially, the parties agreed to submit a joint stipulation of facts and cross-motions for summary decision, but the parties were unable to jointly stipulate to all facts and a hearing was scheduled for March 25, 2020. The March 25, 2020, hearing date was

adjourned and rescheduled for November 4, 2020. On October 20, 2020, the parties submitted a joint stipulation of facts in advance of the hearing. The hearing was held on November 4, 2020, and post-hearing briefs were to be submitted by the parties. On February 12, 2021, respondent filed a post-hearing brief, but petitioner filed a motion for summary decision. Thereafter, on February 26, 2021, petitioner filed a letter brief in opposition to respondent's post-hearing brief, and in further support of petitioner's motion for summary decision. A telephone conference was held regarding the submissions and respondent objected to the filing of a motion for summary decision after the hearing. The motion for summary decision was not accepted post-hearing, but because the motion relied upon petitioner's certification, petitioner was afforded an opportunity to present testimony at an additional hearing date. The hearing was held on August 18, 2021. The record closed on November 22, 2021, upon receipt of petitioner's post-hearing brief, as respondent opted to rely upon its February 12, 2021, brief.

FACTUAL DISCUSSION

Stipulated Facts

Based upon review of the Joint Stipulation of Undisputed Material Facts (J-1) submitted by the parties, I **FIND** the following undisputed **FACTS**:

Van Syckle began her employment with the West Essex Regional School District (District) Board of Education (Board) on February 1, 2008. Van Syckle was employed continuously as a guidance counselor by the Board for the next eleven years. Van Syckle resigned for purposes of retirement effective March 1, 2019. At the time of her retirement, Van Syckle had eleven years of service with the Board. To be eligible for enrollment in the school employee health benefits program (SEHBP) retiree group the retiree must have twenty-five years or more of credited service. At the time of her retirement, Van Syckle was eligible to continue medical insurance through the COBRA program and she elected to do so. Petitioner's COBRA coverage ran through August 2020. The Board rejected Van Syckle's request to purchase medical insurance through the Board following the expiration of her COBRA coverage.

Additional Facts

Janet Van Syckle testified on her own behalf. Melissa Kida testified on behalf of respondent. Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following additional **FACTS**:

The Agreement between the Board of Education of the West Essex Regional School District and the West Essex Education Association 2017–2018 2018–2019 2019–2020 (Agreement) reflects that the Board has an obligation pursuant to N.J.S.A. 34:13A to negotiate with the West Essex Education Association (Association) as the representative of the employees with respect to the terms and conditions of employment, and that the Board recognizes the Association as the exclusive and sole representative for collective negotiation concerning grievances and terms and conditions of employment. (R-2.)

Article 11, "Salary Provisions," Section E, provides, in part, that the Board shall provide health-care insurance protection as designated:

> 1. The New Jersey School Employees' Health Benefits Plan.
>
> . . . .
>
> 3. The Board reserves the right to elect participation in any other health care insurance program, provided that the level of benefit is equal to or greater than the existing level of benefits. . . .

The Agreement does not reference retirement health-insurance benefits. The Contracts for Professional Employment for Van Syckle's years of employment as a guidance counselor do not reference health-insurance or retirement benefits. (R-3.)

The Horizon Blue Cross Blue Shield of New Jersey Direct Access Policy (Horizon Policy), effective November 1, 2017 (R-1), GENERAL INFORMATION, states, in part:

When Coverage Ends

Your coverage under this Program ends when the first of these occurs:

- The end of the Benefit Month in which you cease to be eligible due to termination of your employment or any other reason.
- The date on which the Group Policy ends for the class of which you are a member.
- You fail to make, when due, any required contribution for the coverage. . . .

[R-1 at 65.]

The Horizon Policy includes various provisions for continued coverage, including, inter alia, if the member is confined as an inpatient in a facility on the date coverage ends; if the member loses his or her job or becomes ineligible due to total disability; and if the member takes a leave that qualifies under the Federal Family and Medical Leave Act. (R-1 at 65–67.)

Additionally, with respect to "Continuation of Coverage under COBRA," the Horizon Policy states, in part:

> Under federal law called the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (COBRA), you and your enrolled Dependents, and any newborn or newly adopted child may have the opportunity to continue group health care coverage which would otherwise end, if any of these events occur:
>
> - Your death;
> - Your work hours are reduced;
> - Your employment ends for a reason other than gross misconduct.*
>
> . . . .

> If you and/or your Dependents elect to continue coverage, it will be identical to the health care coverage for other members of your class. It will continue as follows:
>
> Up to 18 months in the event of the end of your employment or a reduction in your hours. . . .
>
> [R-1 at 67–68.]

The "covered class" applies to "All Full Time Employees," defined as "permanent employment by an Included Employer for an average of 35 or more hours per week." (R-1 at 25.)

By letter dated December 7, 2018, Van Syckle notified superintendent Barbara Longo of her retirement, effective March 1, 2019. (R-3.) By letter dated December 11, 2018, Longo notified Van Syckle that at its December 10, 2018, public meeting the Board voted to accept her resignation, due to retirement, as a guidance counselor assigned to West Essex Regional High School, effective March 1, 2019. (R-3.)

An email dated January 10, 2019, from Simona Pepe, District payroll and benefits coordinator, to Van Syckle, states, in pertinent part:

> I attached the COBRA letter that was mailed to you with the forms you had questions about. The District does not administer the COBRA coverage. It is handled by the carriers directly therefore you are required to submit the completed forms to the address on the forms.
>
> Melissa Kida signed the forms before they were mailed to expedite the process if COBRA coverage is elected so there is no need to return the forms to us.
>
> [P-F.]

Van Syckle responded that she had received the letter but did not see instructions about where to mail the forms, to which Kida responded with the address information. (P-F.)

A January 14, 2019, letter (COBRA letter) from the District regarding COBRA continuation coverage and other health-coverage alternatives states, in pertinent part:

> **This notice contains important information about your right to continue your health care coverage in the West Essex Regional School District (M) group insurance plan (collectively referred to as "the Plan") as well as other health coverage alternatives that may be available to you, including coverage through the Health Insurance Marketplace at www.HealthCare.gov** or call 1-800-318-2596. **You may be able to get coverage through the Health Insurance Marketplace that may cost less than COBRA continuation coverage.** Please read the information in this notice very carefully before you make your decision. If you choose to elect COBRA continuation coverage, you should use the election form provided later in this notice.
>
> [P-G.]

The COBRA letter reflects that Van Syckle was getting the notice because her coverage under "the Plan" was ending on February 28, 2019, due to "end of employment." (P-G.) The COBRA letter further reflects that COBRA coverage generally may be continued for up to a total of eighteen months. (P-G.)

An email dated January 25, 2019, from Van Syckle to Kida states, in pertinent part:

> Sorry I haven't been able to reach you by phone but I wanted to follow up on our earlier conversation. I'm looking for confirmation of retiree benefits that extend beyond the 18 month Cobra period. It is my understanding that, as a retiree, I am able to purchase my current health benefits. I would appreciate the contact info for the company that will be administering my plan.
>
> [P-F.]

On January 30, 2019, Van Syckle and her husband completed the COBRA Continuation Coverage Election Form, indicating that they elected COBRA continuation

coverage under the Horizon Policy. (P-H.) Van Syckle's COBRA coverage terminated on August 31, 2020, after eighteen months.

Testimony

Melissa Kida

Melissa Kida has been employed by the District as school business administrator/board secretary since January 2017. In that capacity she was custodian of records, and among her job duties was dealing with the medical insurance. The current medical-insurance provider for the Board is Horizon Blue Cross/Blue Shield of New Jersey (Horizon BCBS). The medical insurance provider switched from the SEHBP to a private plan with Horizon BCBS effective November 1, 2017. Horizon BCBS remains the District's medical-insurance provider, under the same terms as the initial policy. The Horizon Policy is renegotiated at a percentage increase each year, so the plan costs change but the policy remains the same.

The Agreement governs the terms and conditions of employment. The Agreement is for the 2019–2020 school year, and a successor agreement was not negotiated in time for July 1, 2020, so the terms of the Agreement carry over until a successor agreement is ratified. The 2019–2020 Agreement governed the terms and conditions of employment for members when Van Syckle retired. The Agreement does not provide for members to purchase retiree insurance through the District. The Association did not grieve the change from the SEHBP to the Horizon Policy and did not negotiate over the impact of the change. The Board just finished negotiations with the Association for a successor agreement to the Agreement and it was already ratified by the Association and was to be ratified by the Board in December 2021. During the negotiations, the Association did not raise the issues of medical-benefits eligibility for retirees not eligible for coverage through the SEHBP or employees who did not have the requisite number of years of service to be eligible for insurance through the District. There is no provision in the Horizon Policy for retirees to purchase coverage through Horizon following retirement. The Horizon Policy specifically excludes non-employees from purchasing insurance. Neither the Horizon

Policy nor any clauses therein were grieved by the Association and there was no demand to negotiate by the Association.

Kida reviewed the District's records and consulted with other employees who manage the health-insurance plans, including the human resource manager, who has been in the District for twenty-five years, and a payroll and benefits employee who has been in the District fifteen years, and confirmed that the District has never allowed any employees to purchase benefits through the District after retirement, and that no retiree made a request to purchase such benefits. Kida did not review past Board-meeting minutes.

Van Syckle contacted Kida in January 2019 to inquire whether she could purchase insurance benefits. Kida advised Van Syckle that she would investigate it, but that she was sure the Horizon Policy did not allow it and that she would be able to purchase COBRA coverage. Van Syckle consulted with the insurance broker and the Board attorney, but the Horizon Policy does not allow retirees to purchase benefits after termination/retirement. Van Syckle contacted Kida again and said that an NJEA representative advised that she could purchase coverage, but Kida advised her that she was not able to purchase retiree health benefits through the Board but could purchase COBRA coverage. The Board did not formally take any action with respect to Van Syckle's request, and there are no Board minutes relative to Van Syckle purchasing health insurance as a retiree.

There would be no cost to the District for Van Syckle to continue with the Board's health insurance if she paid the premium herself, but it is not allowed in the Horizon Policy.

Janet Van Syckle

At the time of her retirement, Van Syckle was under sixty-five years of age. Prior to her retirement she met with a union representative for a personal planning session for potential retirees and she asked about insurance. The representative told her that the law protected her and that she would absolutely be able to purchase the insurance at her own expense but would have to pay the premium, and the District could charge her 2 or

3 percent more per month to administer the plan. Van Syckle knew she would be eligible for COBRA benefits upon retirement, and at the conclusion of COBRA benefits she planned to purchase the insurance provided through the District at her own expense because the plan was comprehensive and had worked well for her and her husband.

Van Syckle spoke with Simona Pepe and Melissa Kida about maintaining health benefits as a retiree. She spoke to Kida by phone in late December or early January. She asked Kida how, when COBRA benefits expired, she could purchase the District insurance and asked who would administer that. Kida told her that she could not purchase the District insurance at her own expense, and that she would consult with the District's lawyers. Van Syckle did not hear back from Kida about the procedure to purchase the District's insurance, so she emailed Kida on February 25, 2019, to follow up. They spoke by telephone and Kida advised that per the District's attorney the opportunity to purchase the District insurance at her own expense would not be offered to her because it was not required to be offered. Prior to her retirement, Kida expressly told her she would not be able to purchase the District's insurance.

While on COBRA, Van Syckle paid $1,945.91 per month for medical insurance and approximately $600 per month for dental insurance. When COBRA coverage terminated, she went to the marketplace and purchased Horizon Blue Cross Blue Shield OMNIA. It was a health-insurance and prescription plan, and she purchased dental insurance separately. The monthly cost for health insurance is a little more than $1,000 per month, but the OMNIA plan has significantly higher deductibles and has a separate deductible for medical procedures. She has had three surgical procedures, so she has had to pay the additional deductible three times.

Van Syckle wants to purchase health benefits through the District for her former Horizon Policy. She is sixty-three, but when she reaches sixty-five she will go on Medicare.

LEGAL ANALYSIS AND CONCLUSION

Any local board of education may directly or indirectly through a trust fund or otherwise enter into contracts of group life, accidental death and dismemberment, hospitalization, medical, surgical, major medical expense, minimum premium insurance policy or health and accident insurance with any insurance company or companies authorized to do business in this state. N.J.S.A. 18A:16-13. Such contract or contracts shall provide any one or more of such coverages for the employees of the local board of education and may include their dependents. Ibid. A local board of education may enter into a contract or contracts to provide drug prescription and other health care benefits, or enter into a contract or contracts to provide drug prescription and other health care benefits as may be required to implement a duly executed collective negotiations agreement, or as may be required to implement a determination by a local board of education to provide such benefit or benefits to employees not included in collective negotiations units. Ibid. The contract shall exclude from eligibility: (a) employees and dependents, active or retired, who are otherwise eligible for coverage but who, although they meet the age eligibility requirement of the Federal Medicare Program, are not covered by the complete Federal program; and (b) any class or classes of employees who are eligible for like or similar coverage under another group contract covering such class or classes of employees. N.J.S.A. 18A:16-14. Any local board of education entering into a contract pursuant to N.J.S.A.18A:16-12 et al. is authorized to pay part or all of the premiums or charges for such contracts and may appropriate out of its general funds any money necessary to pay such premiums or charges or portions thereof. N.J.S.A. 18A:16-17(a).

The coverage of any employee, and of his dependents, if any, shall cease upon the discontinuance of his employment or upon cessation of active full-time employment in the classes eligible for coverage **subject to such provision as may be made in any contract made by the local board of education** for limited continuance of coverage during disability, part-time employment, leave of absence other than leave for military service, and for continuance of coverage after retirement. N.J.S.A. 18A:16-16. The continuance of coverage after retirement of any employee shall be provided at such rates and under the conditions **as shall be prescribed in the contract** subject, however, to

the requirements set forth at N.J.S.A. 18A:16-19. N.J.S.A. 18A:16-18. The contribution required of any retired employee toward the cost of such coverage may be paid by the employee to the local board of education or in such other manner as the local board of education shall direct. Ibid.

N.J.S.A. 18A:16-19 provides as follows:

> a. Except as otherwise prescribed by P.L. 1979, c. 391 (C. 18A:16-12 et seq.), retired employees shall be required to pay for the entire cost of coverage for themselves and their dependents at rates which are deemed adequate to cover the benefits, as affected by Medicare, of such retired employees and their dependents on the basis of the utilization of services which may be reasonably expected of such older age classification; provided, however, that the total rate payable by such a retired employee for himself and his dependents, for coverage under the contract and for Part B of Medicare, shall not exceed by more than 25%, the total amount that would have been required to have been paid by the employee and the local board of education for the coverage maintained had he continued in office or active employment and he and his dependents were not eligible for Medicare benefits.
>
> b. The local board of education may, in its discretion, assume the entire cost of such coverage and pay all of the premiums for employees who have retired after 25 years or more service with the local board of education, including the premiums on their dependents, if any, under such uniform conditions as the local board of education shall prescribe, except that retired employees and dependents who are eligible for and elect at the time of retirement to take State-paid coverage under the State Health Benefits Program pursuant to paragraph (2) of subsection b. of section 7 of P.L. 1964, c. 125 (C. 52:14-17.38) shall not be eligible for employer-paid coverage under this subsection.

The various sections of N.J.S.A. 18A:16-12 et seq. reflect that the "contract" is the insurance policy, which in this matter is the Horizon Policy, and that the "agreement" is a collective bargaining agreement, which in this matter is the Agreement. Additionally, the various sections primarily reference "employees," and no health-benefits rights are given to retirees beyond those set forth hereinabove except for N.J.S.A. 18A:16-19.1, which applies to the establishment of a cafeteria plan for health benefits. As such, health-

benefits coverage is available to retirees from a participating board of education with less than twenty-five years of service credit only if the board of education continues to participate with the SEHBP. In the present matter, the District does not participate with the SEHBP, and continuation health-benefits coverage is not available to Van Syckle because no such benefits appear in the contract, to wit: the Horizon Policy. Moreover, the Horizon Policy is not inconsistent with the collective-bargaining agreement, as the Agreement reflects that the Board may participate in the SEHBP, or any other health-care insurance program, and it does not provide for continuation of health-benefits coverage or even reference retiree health-insurance benefits. Van Syckle's employment contracts likewise did not provide for continuation health-insurance coverage as a retiree.

Van Syckle retired after eleven years of service, which is less than half the twenty-five years of service required for the Board—in its discretion—to assume the entire cost of coverage and pay the premiums. Petitioner relies upon Miller v. Board of Education of the Southern Regional High School District, Ocean County, 95 N.J.A.R.2d (EDU) 253 (State Board of Education, June 7, 1995). Miller was one year short of twenty-five years of service. She notified her employer that she applied for retirement and planned to continue in the employer's health-insurance plan until she was eligible for Medicare. Miller's employer advised that she was only eligible for COBRA continuation benefits for eighteen months because she was not a service retirement, but instead was terminated pursuant to a reduction in force. Miller v. Bd. of Educ. of the Southern Reg'l High Sch. Dist., Ocean Cnty., 1993 N.J. AGEN LEXIS 1132, Initial Decision at *5–6. Miller appealed, and both the Initial Decision and the Commissioner's Final Decision dismissed her appeal because Miller had not retired prior to the expiration of her employment. Id. at *8. Thereafter, Miller appealed to the State Board of Education. The State Board of Education reversed the decision of the Commissioner. However, Miller is distinguishable from this matter because the collective-bargaining agreement in Miller provided as follows:

> Retirees may enroll in the current insurance programs at the group rates and at the individual's own expense. If, in the event a carrier will not permit such coverage for retirees, the coverage will cease, but the parties will meet to explore

> alternatives, making every attempt to find a carrier who will permit such coverage for retirees.
>
> [Id. at *7.]

However, no such provision for coverage for retirees exists in the Agreement between the Board and the Association in this matter, and thus no such provision exists in the Horizon Policy.

In view of the foregoing, I **CONCLUDE** that respondent is not in violation of N.J.S.A. 18A:16-18 and it need not offer the petitioner continuation health-insurance coverage under the Horizon Policy as a retiree. I further **CONCLUDE** that the Petition should be dismissed.

ORDER

It is hereby **ORDERED** that Van Syckle's Petition is **DISMISSED**.

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

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

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

March 30, 2022

DATE

KELLY J. KIRK, ALJ

Date Received at Agency: March 30, 2022

Date Mailed to Parties: March 30, 2022

db

APPENDIX

LIST OF WITNESSES

For Petitioner:

Janet Van Syckle

For Respondent:

Melissa Kida

LIST OF EXHIBITS

Joint:

J-1 Joint Stipulation of Undisputed Material Facts

For Petitioner:

P-A (Not in Evidence)
P-B (Not in Evidence)
P-C (Not in Evidence)
P-D (Not in Evidence)
P-E (Not in Evidence)
P-F Emails
P-G January 14, 2019, COBRA Continuation Coverage letter
P-H COBRA Continuation Coverage Election Form

For Respondent:

R-1/D Horizon Blue Cross/Blue Shield of New Jersey Policy
R-2/C Agreement between Board and Association
R-3/E Personnel File (employment contracts, resignation letter, letter accepting resignation)

129-22

OAL Dkt. No. EDU 13086-19
Agency Dkt. No. 201-8/19

New Jersey Commissioner of Education

Final Decision

Jason Williams,

Petitioner,

v.

Board of Trustees of the Newark Educators Charter School, Essex County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled May 9, 2022 OAL Conference, has been reviewed. Petitioner did not file an explanation for the failure to appear, 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.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 23, 2022
Date of Mailing: June 23, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

130-22

State Board of Examiners Dkt No. 1920-165
Agency Dkt. No. 8-11/21A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Brett Holeman, State Board of Examiners,
New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, September 17, 2021

Respondent-Appellant, *pro se*

For the Petitioner-Respondent State Board of Examiners, Sadia Ahsanuddin, Deputy Attorney General (Matthew J. Platkin, Acting Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Brett Holeman's appeal of the Order of the State Board of Examiners (Board), dated September 17, 2021, suspending his School Psychologist certificate for six months. Appellant was a tenured school psychologist in the Freehold Regional High School District (Freehold). Freehold certified tenure changes against appellant and, following an arbitration, the Arbitrator determined that appellant had made disparaging comments about his superiors and colleagues, accepted counseling fees from parents of a student, and sent emails containing profanity and advising his supervisor not to refer cases to him. The Arbitrator also found that colleagues criticized appellant in writing and via testimony, including testimony indicating that colleagues were afraid of appellant. The Arbitrator further found that irreconcilable differences between

appellant and Freehold made it inadvisable to reinstate appellant to his position. The tenure charges were sustained, and appellant was dismissed from his position in Freehold.

The matter was then referred to the Board to determine whether appellant's conduct warranted action against his certificates. The Board concluded that the doctrine of collateral estoppel required the Board to accept the facts found in the tenure hearing and that those facts demonstrated that appellant's conduct provided just cause to suspend his certificate. The Board noted that appellant had no record of previous discipline or other inappropriate conduct during his employment in Freehold, and that the Arbitrator's penalty was based more on the breakdown of the relationship between appellant and Freehold than on the nature of appellant's conduct. Accordingly, the Board found that revocation was not appropriate and instead ordered appellant's certificate to be suspended for six months.

On appeal, appellant argues that the arbitration hearing was unfair because of manipulation by the district and deficiencies in the Arbitrator's reasoning. Appellant suggests that the Board did not want to penalize him but felt they had to because they were constrained to accept the facts in the Arbitrator's decision. Appellant contends that he has been sufficiently punished by the trauma of the proceedings and because he has been unable to work in education for the past five years while the proceedings were occurring. Finally, appellant notes that he had positive evaluations for twelve years at Freehold.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her 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. 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). With regard to reviewing a sanction imposed by the Board, the Appellate Division has defined the standard as determining whether the "punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *In re Certificates of Benjamin Norton*, 2016 *N.J. Super. Unpub. LEXIS* 2291, *6-7 (internal citations and quotations omitted).

After a comprehensive review of the record, the Commissioner finds that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct and that a six-month suspension of his certificate is the appropriate penalty. The majority of appellant's arguments on appeal take issue with the decision of the Arbitrator regarding the tenure charges. However, as the Board correctly concluded, the doctrine of collateral estoppel precludes appellant from relitigating the issue of unbecoming conduct, as appellant had a full and fair opportunity to contest those charges during the tenure proceeding. Appellant was represented by counsel during that proceeding, which included twelve days of hearings. Moreover, appellant has already challenged the Arbitrator's decision, and it was affirmed by the Appellate Division, which found that there was sufficient credible evidence in the record for the Arbitrator to find that appellant engaged in unbecoming conduct. *Holeman v. Freehold Regional High Sch. Dist. Bd. of Educ.*, 2018 N.J. Super. Unpub. LEXIS 2617 (App. Div. Nov. 29, 2018). The Commissioner finds no basis to dispute the Arbitrator's findings, particularly when those findings have been affirmed by the Appellate Division.

Regarding his suspension, appellant argues that his loss of tenure – and its accompanying consequences – and previous good record should mitigate his penalty. The Commissioner notes that *N.J.A.C.* 6A:9B-4.5(a) specifically contemplates that, following a

teacher's loss of tenure or employment, the Board may initiate proceedings to suspend or revoke the teacher's certificates. Accordingly, the possible consequences of incompetence or unbecoming conduct may be *both* loss of tenure/employment *and* suspension of certificates, and the former does not mitigate the latter. Furthermore, while the Commissioner acknowledges appellant's prior good record, that alone does not fully mitigate the penalty. The lack of prior discipline does, in these circumstances, serve to reduce the possible penalty from revocation to a six-month suspension.

Accordingly, the decision of the State Board of Examiners suspending appellant's School Psychologist certificate for six months is affirmed.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 23, 2022
Date of Mailing: June 23, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to ***N.J.S.A.*** 18A:6-9.1. Under ***N.J.Ct.R.*** 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATE OF	:	STATE BOARD OF EXAMINERS
BRETT D. HOLEMAN	:	ORDER OF SUSPENSION
_____	:	DOCKET NO: 1920-165

At its meeting of February 28, 2020, the State Board of Examiners (Board) reviewed a tenure decision regarding Brett D. Holeman, a tenured teacher in the Freehold Regional High School District (Freehold). Freehold certified tenure charges against Holeman for allegedly speaking inappropriately to a student, cursing loudly during testing, failing to complete IEPs in a timely manner, spending time on his private counseling practice while working for the Board, among other related allegations.

Pursuant to *N.J.S.A.* 18A:6-16, the Arbitrator assigned by the Department of Education to hear the case, referred to the State Board of Examiners (Board) the tenure matter captioned *In the Matter of the Tenure Hearing Between Brett D. Holeman and the Freehold Regional School District Board of Education,* Dkt. No. 249-9/16 (Arbitrator's Decision, May 12, 2017). The arbitration decision is incorporated herein by reference.

Generally, in the Tenure Charges and Statement of Evidence, which are incorporated herein by reference, Freehold alleged that Holeman engaged in inappropriate behavior (comments, language, and expressions) including use of profanity and reference to sexual activity in front of students; made repeated derogatory comments about and to colleagues and supervisors; engaged in erratic and concerning behaviors that intruded into the workplace; jeopardized the State mandated testing environment; demonstrated a lack of respect for authority; disregarded the District's organizational plan; and did not use the proper chain of command.

Freehold also alleged that Holeman spoke inappropriately to a student distraught over a breakup with a girlfriend. Holeman allegedly told the student that the girlfriend was a "slut" and that he would

soon leave for college and could "fuck 40 girls." Holeman also allegedly recommended a book entitled "F*ck Feelings," which is a profanity filled self-help book.

Holeman also acted disruptively during the administration of the PARCC testing. He was allegedly cursing and talking loudly and made colleagues uncomfortable. Holeman failed to complete IEPs in a timely manner and spent time on his private counseling practice during work hours. He also accepted payment when he counseled current and former students and allegedly directly solicited students for his private counseling services.

Holeman allegedly failed to disclose prior employment with West Morris Regional High School District (West Morris) when he applied to Freehold. Documents from West Morris indicate that Holeman demonstrated similar conduct at West Morris when employed there and that he was subsequently terminated from that position.

In his Decision (which is incorporated herein by reference), the Arbitrator found that "it would be inadvisable to reinstate Dr. Holeman. The record indicates irrevocable differences between administration, staff members and Dr. Holeman." Accordingly, the Tenure Charges were sustained and Holeman was dismissed from his position with Freehold.

The Arbitrator determined that Holeman made disparaging comments about his superiors and colleagues. He also determined that Holeman accepted counseling fee(s) from parents of a student in 2013. He further found that Holeman sent an email containing profanity to a supervisor stating that she "caved." He also told the supervisor in an email not to refer cases to him. Moreover, the Arbitrator found that Holeman's own educator association offered testimony that colleagues were afraid of Holeman. This witness testified that Holeman stated to the principal that she should "sleep with one eye open." The Arbitrator noted how unusual it is that an association representative would provide negative testimony.

He noted further that colleagues criticized Holeman in writing and by testimony. Holeman was dismissed from his tenured employment with Freehold as a result of the charges proven in the tenure proceeding.

Holeman currently holds a School Psychologist Certificate. After reviewing the above information, at its May 14, 2020 meeting, the Board voted to issue an Order to Show Cause to Holeman as to why his certificates should not be revoked. The Order was predicated on the charges of unbecoming conduct that had been proven in the tenure hearing.

The Board sent Holeman the Order to Show Cause by regular and certified mail. The Order provided that Holeman's Answer was due within 30 days. Holeman filed his Answer on August 21, 2020.

In that Answer, Holeman admitted that he was the subject of tenure charges but denies the allegations contained therein. *See* Answer at ¶ 2,3,4,5,6,7. Holeman admitted that the Arbitrator found that "it would be inadvisable to reinstate Dr. Holeman" and that he was dismissed from his position. *Id.* at ¶ 8. He states that only a small portion of the lesser of Freehold's allegations against him were sustained. *Id.* Further, Holeman admits to certain allegations, indicates that there were mitigating factors regarding some of those allegations, and denies that he accepted a fee for private counseling or that he told a colleague to "sleep with one eye open." *Id.* at ¶ 9. He also asserted 10 separate defenses.

Thereafter, pursuant to *N.J.A.C.* 6A:9B-4.6(e), on March 9, 2021, the Board sent Holeman a hearing notice by regular and certified mail. The notice explained that there appeared to be no material facts in dispute. Thus, Holeman was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause provided just cause to take action against his certificates as well as arguments with regard to the appropriate sanction in the event that the Board determined to take action against his certificates. It also explained that upon review of the charges against him and the legal arguments tendered in his defense, the Board would determine if Holeman's offense warranted action against his certificates. Thereupon, the Board would also determine the appropriate

sanction, if any. Holeman was also offered the opportunity to appear before the Board to provide testimony on the sanction issue. Holeman filed a written response on May 21, 2021. Holeman also asked to appear before the Board.

In his Hearing Response, Holeman argued that Freehold failed to prove a vast majority of its allegations and those allegations that were substantiated do not warrant revocation. *See* Hearing Submission at p. 1-2. Holeman argues that the arbitration findings are not extreme or egregious so as to warrant revocation of his teaching certificates. *Id.* at p. 11. Holeman then details the findings of each charge, along with mitigating circumstances surrounding each charge. *Id.* at p. 12-14.

Holeman additionally argues that in the event Board finds just cause to take action against his certificates, the sanction should align to the circumstance and the "local nature" behind the conduct, along with consideration of the penalties Holeman has already incurred. *Id.* at p. 17. He states that the basis for the Arbitrator's Award was the "breakdown in the working relationship in the Guidance Department at Freehold." *Id.* at p. 18. Holeman states that he has nearly lost everything professionally due to this matter. The impact of the "salacious nature of the charges" thwarted his ability to develop his private practice. He has dealt with the repercussions of this matter for five (5) years. *Id.* at p. 18-19. Holeman also submitted a written statement to the Board, which was reviewed.

In testimony before the Board, Holeman's attorney, James Zazzali, detailed Holeman's stellar career. He stated that there were 67 allegations against Holeman and that after 12 days of hearing, the arbitrator only found 4 or 5 of the incidents were substantiated. He stated that Holeman was the subject of a relationship breakdown and that was the reason the arbitrator found it appropriate to dismiss his tenure – because it would be "inadvisable" to bring him back in light of the breakdown. Mr. Zazzali then detailed the findings of misconduct in the Decision. He asked that the Board consider the severity of the penalty Holeman endured for the last 5 years.

Holeman made a statement to the Board. He asked for understanding and mercy. He indicated that he is a family man; it is his life's work to try and create a better world for his children. He stated that in 2016 he saw an injustice with a student. His advocacy for the student conflicted with the District. He stated that he should have been smarter and more patient; if he knew then what he knows now he would not have risked anything. He asked the Board to look at his entire 13-year record. He wants the chance to pursue his goals again and be an example of service and dedication. One Board member asked a question of Holeman, which he responded to.

The threshold issue before the Board in this matter, therefore, is whether Holeman's conduct constitutes conduct unbecoming a certificate holder. At its meeting of July 30, 2021, the Board considered the allegations in the Order to Show Cause as well as Holeman's Answer, Hearing Response, and testimony. The Board determined that it was constrained by collateral estoppel to accept the facts as found in the tenure hearing and therefore no material facts related to Holeman's offense were in dispute. *See In the Matter of the Certificates of Richard Barnes-Bey*, Dkt. No. 1314-194 (Bd. Of Examiners September 17, 2015) (Collateral estoppel applies to facts established in a prior tenure hearing for Board revocation proceedings). Thus, the Board determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9B-4.6(h).

The Board must now determine whether Holeman's conduct, as set forth in the Order to Show Cause and proven in the tenure hearing, represents just cause to act against his certificates pursuant to *N.J.A.C.* 6A:9B-4.5. The Board finds that it does.

The Board 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:9B-4.4. In this case the Arbitration Decision establishes that Holeman made inappropriate or disparaging comments to colleagues and superiors; accepted counseling fees from parents of a current student in 2013;

spent time on his private counseling practice while employed at Freehold by using his Freehold email to set up/manage private counseling appointments; bore some responsibility in the delay of IEP submissions; and his conduct resulted in a damaged relationship with the guidance department, teaching staff, and administration. Such conduct is unfitting of a role model.

Nevertheless, there is no record of previous discipline for similar conduct, or other inappropriate conduct in his employment history with Freehold. Further, the Arbitrator's Decision as to penalty was predicated on the breakdown in relationship between Holeman and his colleagues and less so the nature of his conduct. Accordingly, the Board does not believe that revocation is appropriate. Rather, in light of the above, the Board finds that the appropriate penalty is a six-month suspension of his educator certificates.

Accordingly, on July 30, 2021, the Board voted to suspend Brett D. Holeman's School Psychologist certificate for a period of 6 months. On this 17th day of September 2021, the Board voted to adopt its formal written decision and it is therefore ORDERED that Holeman's certificates are hereby suspended for 6 months, effective immediately. It is further ORDERED that Holeman return his certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

_____
Rani Singh, Secretary
State Board of Examiners

RS/KAG/cf

Date of Mailing:
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

131-22

State Board of Examiners Dkt No. 2021-123
Agency Dkt. No. 9-12/21A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Nicholas Cilento, State Board of Examiners,
New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, October 28, 2021

For the Respondent-Appellant, Edward A. Cridge, Esq.

For the Petitioner-Respondent, State Board of Examiners, Michal Czarnecki, Deputy Attorney General (Matthew J. Platkin, Acting Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Nicholas Cilento's appeal of the State Board of Examiners' (Board) Order of October 28, 2021, suspending his Teacher of the Handicapped certificate (certificate) for two years. The Board found that the appellant engaged in unbecoming conduct when he possessed and used alcohol on school premises while on duty on May 20 and May 21, 2019 (May incidents). The appellant previously had tenure charges filed against him related to the May incidents and the Arbitrator, assigned to the case pursuant to *N.J.S.A.* 18A6-16, found that the appellant engaged in unbecoming conduct and suspended him for a period of three months. Thereafter, the Board issued an Order to Show Cause upon the appellant requiring him to show cause as to why his certificate should not be revoked.

On appeal the appellant does not argue that the May incidents did not occur, but instead contends that the Order of Suspension is barred by the principles of *res judicata* and

collateral estoppel. *Res judicata*, or claim preclusion, is a doctrine that declares that once a matter has been fully litigated and resolved, it cannot be re-litigated. Here, the appellant asserts, the Arbitrator assigned to the tenure proceedings was statutorily empowered to act in a judicial capacity under the auspices of the Department of Education in issuing the award, just as the Board is empowered to preside over Order to Show Cause proceedings. Therefore, the principles of *res judicata* bar the Board from relitigating whether the appellant can be removed from his position for conduct unbecoming based upon allegations set forth in the underlying tenure case and final award. The appellant also maintains that the Board cannot issue a suspension that is inconsistent with the Arbitrator's final penalty determination. The appellant notes that the application of these principles would not foreclose the Board from issuing an Order to Show cause when tenured cases are settled, but the principles apply in this case because the Arbitrator determined as a matter of fact and law that the appellant should not be removed from his tenured position. Finally, the appellant argues that the Board's penalty determination is inconsistent with the factors outlined in *In re Fulcomer*, 93 *N.J. Super* 404 (App. Div. 1967). As a result, the appellant maintains that the Commissioner should reject the Board's decision.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her 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. 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).

Upon a comprehensive review of the record, the Commissioner finds that the record adequately supports the Board's determination that the appellant engaged in unbecoming conduct, and that a two-year suspension of his certificate was the appropriate penalty. It is undisputed that the appellant possessed and used alcohol on school premises during the May incidents. Therefore, the Board's determination regarding the characterization of appellant's behavior as unbecoming conduct is amply supported by the record and consistent with applicable law.

Despite the appellant's contentions to the contrary, the Board is not constrained by the Arbitrator's penalty determination in the tenure proceeding under the principles of *res judicata* and collateral estoppel. For *res judicata* to become applicable, the party asserting the bar must demonstrate: 1) a final judgment by a court or tribunal of competent jurisdiction, 2) the same identity of issues, 3) the same parties, and 4) the same cause of action and thing sued for. *City of Hackensack v. Winner*, 162 *N.J. Super.* 1, 28 (App. Div. 1978), modified, 82 N.J. 1 (1980). A party attempting to invoke collateral estoppel must establish similar criteria. "Collateral estoppel is the branch of *res judicata* which bans relitigating an issue of fact or law that has been actually determined on the merits in a prior proceeding. *Res judicata* applies when either party attempts to relitigate the same cause of action. Collateral estoppel applies when either party attempts to relitigate facts necessary to a prior judgment." *T.W. v. A.W.*, 224 *N.J. Super.* 675, 682 (citations omitted).

First and foremost, the party against whom the doctrines of both *res judicata* and collateral estoppel are to be invoked must have been a party to the other proceeding. It is undisputed that the Board was not a party to the arbitration proceedings and had no role

whatsoever in the determination of the final award. Nor are the Board, whose statutory power is derived from *N.J.S.A.* 18A:6-38, and the panel of Arbitrators, whose statutory power is derived from *N.J.S.A.* 18A:6-17.1, deemed to be one in the same as the appellant attempts to suggest.

The principle of *res judicata* is also inapplicable because the two actions addressed herein were separate proceedings undertaken for different purposes. The proceeding held before the Arbitrator was limited to a determination as to whether the tenure charges proven against the appellant warranted his dismissal or the reduction of his salary. *N.J.S.A.* 18A:6-16. The Order to Show Cause proceeding before the State Board of Examiners was a separate and distinct action to determine whether the appellant's certificate should be revoked pursuant to *N.J.S.A.* 18A:6-38. Practically speaking, when a tenured employee is dismissed from a tenured position through the arbitration process, the employee is not precluded from seeking employment that requires a certificate in another school district. However, when the Board issues an order suspending or revoking a certificate, the certificate holder is precluded from utilizing the certificate. Thus, a final arbitrator award dismissing an employee from a tenured position does not equate to an order issued by the Board suspending or revoking a certificate under the principles of *res judicata*.[1] Therefore, the Board was not precluded from conducting the Order

[1] Notably, there are cases in which the tenured employee was dismissed from employment by an arbitrator but did not have their certificates revoked by the Board. *See, In the Matter of the Certificates of Kimberley Peschi*, Dkt. No. 1920-192 (State Board of Examiners Decision, June 25, 2021); *In the Matter of the Certificates of Bruce Bassetti*, Dkt. No. 2021-103 (State Board of Examiners Decision, September 17, 2021).

to Show Cause proceedings and from issuing an Order suspending the appellant's certificate for two years.[2]

Finally, for the reasons outlined in the October 21, 2022 Order, the Board's penalty determination is consistent with the factors outlined in *In re Fulcomer*, 93 *N.J. Super* 404 (App. Div. 1967). Accordingly, the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 23, 2022
Date of Mailing: June 23, 2022

[2] The Commissioner finds that the Board properly invoked collateral estoppel with respect to the facts related to the unbecoming conduct found during the arbitration proceeding. The appellant was a party to the action, the baseline facts are the same and the appellant had a full and fair opportunity to litigate the issue.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATE OF	:	STATE BOARD OF EXAMINERS
NICHOLAS CILENTO	:	ORDER OF SUSPENSION
_____	:	DOCKET NO. 2021-123

At its meeting of January 21, 2021, the State Board of Examiners (Board) reviewed information provided by the Woodbridge Township Board of Education (Woodbridge). Woodbridge certified tenure charges against Cilento for unbecoming conduct and other just cause for allegedly bringing and consuming alcohol at school.

On December 5, 2020, the Arbitrator assigned to the case pursuant to *N.J.S.A.* 18A:6-16 found that Woodbridge demonstrated the truth of the charges, except Charge V, and suspended Cilento for a period of three (3) months from his tenured employment. *In the Matter of the Tenure Hearing of Nicholas Cilento*, Dkt. No. 282-10/19 (Arbitrator's Decision, December 5, 2020). The matter was referred to the New Jersey State Board of Examiners (Board) for review.

In the tenure charges (which are incorporated herein by reference), Woodbridge alleged that on May 20, 2019 and May 21, 2019 Cilento brought a water bottle filled with alcohol to school and was observed consuming it while in the front lobby. Prior to this incident, on April 17, 2018, Cilento received a written reprimand for using his cellular phone during PARCC testing, in violation of testing protocol.

The assigned Arbitrator found that the facts were "essentially undisputed." *See* Tenure Decision at p. 2. Cilento has a history of alcoholism and sought treatment four or five times via Alcoholics Anonymous and the Employee Assistance Program but relapsed each time. *Id.* at p. 3. Cilento admitted that he brought a small plastic water bottle of vodka to school on the mornings of May 20 and 21 and had several sips of vodka each day. *Id.* Accordingly, the Arbitrator found that Cilento possessed and used alcohol on school premises while on duty on May 20 and May 21, 2019.

The Arbitrator found that drinking on duty on school grounds is prohibited and contrary to standards of professional behavior, board policies, law, and code and that it constitutes conduct unbecoming a teacher. *Id.* at p. 4. Tenure Charges I-IV were sustained. *Id.* The Arbitrator determined that the appropriate penalty for Cilento's conduct was not dismissal, but rather a three (3) month suspension and reinstatement on a Last Chance basis. *Id.* at p. 11.

over a decade of "commendable service" to Woodbridge students and that his conduct did not adversely impact Woodbridge. *Id.* at p. 9.

The hearing was scheduled for the Board's July 30, 2021 meeting. Mr. Cilento appeared with his counsel, Edward A. Cridge, Esquire. Mr. Cridge detailed the argument contained in the hearing submission, specifically as it relates to Cilento's legal position regarding *res judicata* and collateral estoppel. Cilento appeared and indicated that he was not drunk at school and that he made a terrible mistake. He suffers from alcoholism and has completed a rehabilitation program in Florida and has weekly conversations with his sponsor. He has maintained his sobriety through the tenure challenge and his divorces. He does not believe one incident should define his career.

The threshold issue before the Board in this matter is whether Cilento's conduct constitutes conduct unbecoming a certificate holder or other just cause. At its meeting of September 17, 2021, the Board considered the allegations in the Order to Show Cause as well as Cilento's Hearing Response and testimony. The Board determined that no material facts related to Cilento's offense were in dispute since the Arbitration Award found that the facts were undisputed – Cilento possessed and used alcohol on school premises while on duty on May 20 and May 21, 2019. Thus, the Board determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9B-4.6(h). After reviewing the allegations, the Board found that Cilento engaged in unbecoming conduct.

The Board must now determine whether Cilento's conduct, as set forth in the Order to Show Cause, provides just cause to act against his certificates pursuant to *N.J.A.C.* 6A:9B-4.4. The Board finds that it does.

The Board 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:9B-4.4. "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. Moreover, 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 (1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). Cilento's conduct in drinking alcohol at work, along with bringing alcohol to school clearly indicates a serious lapse in judgment. However, given Cilento's presentation of mitigation, specifically his exemplary record prior to this incident, his passion for teaching, the fact that there is no record of concerns related to his teaching, even while he was addressing his alcoholism, the Board concludes that the appropriate response to

his breach is a two-year suspension of his certificates. This is consistent with the Board's prior decision in similar cases, specifically *IMO Certificates of Jennifer Pechko*, Dkt. No. 1718-163 (State Board of Examiners Decision, February 28, 2020).

Further, the Board is not bound to the penalty assessed by an Arbitrator as it relates to a challenge on an educator's tenure. Cilento's arguments would essentially hamstring the Board from exercising its responsibility and statutory authority on revocation/suspension of educator certificates, usurping the Board's expertise and authority on these matters. The Board is a separate body and applies its own, independent decision as to whether the specific conduct established in the tenure proceedings warrants action on an educator's teaching certificates. The "responsibility of the [Board] under N.J.S.A. 18:6-38 is not the same as the Commissioner's obligation to determine the appropriate penalty once tenure charges brought against a teaching staff member have been sustained." *IMO Theresa Lucarelli*, Dkt. No. 2-99 (State Board of Education Decision, May 5, 1999), citing *IMO John Ahern*, Dkt No. ___ (State Board of Education Decision, August 5, 1987).

Accordingly, on September 17, 2021, the Board voted to suspend Nicholas Cilento's Teacher of the Handicapped certificate for a period of two years. On this 28th day of October 2021 the Board voted to adopt its formal written decision and it is therefore ORDERED that Cilento's certificates are hereby suspended for a period of two years, effective immediately. It is further ORDERED that Cilento return his certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Rani Singh, Secretary
State Board of Examiners

Date of Mailing: 11/3/21
Via certified and regular mail
*Board members Zeitz recused from this matter
Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

132-22

New Jersey Commissioner of Education

Final Decision

R.C. and B.C., on behalf of A.C.,

Petitioner,

v.

Board of Education of the Township of Galloway, Atlantic County,

Respondent.

Synopsis

Petitioners filed an appeal challenging the respondent Board's actions regarding a Harassment, Intimidation and Bullying (HIB) complaint filed on behalf of their minor child, A.C. The Board filed a motion to dismiss the petition as premature, arguing that petitioners failed to exhaust their administrative remedies under New Jersey's Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13.2.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioners requested a hearing before the matter had been presented to the Board and before they received written information on the HIB investigation; and petitioners' appeal rights to the Commissioner did not accrue until after the Board had made a final determination on the HIB complaint. The ALJ concluded that petitioners sought a hearing and filed their appeal prematurely, thereby failing to exhaust the remedies afforded them under the Act. Accordingly, the ALJ granted summary decision to the respondent Board and dismissed the petition but remanded the matter to the Galloway Township Board of Education for a hearing in accordance with the Act.

Upon consideration, the Commissioner found that: a party challenging a board of education's HIB decision is not required to request and participate in a hearing before the board of education prior to filing a petition of appeal with the Commissioner; *N.J.S.A.* 18A:37-15(6)(d) provides that a parent may request a hearing, but nothing in the Anti-Bullying Bill of Rights Act requires a board hearing. The Commissioner concluded that the ALJ was incorrect in determining that petitioners failed to exhaust their administrative remedies. Since petitioners indicated in their pleadings that they wish to have a hearing before the Board, the Commissioner remanded the matter and ordered the Board to hold such hearing within ten days of the mailing of the Commissioner's decision herein.

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

132-22

OAL Dkt. No. EDU 00815-22
Agency Dkt. No. 3-1/22

New Jersey Commissioner of Education

Final Decision

R.C. and B.C., on behalf of minor child, A.C.,

Petitioner,

v.

Board of Education of the Township of Galloway, Atlantic County,

Respondent.

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

This matter involves a harassment, intimidation, and bullying (HIB) complaint filed by petitioners on behalf of their child. Following a motion to dismiss by the Board, the Administrative Law Judge (ALJ) found that petitioners had failed to exhaust their administrative remedies and remanded the matter to the Board for a hearing.

Upon review, the Commissioner notes that a party challenging a board of education's HIB decision is not required to request and participate in a hearing before the board of education prior to filing a petition of appeal with the Commissioner. *N.J.S.A.* 18A:37-15(6)(d) provides that a parent *may* request a hearing, but nothing in the Anti-Bullying Bill of Rights Act

requires a board hearing.[1] Accordingly, the ALJ's conclusion that petitioners failed to exhaust administrative remedies is incorrect.

Nonetheless, as the pleadings indicate that petitioners do wish to have such a hearing, the Commissioner concludes that it is appropriate to allow that hearing to occur. The Board is ordered to hold a hearing within ten days of the mailing date of this decision, unless petitioners agree to a later date. Should the Board affirm its HIB decision at or after that hearing, petitioners may file a new petition of appeal.

Accordingly, this matter is remanded to the Board.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 23, 2022
Date of Mailing: June 23, 2022

[1] However, the board of education must have issued a decision affirming, rejecting, or modifying the superintendent's decision for the matter to be ripe for review by the Commissioner, as it is the board's decision – not the superintendent's decision – that is appealable to the Commissioner. *N.J.S.A.* 18A:37-15(b)(6)(e). This requirement had been met when the petition of appeal dated January 7, 2022 was filed.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00815-22
AGENCY DKT. NO. 3-1/22

R.C. AND B.C. ON BEHALF OF A.C.,
Petitioners,
v.
TOWNSHIP OF GALLOWAY
BOARD OF EDUCATION,
Respondent.

R.C.[1] and **B.C.**, petitioners on behalf of A.C., pro se

Amy Houck Elco, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: April 25, 2022 Decided: May 9, 2022

BEFORE **TAMA B. HUGHES**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

R.C. and B.C. (collectively "petitioners") filed an appeal challenging the Galloway Township Board of Education (respondent) actions regarding a Harassment, Intimidation and Bullying (HIB) complaint filed on behalf of their child A.C.

[1] R.C. is a licensed attorney in Pennsylvania however is appearing in his personal capacity as the parent of A.C.

On February 1, 2022, in Lieu of an Answer, respondent filed a Notice of Motion to Dismiss pursuant to N.J.A.C. 6A:3-1.5(g).

On February 1, 2022, the matter was transmitted to the Office of Administrative Law (OAL), where it was filed as a contested case on February 1, 2022. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Petitioners' opposition to the motion was filed on April 11, 2022, and Respondents' reply was received on April 25, 2022.

FACTUAL SUMMARY AND FINDINGS

In October 2019, the respondent adopted a HIB policy in accordance with Anti-Bullying Bill of Rights Act (Act). N.J.S.A. 18A:37-13.2. (Respondent's brief, Exhibit A.) The respondent's HIB policy mirrors N.J.S.A. 18A:37-15 and N.J.A.C. 6A:16-7.7 as it relates to reporting procedures, investigation, and the appeal process.

On November 18, 2021, petitioners reported, via email, an alleged instance of HIB against A.C. which was acknowledged by the superintendent of schools for Galloway Township Board of Education, Dr. Annette Giaquinto. (Petitioners' brief, ¶62; Respondent's brief, certification of Dr. Annette Giaquinto (Giaquinto's certification), ¶3.)

On November 30, 2021, petitioners sent an amended HIB complaint to Dr. Giaquinto with additional information for use in the investigation. The complaint named two administrators and additional staff members as the aggressors. (Petitioners' brief, ¶65; Giaquinto's certification, ¶4.)

Dr. Giaquinto conducted the HIB investigation.

On December 6, 2021, Dr. Giaquinto spoke with R.C. and advised that the investigation was complete and the outcome. (Petitioners' brief, ¶72; Giaquinto's certification, ¶6.) Dr. Giaquinto also advised R.C. of the next steps in the HIB process,

including how and when to appeal. (Petitioners' brief, ¶74 – 76; Giaquinto's certification, ¶6.) R.C. was also informed that the next scheduled Board meeting was slated for December 20, 2021, at which time the results of the investigation were scheduled to be reported to the Board. (Giaquinto's certification, ¶7.)

The following day, on December 7, 2021, R.C. sent correspondence to the Board president requesting an appeal of A.C.'s HIB case.

On December 16, 2021, Dr. Giaquinto emailed R.C. informing him that his appeal was premature, and that a formal notification would be provided to him five days after the investigation results were reported to the Board. (Initial appeal, page 2; Amended appeal, page 123; Petitioners' brief, ¶77; Giaquinto's certification, ¶9)

On this same date of December 16, 2021, petitioners filed an appeal with the Commissioner of Education.[2] (Initial Appeal, page 5.) The appeal challenged, among other things: Dr. Giaquinto's authority to deny R.C.'s request for a hearing; raised questions and/or discrepancies that were allegedly not taken into consideration in the underlying HIB investigation; and closed by stating that petitioners would be prepared to have their appeal heard during the December 20, 2021, Board meeting. (Initial Appeal, page 5.)

On December 20, 2021, the results of the HIB investigation were submitted to the Board. Thereafter by letter, dated December 23, 2021, petitioners were formally notified that the matter had been presented to the Board. The letter provided information on how to request a hearing before the Board on the HIB determination. (Amended Appeal, page 196.)

Thereafter, on January 7, 2022, petitioners filed an Amended Appeal. Through this appeal, petitioners again appealed the December 16, 2021, denial of their request for a Board hearing and a ruling on their HIB/amended HIB complaint. (Amended Appeal,

[2] The appeal was improperly filed having been sent directly to the commissioner's email address and not ControversiesDisputesFilings@doe.nj.gov which is the correct portal for filing. Additionally, petitioners failed to include a proof of service.

page 3.) Petitioners asserted, among other things, that: school personnel created a hostile educational environment for A.C.; the superintendent's investigation into the matter was biased and inappropriate given the targets of the investigation; the December 7, 2021, request for a hearing before the Board was proper and refused on December 16, 2021, by a non-voting Board member (Dr. Giaquinto); the December 16, 2021, appeal to the Commissioner of Education (Commissioner) was correct with the exception of minor formatting issues which had since been cured. (Amended Appeal, pages 9-16.)

LEGAL ANALYSIS AND CONCLUSIONS

Through this motion, respondent asserts that petitioners' appeal was premature for failure to exhaust the remedies afforded to them under N.J.A.C. 6A:16-7.7 and N.J.S.A. 18A:37-15. More specifically, petitioners improperly deemed Dr. Giaquinto's courtesy call on December 6, 2021, to be formal notification/action by the Board. On December 7, 2021, the day after the call, petitioners requested a hearing before the Board. On December 16, 2021, via email, Dr. Giaquinto responded to their request and informed them that their request was premature as the matter had yet to be presented to the Board. That same day, petitioners filed their Initial Appeal - the springboard being Dr. Giaquinto's call on December 6, 2021.

Respondent further contends that petitioners Amended Appeal, again reiterated the same flawed arguments. It is respondent's position that petitioners' failure to follow the timelines established by the district in accordance with N.J.S.A. 18A:37-15 and N.J.A.C. 6A:16-7.7 as it relates to when a hearing can be requested and the filing of an appeal to the Commissioner, requires dismissal of their Amended Appeal.

Petitioners on the other hand, argue that respondent is not entitled to summary decision as they had in fact exhausted their administrative remedies.[3] It is their contention

[3] Notably, petitioners in their opposition, went through each paragraph of the Amended Appeal and inserted in bold lettering "**Respondent Has Not Specifically Disputed This**" the inference being that there was no factual dispute by the respondent as to the allegations put forth in each of the paragraphs. No answer is required by the respondents at this time because they have chosen to file a Motion to Dismiss of Lieu of an Answer to the petition in accordance with N.J.A.C. 6A:3-1.5 (g).

that the law is silent on whether parents must wait for written notice of a HIB investigation finding. Therefore, such notice can be provided in writing or verbally. In this case, verbal notification was provided on December 6, 2021, by Dr. Giaquinto, a nonvoting member of the Board. On December 7, 2021, they exercised their rights to request a hearing before the Board. The Board's lack of action by not hearing the matter within ten days of the request, and Dr. Giaquinto's email on December 16, 2021, effectively denied their hearing request, and triggered their appeal rights. On this last point, petitioners assert that the Board's scheduled meeting date, which in this case was thirteen days after they submitted a request for a hearing, does not supersede the law. It is petitioners' contention that by failing to hold a hearing within ten days of their request, the Board violated both the District's HIB policy and N.J.S.A. 18A:37-15(b)(6)(d) and therefore, respondents' motion should be dismissed.

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." 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 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 at 252, 106 S. Ct. at 2512, 91 L. Ed.2d at 214.

In the instant matter, the issue before the tribunal is procedural in nature – a question of law and interpretation. For the reasons set forth more fully below, I **FIND** that this matter is appropriate for summary decision.

New Jersey enacted the Act to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying (HIB) of students that occur in school and off school premises. N.J.S.A. 18A:37-13.1(f).

Under the Act, HIB is defined as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, 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 disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or

c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

[N.J.S.A. 18A:37-14.]

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A. 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6). The investigation shall be conducted by a school anti-bullying specialist and shall take no longer than ten school days to be completed. N.J.S.A. 18A:37-15(b)(6)(a).

The results of the investigation must be reported to the superintendent of schools within two school days of the completion of the investigation. N.J.S.A. 18A:37-15(b)(6)(b) The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." N.J.S.A. 18A:37-15(b)(6)(c).

Parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the result of the investigation. The information is required to be provided in writing within five school days after the results of the investigation are reported to the board. N.J.S.A. 18A:37-15(b)(6)(d). The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Id. Any hearing shall be held in executive session to protect the identity of any students involved. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. Id.

The board must issue a decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Id. The board's decision may be appealed to the Commissioner. Id.

As noted above, the origin of petitioners' Amended Appeal stems from a call with Dr. Giaquinto on December 6, 2021, wherein petitioners were informed of the status of the HIB investigation and process going forward. Petitioners appear to rely upon the language provided in the New Jersey Department of Education's Guidance for Parents on the Anti-Bullying Bill of Rights Act (Guidance), for the proposition that the conversation with Dr. Giaquinto triggered the appeal hearing timeline. Such interpretation is misguided; takes the procedural requirements under the Act out of context; and ignores both the plain language and the mandates of N.J.S.A. 18A:37-15 and N.J.A.C. 6A:16-7.7.

N.J.S.A. 18A:37-15(6)(d) and (e) state in relevant part that:

> (d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;
>
> (e) at the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision . . . [emphasis added]

Petitioners in this case requested a hearing before the matter had been presented to the Board and before they received the written information on the HIB investigation. Thereafter, petitioners filed the Initial Appeal with the Commissioner before the matter had been presented to the Board and a decision rendered. Thereafter, petitioners filed

an Amended Appeal with the same procedural defects as the Initial Appeal. While it was filed after the Board had rendered a decision and after they had received the written information on the HIB investigation, the foundation of the appeal that the board had denied their request for a hearing continued to be flawed as were the procedural defects.

The issue of exhaustion of remedies was addressed in Abbott v. Burke, 100 N.J. 269, 299, 495 A.2d 376 (1985) (holding that even when a case implicates constitutional issues, a court may require a party to exhaust its administrative remedies, when doing so "will serve to develop a fully informed factual record and maximize the soundness of determinations through the agency's expertise.) Quoting Heritage at Independence, LLC v. State, 2010 N.J. Super. Unpub. LEXIS 2025.

The underlying challenge in Abbott centered on school funding. Petitioner had brought suit, claiming that the Public-School Education Act of 1975 was unconstitutional as funded. The defendants, the board of education and state officials, moved to dismiss the claim on the grounds that the plaintiffs had failed to exhaust their administrative remedies. The issue considered by the court was narrow – specifically, whether the OAL should consider the evidence relevant to the parties' contentions and the facts at the heart of the controversy.

In concluding that the matter should be remanded to the appropriate administrative agency, the court stated:

> Given the confluence of complex legal and factual issues in this case, we must decide whether the controversy, in the first instance, can and should be resolved in whole or in part before an administrative tribunal, or whether it must immediately be considered by the judiciary. In general, available and appropriate "administrative remedies should be fully explored before judicial action is sanctioned." Garrow v. Elizabeth General Hospital and Dispensary, 79 N.J. 549, 558 (1979); see Board of Education of East Brunswick Township v. Township Council of East Brunswick, 48 N.J. 94, 102 (1966.) The State argues for such a requirement because the litigation focuses on subjects that are particularly amenable to specialized consideration and clearly related to areas of administrative regulatory concern. Plaintiffs, however, assert that a constitutional issue invokes solely the jurisdiction of the courts and that an administrative proceeding will

deny them the opportunity to make a timely presentation and secure final resolution of their constitutional contentions. All litigants agree that the procedural desideratum in this case is the rapid, thorough, complete, and impartial determination of all the relevant issues that have been properly and fairly presented. Toward this end, we are satisfied that the presence of constitutional issues and claims for ultimate constitutional relief does not, in the context of this litigation, preclude resort in the first instance to administrative adjudication.

We note that the preference for exhaustion of administrative remedies is one "of convenience, not an indispensable pre-condition." Swede v. City of Clifton, 22 N.J. 303, 315 (1956.) Thus, except in those cases where the legislature vests exclusive primary jurisdiction in an agency, a plaintiff may seek relief in our trial courts. Borough of Matawan v. Monmouth County Board of Taxation, 51 N.J. 291, 296 (1968) (administrative exhaustion not an absolute jurisdictional requirement.) In any case amenable to administrative review, however, upon a defendant's timely petition, the trial court should consider whether exhaustion of remedies will serve the interests of justice.

The interests that may be furthered by an exhaustion requirement were identified in City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979):

> (1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts.

However, as explained in Garrow, 79 N.J. at 561,

> [t]he exhaustion doctrine is not an absolute. Exceptions exist when only a question of law need be resolved, Nolan v. Fitzpatrick, 9 N.J. 477, 487 (1952); when the administrative remedies would be futile, Naylor v. Harkins, 11 N.J. 435, 444 (1953); when irreparable harm would result, Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 142 (1962); when jurisdiction of the agency is doubtful, Ward v. Keenan, 3 N.J. 298, 308-309 (1949); or when an overriding public interest calls for a prompt judicial decision, Baldwin Const. Co. v. Essex Cty. Bd. of Taxation, 24 N.J. Super. 252, 274 (Law Div.1952), aff'd 27 N.J. Super. 240 (App.Div.1953). The assertion of a constitutional right may be one factor to be considered in determining whether judicial intervention is justified -- but it is only one of many relevant considerations. * * * Brunetti v. Borough of New Milford, 68 N.J. 576 [, 590-91] (1975)

Clearly, there will be cases, as here, where the considerations that are relevant to the exhaustion requirement are in near-equipoise, and the court must weigh them carefully to find the proper balance. See Hinfey v. Matawan Regional Board of Education, 77 N.J. 514, 532 (1978); Roadway Express, 37 N.J. at 141; see generally K. Davis, 4 Administrative Law Treatise § 26:1 (1983) ("The Exhaustion Problem.")

While factually dissimilar, the appropriateness of the level of due process was discussed in Ruth Young-Edri v. Board of Education of the City of Elizabeth, 2019 N.J. AGEN LEXIS 403, wherein the Honorable Ellen S. Bass, ALJ determined that:

> [T]he due-process protections contained in the Anti-Bullying Law were largely ignored by this board. A written summary of the investigation was not provided to Young-Edri within five days of the issuance of the anti-bullying specialist's report. The results of the investigation were not shared with the superintendent of schools. The superintendent rendered no decision relative to the bullying allegations and investigation, although, ultimately, the Board was required to "issue a decision, in writing, to affirm, reject, or modify the superintendent's decision." N.J.S.A. 18A:37-15(b)(6)(e) (emphasis supplied.) Relative to the scope of the information that should have been shared with Young-Edri, the recent unpublished Appellate Division decision in J.L. v. Bridgewater Board of Education, No. A-2022-16 (App. Div. October 16, 2018), https://njlaw.rutgers.edu/collections/courts/, is instructive. There, the local board did not supply the parents of an alleged bully with investigative reports completed by the anti-bullying specialist and an HIB committee. The matter was remanded to the local board, which was directed to provide the parents with the full record of the HIB allegations, "including the underlying investigative report, [and] any additional written reports or summaries." Ibid. Only with this completeness of information, the court determined, would the hearing contemplated by law afford the family its rightful measure of due process, and satisfy the requirements of N.J.S.A. 18A:37-15(b)(6).
>
> The proper remedy under the totality of the circumstances is a remand to the Board so that it may afford Young-Edri a proper measure of due process. . . .
>
> As for what the board-level hearing should look like, the plain language of the statute does not require a full adversarial hearing, 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). The statute only demands that

> the hearing be conducted in executive session, and that "the board may hear from the school anti-bullying specialist about the incident." N.J.S.A. 18A:37-15. But what is surely required is an opportunity for Young-Edri to fully understand the evidence against her and to present testimony and documents to the Board for its consideration; or, put another way, what is required is the modicum of local due process needed to guard against arbitrary, capricious, or ill-informed Board action.

Here, contrary to Young-Endri, the Board followed all procedural requirements under the Act with regard to its investigation of the HIB complaint and reporting of the findings to the Board at its next scheduled meeting date of December 20, 2021. There is no dispute that petitioners were entitled to a hearing however, such rights did not accrue by law until after the matter had been presented to the board. Thereafter, petitioners' appeal rights to the Commissioner did not accrue until after the Board had made a final determination.

I **CONCLUDE** that none of that occurred as petitioners sought a hearing and filed their appeals prematurely. Petitioners completely circumvented the HIB process and therefore failed to exhaust the remedies afforded to them under the Act.

ORDER

Based on the foregoing, it is **ORDERED** that respondents' motion for summary decision is **GRANTED** and petitioners' appeal is **DISMISSED**. It is further **ORDERED** that the matter be **REMANDED** to the Galloway Township Board of Education for a hearing in accordance with the Act which will allow the parties the opportunity to create a factual record necessary for a meaningful review by both the Board and the Commission should the matter thereafter be appealed.

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

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

to make a final decision 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.

Tama B Hughes

May 9, 2022
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: emailed May 9, 2022

Date Mailed to Parties: emailed May 9, 2022

TBH/gd/tat

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

June 23, 2022

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Re: *Board of Education of the Township of Deptford, Gloucester County v. Board of Education of the Gloucester County Vocational Technical School District, Gloucester County*
Agency Dkt. No. 102-5/22

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling and the Cross-Petition for Declaratory Ruling in the above-captioned matter, together with the respondent's answer to the petition. Upon such review, I have determined to exercise my discretion to decline the requests pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq*.

Accordingly, the requests for declaratory ruling are declined and this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

133-22L

134-22
Agency Dkt. No. 103-5/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of Mirel Kazazi, School District of the City of Hackensack,
Bergen County.

For the Petitioner, David J. Kass, Esq.

No appearance by or on behalf of Respondent, Mirel Kazazi

This matter was opened before the Commissioner of Education on May 6, 2022, through tenure charges of unbecoming conduct and abandonment of position certified by Robert Sanchez, Superintendent of the Hackensack School District ("District"), together with supporting evidence against respondent, Mirel Kazazi, a tenured custodian in the District's employ. The District provided respondent with written notice of such certification at the respondent's current known address, via regular mail.

On May 9, 2022, the Commissioner directed the respondent via regular mail to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would result in the charges being deemed admitted. No reply to the tenure charges has been received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent was employed by the District as a tenured custodian. The Statement of Evidence indicates that the respondent refused to comply with Executive Order No. 253 which required all school personnel to either submit proof of Covid-19 vaccination or take a weekly Covid-19 test. As a result of his refusal to comply with Executive Order No. 253, the respondent has not returned to work since November 2, 2021.

Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against him at the District level and before the Commissioner, the Commissioner finds that the District's charge of unbecoming conduct has been proven and overwhelmingly warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from his tenured position with the Hackensack School District.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 23, 2022
Date of Mailing: June 23, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

BEFORE THE BOARD OF EDUCATION OF ROSELLE PUBLIC SCHOOL DISTRICT/COMMISSIONER OF EDUCATION

In the Matter of Tenure Charges

between

Roselle Borough Board of Education,

Petitioner,

and

Lovena Batts, Teacher,

Respondent.

Agency Docket No. 66-4/19

FINAL AWARD

Dr. Andrée Y. McKissick
Arbitrator

APPEARANCES:

For the Petitioner:
Stephen J. Edelstein, Esquire
Weiner Law Group, LLP
PO Box 438
629 Parsippany Road
Parsippany, New Jersey 07054-0438

For the Respondent:
Nicholas Poberezhsky, Esquire
Caruso Smith Picini, PC
60 Route 46 East
Fairfield, New Jersey 07004

PROCEDURAL BACKGROUND

On October 14, 2019, rulings on the Motion to Suppress and Motion for Summary Decision issued, involving tenure charges filed by Appellant Roselle Board of Education ("the Board") against one of its teachers, Respondent Lovena Batts. The Board sought interim relief to reverse rulings made by this Arbitrator. The Board appealed from Chancery Division orders that denied its request for a preliminary injunction and then

dismissed its complaint without prejudice. Finding no basis to disturb the challenged orders, the Superior Court of New Jersey, Appellate Division, affirmed this Arbitrator's rulings on August 20, 2021.

On December 29, 2021, Director Killough-Herrera authorized this Arbitrator to begin hearings on March 29, 2022, upon being reassigned this tenure dispute. Zoom Video Communications hearings were agreed upon and hearings commenced on: March 29, 2022; March 31, 2022 and April 5, 2022. Both parties had a full and fair evidentiary hearing by way of Zoom, videotelephony to socially distance from the still-raging Covid-19 virus. Post-hearing briefs were promptly mailed with a plethora of case law on or before May 27, 2022.

STATEMENT OF FACTS

Respondent Lovena Batts has been employed by the Board since 2010 as an elementary teacher. She was granted tenure in 2013. She sustained serious, life-threatening injuries, which precipitated from a severe motor vehicle accident on September 30, 2017. The record reflects that these current tenure charges are entirely based upon Respondent Batts's attendance record since September 30, 2017, the date of the car accident.

The record further reveals that the former Superintendent, Dr. James C. Baker, filed tenure charges on February 14, 2019. Members of the Board certified these charges on March 25, 2019. It is significant to note that Respondent Batts's attendance record predated the 2017-2018 school year. However, the ruling on the Motion for Summary

Decision, dated October 14, 2019, was granted by this Arbitrator. Thus, those particular charges were dismissed. The current tenure charges are comprised of two (2) counts. In essence, Count One alleges that Respondent Batts had a pattern and practice of chronic and excessive absenteeism, thus establishing her present inability to return to work and to perform any teaching duties, which constitutes incapacity. Count Two alleges that Respondent Batts engaged in pattern and practice of chronic and excessive absenteeism which constitutes: incapacity, excessive absenteeism and other just cause which warrants termination from her tenured employment with the Borough of Roselle Board of Education.

As to the precise days missed, is at issue and delineated fully in the "Positions of the Parties," later within this Award.

ISSUES

The Board's issues are as follows:

Whether or not the Respondent has failed to work since September 29, 2017, and has demonstrated no capacity to return to work with or without reasonable accommodations?

Whether or not the Respondent's pattern and practice of chronic excessive absenteeism present an inability to return to work to perform any teaching duties constitutes incapacity requiring termination?

Whether or not the Respondent's habitual and chronic absenteeism and failure to provide medical documentation demonstrates her inability to work?

Whether or not the Respondent's pattern and practice of chronic absenteeism and inability to return to work and perform her teaching duties constitutes other just cause requiring termination?

The Union's sole issue is:

Whether or not Respondent Batts is guilty of conduct unbecoming a tenured teacher, and, if so, what penalty, if any, is appropriate?

PERTINENT PROVISIONS

NJSA 18A-6-10

Dismissal and Reduction in Compensation of Persons under Tenure in Public School System

No person shall be dismissed or reduced in compensation

a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the State or

b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach School for the Deaf, or in any other educational institution conducted under supervision of the Commissioner.

Except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the Commissioner, or person appointed by him to act in his behalf, after a written charge or charges, of cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a Board of Education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

TENURE CHARGES
[See Exhibit 1A]

COUNT ONE: INCAPACITY

29. Despite the Board's reasonable expectation that Respondent regularly attend work, Respondent has failed to work since

September 29, 2017, and demonstrates no present capacity to return to work with or without reasonable accommodation.

30. Notwithstanding the well-defined duties and responsibilities of a teacher as defined under New Jersey Statute and Regulation, District Policy, and Job Description, Respondent's pattern and practice of chronic and excessive absenteeism and her present inability to return to work to perform any teaching duties constitute incapacity requiring her termination.

CHARGE TWO: OTHER JUST CAUSE

31. The allegations set forth in Paragraphs 1 through 30 are repeated and realleged as if set forth at length herein.

32. Respondent's habitual and chronic absenteeism, failure to provide the District with medical documentation substantiating her need for leave and her present inability to return to work (with or without reasonable accommodation), and perform any teaching duties constitutes a consistent, long-term, and unimproved course of conduct which has interfered with the orderly operation of the district, has disrupted the continuity of instruction, and has adversely impacted the students and the District.

33. Notwithstanding the well-defined duties and responsibilities of a teacher as defined under New Jersey Statute and Regulation, District Policy, and Job Description, Respondent's pattern and practice of chronic and excessive absenteeism and inability to return to work to perform any teaching duties constitutes other just cause requiring her termination.

By virtue of the foregoing acts and omissions, Lovena Batts engaged in a pattern and practice of chronic and excessive absenteeism that constitutes Incapacity, Excessive Absenteeism, and Other Just Cause that warrants her termination from her tenured employment with the Borough of Roselle Board of Education.

Dr. James C. Baker
Interim Superintendent of Schools

Dated: February 11, 2019

POSITIONS OF THE PARTIES

It is the Board's position that this is a straightforward case involving the Respondent not fulfilling her obligation and responsibility to come to work. That is, the Board contends that the Respondent was absent four-hundred (400) consecutive days, from October 2, 2017 until February 11, 2019. Although the Respondent may argue that

these dates included approved leave or sick days or personal illness, the Board rebuts that case law does not support this premise. Specifically, the Board points out: State-Operated School District of Jersey City v. Pellecchio, 92 NJAR 2[d] (EDU) 267 disallows such entitlements. Most importantly, the Board asserts that the Respondent was charged with incapacity because she demonstrates no present capacity to return to work with or without reasonable accommodations. Thus, the Board further argues that the Respondent has demonstrated a pattern and practice of chronic and excessive absenteeism. Moreover, the Board further asserts that she demonstrates a present inability to return to work to perform any teaching duties which constitutes incapacity requiring her termination. Although the Respondent counters that Respondent Batts was absent for legitimate reasons due to medical conditions from a car accident, the Board rebuts that case law does not support this reasoning. Instead, In the Matter of Gillespie, EDU 20524-15 (2016) clearly asserts that chronic absenteeism constitutes both incapacity and unbecoming conduct within the meaning of NJSA 18A-6-10 to warrant dismissal from employment, even for legitimate reasons of personal sickness.

In response to the Respondent's argument that Respondent Batts was not warned of the upcoming tenure charges or the charge of absenteeism, the Board counters that case law does not support that rationale. Specifically, in Elizabeth Board of Education v. Segall No. EDU 1077-00 (February 25, 2000) held that significant absences that are characterized as chronic and excessive absenteeism need not require any warning to the Respondent, the Board asserts. Moreover, in our current case, Respondent Batts was taken off the payroll in November 2017 and lost her health insurance plan in December 2017. Surely, the Board asserts, constitutes a warning that there is a major problem afoot.

In response to Respondent Batts claiming to assert the right to reasonable accommodation, the Board retorts that she has no standing to make such an assertion because she is currently absent and is characterized as chronically absent from her job. The Board asserts that case law supports this analysis, see In the Matter of the Tenure Hearing of Jeanne Cook, EDU 8568-02 (January 26, 2005). In that case, she was not able to assert her request for reasonable accommodation because she was a teacher who was unable to be present to teach. Also see Svarnas v. AT&T Communications, 326 NJ Super. 59 (App. Div. 1999) in regards to a denial of accommodations. Ms. Cook was also charged with excessive absenteeism, tardiness, and unbecoming conduct. Moreover, Respondent Batts claims to have requested reasonable accommodation, yet the Board asserts, she failed to put it in writing. Nonetheless, such a request would not have been considered because of her current absenteeism.

In response to Respondent's assertion of Respondent Batts's ability, performance and accolades as a teacher, the Board retorts that case law again does not support her assertions against charges of incapacity and chronic absenteeism. In State-Operated School District of Jersey City v. Pellecchio, Respondent Pellecchio supported his case with satisfactory evaluations as well as no prior history of discipline, but both issues failed in the consideration of the charges of excessive absences and incapacity. Also see In the Matter of the Tenure Hearing of Jerome Kasprowiez, 93 NJAR 2nd 147 (NJ Adm., January 31, 1993), where he was described as a "very fine teacher" and his evaluations were "excellent," yet he was still terminated for incapacity and excessive absenteeism.

In regards to the issues discussed at the July 23, 2018 meeting, where Respondent Batts and her husband were present along with Mr. Huk, the Association Representative,

and Mr. Roth, the District Representative, Respondent Batts asserts that she was not told nor warned of the upcoming tenure charges by Mr. Roth. The Board questions the credibility of this assertion. After Mr. Roth reviewed her attendance reports for 2017-2018 and beyond, the Boards asserts, Mr. Roth told Respondent Batts that she had used her leave time. Most importantly, the Board further contends, he told Respondent Batts that if she returned for the start of 2018-2019 school year that the District would treat her record as a "no harm, no foul" situation. However, the Board further points out that Mr. Roth still further testified that Respondent Batts was warned that if she did not return by September 2018, the Superintendent would file tenure charges against her. Although this did occur, the Board asserts, but the Board also adds, that Respondent Batts and her husband, who was present at this meeting, strongly deny this occurrence. Thus, the Board further asserts that Respondent Batts is not credible.

Based on all of the above, the Board requests that this Arbitrator follows the supportive cited case law and terminate Respondent Batts for incapacity and chronic absenteeism.

On the other hand, it is the Respondent's position that the Board incorrectly determined that Respondent Batts was absent for nineteen (19) months. Instead, the Respondent asserts that the charges reflect only one hundred and sixty-eight (168) absences that Respondent Batts accumulated during the 2017-2018 year and the thirty-eight (38) absences that she utilized in September and October 2018. Thus, the Respondent further asserts that, at best, only two hundred and six (206) total absences should be considered, as reflected in the charges. However, the Respondent also points out that a substantial portion of the two hundred and six (206) absences constituted

approved leave, which should not be subject to discipline. In sum, the Respondent strongly asserts that twenty-nine (29) personal business and illness days as well as sixty (60) Family and Medical Leave Act (FMLA) days should be deducted from the two hundred and six (206) total absences. As such, the Respondent reasons that only one hundred and seventeen (117) absences may be considered for disciplinary purposes.

In response to Count One, the Respondent counters that this should be dismissed with prejudice because the Board failed to prove that Respondent Batts was incapacitated by a preponderance of evidence. Moreover, the Respondent points out that the Board conceded that her absences were due to legitimate medical reasons caused by a harrowing car accident. Most importantly, she is currently ready and able to return without limitation. This is supported by medical documentation and testimony of Dr. Worth, her physician. Thus, the Respondent further reasons that the Board has failed to prove that Respondent Batts is incapacitated.

In response to Count Two, the Respondent asserts that this charge must also be dismissed with prejudice because the Board failed to show that it sufficiently warned Respondent Batts that her absences were a cause of concern. Specifically, the Respondent contends the Board also failed to demonstrate that her absences adversely impacted the operations of the School District. In addition, the Respondent further points out that the Board failed to make any accommodations or offer Respondent Batts assistance to improve her attendance issues. That is, the Respondent further asserts that the Board failed to implement progressive discipline to avert her attendance issue in the future. In sum, the Respondent still further contends that the totality of circumstances all militates against the draconian penalty of termination.

Although the Board focuses only on the amount of chronic absenteeism, the Respondent counters that New Jersey law does not support this conclusion that only the number of absences is controlling. Stated differently, the Respondent maintains that the arbitrator should consider also the reasons for the absences and other mitigating factors. See the Board of Education of Toms River v. Marsden, OAL Docket EDU 1188-84 (August 26, 1985), among other cases.

Although the Board asserts that Respondent Batts's ability, performance and accolades as an excellent teacher cannot support charges of incapacity and chronic absenteeism, the Respondent vehemently disagrees. Instead, the Respondent rebuts this analysis and conclusion with In Re Fulcomer, 93 NJ Super. 404 (App. Div., 1967). This case requires this Arbitrator, the Respondent points out, to consider ten (10) factors before making a final determination. Some of these factors include: the longevity of one's career, one's performance, abilities, whether acts at issue were premeditated, cruel or done with intent to punish, one's disciplinary history, and any harm caused to the operations of the School District.

In response to the Board's argument that Respondent Batts's absences adversely impacted the School District's operations or continuity of instruction, the Respondent strongly argues that the Board failed to prove that her absences caused such harm. The Respondent points out that New Jersey law requires that the District must demonstrate there were particular circumstances where the absences must corroborate with the adverse impact of one's absences during the period in question and with some warning given to the employee that's one's supervisor was dissatisfied with the patterns of

absences. See In Re Greg Short, Agency Docket No. 263-9/14, Final decision (January 4, 2015), citing Tenure Hearing of White, 92 NJAR 2nd (EDU) 157.

In regards to the July 23, 2018 meeting, the purpose of this meeting was to ascertain answers regarding Respondent Batts's health insurance, FMLA leave and other work-related issues. That is, the Respondent points out that it was not disciplinary in nature. Notwithstanding Mr. Roth's testimony, Respondent Batts and her husband vehemently disagree that Mr. Roth gave a verbal warning of future tenure charges, as alleged. Instead, the Respondent contends that the Board was negligent in failing to implement progressive discipline measures before resorting to tenure charges. As to credibility, the Respondent further contends that Mr. Roth's testimony should carry no probative value as he was a sole, uncorroborated witness.

As to the appropriate penalty, the Respondent requests that the Arbitrator considers the totality of events and delays surrounding these tenure charges and the extraordinary hardship Respondent Batts endured such as: loss of her house and car during this delay. Specifically, the Respondent explains that the hearing process was on appeal for three (3) years and ultimately rejected by the Appellate Division of the Superior Court of New Jersey. The Respondent points out that the Board refused to reinstate Respondent Batts to the payroll despite an arbitration order requiring it to do so.

Lastly, there are several cases where mitigating factors required a remedy less than termination. A few of such cases are as follows: the Fulcomer case, op. cit., as well as In Re Elizabeth Corbacho-Musngi, Agency Docket. No. 314-10/14 Final decision (May 12, 2015); and In Re Leslie Ann Ramos, Agency Docket No. 261-9/14 (January 5, 2015). In summation, the Respondent reminds the Arbitrator that Respondent Batts is not

only a long-term employee for more than twenty (20) years and without a disciplinary record and with stellar reviews but also her supervisors were extraordinarily pleased with her performance and her absences caused no harm to the School District. For all of the above reasons, the Respondent requests a lesser penalty than termination. Moreover, the Respondent further requests that the Board be ordered to reimburse her in full the compensation and emoluments withheld from her during the pendency of this proceeding. Specifically, the Respondent points out that this should consist of reimbursement of her full salary from the date she was first authorized to return to work on September 1, 2019.

FINDINGS AND DISCUSSION

After a careful review of the record in its entirety and having had an opportunity to weigh and evaluate the testimony of witnesses, this Arbitrator finds that Count One and Count Two of these tenure charges should be dismissed with prejudice for the following reasons.

First, Count One, which encompassed Respondent Batts's chronic and excessive absenteeism as well as her inability to return to work to perform any teaching duties constitutes incapacity requiring termination has been successfully challenged from the evidence presented.

In the Tenure Hearing of White, 92 NJAR 2nd (EDU) 157 at 161 sets forth the three (3) elements of proof which are requisites for termination. That is, the Board must prove that there was consideration of: "1) the particular circumstances of the absences and not merely the number of absences, 2) the impact that the absences had on the

continuity of instruction during the period of time the absences occurred, not merely after the fact, and 3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences."

Applying this prevailing standard of elements to this tenure case, the Respondent has shown the nexus between the car accident, September 30, 2017, and her subsequent absences through Dr. Worth, her physician's medical documentation, as well as his letter of clearance (Respondent's Exhibit M). In addition, Dr. Worth corroborated these records with his concurrent testimony in TR-2 at 150-153.

As to the impact of those absences, the Board presented no showing as to this subject matter. Instead, Vice President Bullock, Respondent Batts's direct supervisor at the middle school testified that she was a "superior teacher" (TR-2 at 167). She went to great lengths to testify that Respondent Batts was named Teacher of the Year at Polk Elementary School and by the [N]AACP in Roselle (TR-2 at 169). These same sentiments were expressed for Respondent Batts by her direct supervisor, Principal Harry at Polk Elementary School, where she states in a text message, "I am definitely trying to keep your position here at Polk. Miss you and love you always" (see TR-2 at 262). In sum, there was no dissatisfaction shown by either supervisor against Respondent Batts.

As to the requirement that a warning be given to the Respondent Batts that her supervisors were "dissatisfied" with her pattern of absences, the record reflects just the opposite, as noted above.

Clearly, the Board failed as to the showing of a negative or adverse impact of Respondent Batts's absences as well as the third element, requiring a warning to an employee that one's supervisors were dissatisfied with Respondent Batts's absences.

Second, Count Two, which encompassed Respondent Batts's chronic and excessive absenteeism that constitutes incapacity and "other just cause" that warrants termination, Respondent Batts, herself, testified that she was currently ready and able to return to her work. Specifically, she testified "I'm ready and willing and I want to get back to work" (see TR-2 at 329). This is what she testified to in concurrence with Dr. Worth and his medical documentation alluded to earlier. Clearly, the charge of incapacity must be dismissed with prejudice.

As to "conduct unbecoming," a tenured teacher which could fall within the ambit of "other just cause," that too must fail. That charge cannot be supported alone by hearsay. Stated differently, legally competent evidence to support supplemental hearsay must be present to be actionable. Thus, the hearsay evidence of emails or statements of witnesses alone cannot stand (see NJAC, 1: 1-15.5(b) and State of Weston, 60 NJ 36 (1972)).

Third, as to what specific dates are actionable, the record reflects that Respondent Batts was approved for coverage by the Family and Medical Leave Act (FMLA), amounting to twelve (12) weeks by Mr. Roth, the Board's sole witness, on October 2, 2017 (see TR-1 at 94-96 and Board's Exhibit 13). However, the FMLA approved leave was not reflected in the Board's Exhibit 10, her attendance record. This omission was confirmed by Mr. Roth's testimony at our hearing (see TR-1 at 100-101). Mr. Roth also confirmed that the Collective Bargaining Agreement (CBA) additionally allows for

"other leaves of absences without pay," but such leaves are optional and discretionary (see TR-1 at 118-119).

Based on the tenure charges, it would seem that two hundred and six (206) total absences should only be subject to discipline. Specifically, Respondent Batts accumulated one hundred and sixty-eight (168) absences during the 2017-2018 school year with thirty-eight (38) absences from September and October 2018. Nonetheless, the record reflects that a sizable portion of the two hundred and six (206) absences were comprised of approved leave, for which Respondent Batts should not be disciplined for such as: the usage of two (2) personal business days and twelve (12) personal illness days in 2017-2018 and twelve (12) weeks of Family and Medical Leave Act (FMLA), using sixty (60) work days. Based upon 29 CFR §825.216(b), the Board cannot institute disciplinary action for any absences within the ambit of FMLA. The bottom line is: that if, twenty-nine (29) personal business and illness days plus sixty (60) FMLA days are deducted from two hundred and six (206) total absences, as delineated from the charges, then there are one hundred and seventeen (117) absences, the residue which must be considered for disciplinary purposes.

Fourth, as to the July 23, 2018 meeting, the record reflects that the purpose of this meeting was not disciplinary in nature. Instead, the meeting was to further discuss the health insurance, FMLA leave and other work-related matters, but initiated by Respondent Batts (see TR-1 at 53). Most importantly, Mr. Roth, the Board's labor counsel, claims to have warned Respondent Batts of upcoming tenure charges. However, she denies that such a warning ever occurred. Respondent Batts, her husband, who was also present at this meeting, also denies that this warning was given as well. On cross-

examination, Mr. Roth admits that he never consulted Principal Harry to inquire about Respondent Batts's performance or the possible dissatisfaction with Respondent Batts before authorizing tenure charges (see TR-1 at 82-83). Although the Board could have authorized an independent medical exam for Respondent Batts during this period, Mr. Roth admits this was not done (see TR-1 at 85-90). In addition, Mr. Roth also confirms that the Collective Bargaining Agreement (CBA) allows for "other leaves of absences without pay," but they were optional and discretionary (see TR-1 at 118-119). On the other hand, Respondent Batts explains that for two (2) years between the time of her car accident, September 30, 2017, and April 2019, when she received tenure charges, she never had any communications from the Board. That is, the record reflects that after a plethora of letters, emails and text messages that she sent, there was no response until she received tenure charges, April 2019 (see Respondent's exhibits DD, E, F, GN, O, P, Q, R. S, T, W, X, Y, Z and AA). Based on the totality of events and testimony from both Mr. Roth and Respondent Batts, this Arbitrator finds that Respondent Batts to be credible regarding these events.

Fifth, In Re Fulcomer, 93 NJ Super, 404 App. Div. 1967, this Arbitrator finds this case to be pivotal. It requires this Arbitrator to consider a list of varied factors before making a determination of the appropriate penalty in tenure cases. There are approximately ten (10) operative factors that are particularly relevant to our present case such as: the longevity of the respondent's career; the respondent's overall performance record; the respondent's abilities; whether there are acts at issue that were: premeditated, cruel or done with intent to punish; evidence of provocation, extenuating association; the likelihood of such behavior recurring; and whether or not the discipline is fair compared with other public employees.

Comparing these viable elements to our case at hand, Respondent Batts has been a tenured teacher for more than twenty (20) years with a stellar record. In addition, she has no disciplinary record (see TR-2 at 222). Every year, she was observed at least three (3) times plus evaluated twice every year (see TR-2 at 224).

As to the inquiry if her absences harmed the School District, the record reflects excellent recommendations by both of her supervisors, as noted earlier. As to the occurrences of absenteeism being a continuing factor for the future, the record reflects that this is a singular but catastrophic car accident, that is unlikely to ever occur again.

As to whether or not such discipline is fair under the circumstances presented, the record is clear that the Board never responded to any of Respondent Batts's inquiries for two (2) years until April 2019, when it issued the tenure charges. This reflects negligence of the Board by its omission to be responsive to Respondent Batts's many inquiries.

As to the inquiry regarding the last factor regarding the intent to punish, the Respondent has pointed out the three (3) year appeal which caused a delay in this case regarding the procedural issues set forth earlier in the award. As to the result of this three-year procedural delay, Respondent Batts testified that she lost her home as well as two (2) cars (see TR-2 at 326-327). During this time, she was not offered progressive discipline, nor accommodations, as she requested by email. Based upon the totality of events, significant harm has been established to Respondent Batts by these delineated events.

Sixth, the burden of proof is on the Board to prove by a preponderance of evidence the three (3) elements required for termination, as delineated in the White case, op. cit., noted earlier. In sum, 1) the particular circumstances of the absences, not just the sheer number of absences; 2) the impact of those absences on the School District; 3) the need for a warning to an employee that a supervisor was dissatisfied with the pattern of absences, all three (3) requisites must be met for a termination to be viable. It is significant to note that two (2) of the Board's own cited cases also utilize White's analysis of the three (3) viable elements in accessing the appropriate penalty for termination (see In the Matter of the Tenure Hearing of Jeanne Cook School, District of the Township of Old Bridge County, OAL, Docket No. EDU 8568-02 Agency Docket No. 374-11/02 (January 26, 2005); and In the Matter of the Tenure Hearing of Christine Gillespie State-Operated School District of the City of Newark, Essex County, OAL Docket Nos. EDU 20524-15, EDU 9195-11 (On Remand) Agency Docket No. 67-2/03 (January 9, 2016).

As applied earlier to our current case, these concurrent requirements were not met for the reasons delineated earlier.

As for case law, the Board asserts that their cited cases must be followed without exception. That is, the Board maintains the general rule of termination must be strictly adhered to in all cases. However, case law also embraces the totality of circumstances approach which is tailor-made for our current tenure dispute, as personified by Fulcomer op. cit., cited earlier and analyzed. Specifically, that requires analyzing and applying the approximately ten (10) factors. Other case law also embraces this totality of circumstances approach, which allows the analysis of mitigating factors, such as: In Re

Greg Short, Agency Docket No. 263-9/14 Final Decision (January 4, 2015); Board of Education of Toms River v. Marsden OAL, Docket EDU 1188-84 (August 26, 1985); In Re Elizabeth Corbacho-Musngi, Agency Docket, No. 314-10/14 Final Decision (May 12, 2015; and In Re Leslie Ann Ramos, Agency Docket No. 261-9/14 (January 5, 2015).

Seventh, thus based upon case law earlier cited which embraces the totality of circumstances approach to tenure cases, this Arbitrator finds that Respondent Batts with more than twenty (20) years with an exemplary performance record and no disciplinary record should be reinstated to her former position as a tenured teacher.

The record reflects that she is ready and able to return without accommodations and buttressed by the full clearance of her physician and supported by viable medical documentation.

In addition, this Arbitrator orders the Board to reimburse her in full with compensation and emoluments withheld during the pendency of this appeal process detailed earlier. Lastly, Respondent Batts's reimbursement shall include her full salary from the date she was authorized to return to work on September 1, 2019 for reasons stated herein.

AWARD

Respondent Batts is hereby reinstated. Count One shall be dismissed with prejudice as the Board failed to prove

that she was incapacitated by a preponderance of evidence, as required. Count Two shall also be dismissed with prejudice as the Board failed to present a showing that her absences adversely impacted the School District, as required. Moreover, there was a showing of complete satisfaction with Respondent Batts's performance. Accordingly, the Board is ordered to reimburse Respondent Lovena Batts her full compensation and emoluments withheld from her during the pendency of this appeal process of this proceeding. In sum, her reimbursement shall include her full salary from the date she was first authorized to return to work on September 1, 2019.

AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

DATE OF AWARD: June 15, 2022

Dr. Andrée McKissick
ARBITRATOR

142-22
OAL Dkt. No. EDU 06238-21
Agency Dkt. No. 229-11/20

New Jersey Commissioner of Education

Final Decision

Brick Township Education Association,
On Behalf of Its Members,
Kevin Bliem and Brent Middlemiss,

Petitioner,

v.

Board of Education of the Township of Brick,
Ocean 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 have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 30, 2022
Date of Mailing: June 30, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06238-21
AGENCY DKT. NO. 229-12/20

BRICK TOWNSHIP EDUCATION ASSOCIATION, ON BEHALF OF ITS MEMBERS, KEVIN BLIEM AND BRENT MIDDLEMISS,

Petitioner,

v.

BRICK TOWNSHIP BOARD OF EDUCATION,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Caitlin Pletcher, Esq., for respondent (Florio, Perrucci, Steinhardt, Cappelli, Tipton & Taylor, LLC, attorneys)

Record Closed: May 19, 2022 Decided: May 23, 2022

BEFORE **DAVID M. FRITCH,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on July 27, 2021, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On May 19, 2021, the parties filed a fully executed Settlement Agreement and the Board Resolution approving the settlement. The Agreement and Resolution are attached and fully incorporated herein.

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

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

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

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

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

May 23, 2022
DATE

DAVID M. FRITCH, ALJ

Date Received at Agency: 5/25/2022

Date Mailed to Parties: 5/25/2022

/dw

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Caitlin Pletcher, Esq.
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Attorneys for Respondent, Brick Township BOE

BRICK TOWNSHIP EDUCATION ASSOCIATION, on behalf of itself, and its Bargaining members, KEVIN BLIEM and BRENT MIDDLEMISS, Petitioners, v. BRICK TOWNSHIP BOARD OF EDUCATION, Respondent.	OAL DOCKET #: EDU 06238-2021 AGENCY REF.#: 229 – 12/20 SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into by and between the Brick Township Board of Education, which has offices located at 101 Hendrickson Avenue, New Jersey 08724 (hereinafter referred to as the "Board") and the Brick Township Education Association, which has offices located at 270 Chambers Bridge Road, Unit 12, Brick, New Jersey 08724, on behalf of itself, and its Bargaining members, Kevin Bliem and Brent Middlemiss (hereinafter referred to as the "BTEA") (hereinafter collectively referred to as the "Parties").

WHEREAS, the Board and BTEA are parties to a collective bargaining agreement ("CBA"), under which the Board recognizes the BTEA as the majority representative, pursuant to N.J.S.A. 34:13A-1, et seq., representing Classroom Teachers, Special Education Teachers, Nurses,

Special Services Personnel, Librarians, Student Services Personnel, Athletic Trainers, Attendance Officers, Instructional Coaches, and Teacher Aides; and,

WHEREAS, the Parties' CBA (effective dates of July 1, 2018 through June 30, 2021) set forth terms for employees' contributions for health benefits and the medical plans offered by the Board; and,

WHEREAS, the New Jersey Legislature enacted P.L. 2020, c. 44 ("Chapter 44"), effective July 1, 2020, which, among other things, created a new State health care plan, New Jersey Educators Health Plan ("NJEHP"); and,

WHEREAS, Chapter 44 applies to both school districts that do and do not participate in the School Employees Health Benefits Program ("SEHBP"); and,

WHEREAS, the Board does not participate in the SEHBP; and,

WHEREAS, Chapter 44 provides that boards of education shall offer its employees NJEHP, or its equivalent; and,

WHEREAS, Paragraph 8 of Chapter 44 also provides that an employer and the majority representative shall engage in collective negotiations when the net cost of the current health care benefits coverage available to employees is lower than the cost of the NJEHP; and,

WHEREAS, the Board maintains that the implementation of the NJEHP would cause a negative financial impact; and, accordingly, Paragraph 8 of Chapter 44 requires collective negotiations to mitigate a negative financial impact ; and

WHEREAS, the BTEA maintains that Chapter 44 required the implementation of the NJEHP, effective January 1, 2021;

WHEREAS, the BTEA filed a Petition of Appeal ("Petition"), seeking to enforce Chapter 44 and require the Board to offer the NJEHP; and

WHEREAS, the Board filed an Answer to the Petition, seeking an Order denying the relief sought by the BTEA and the dismissal of the Petition; and

WHEREAS, the Parties filed Motions for Summary Decision, which are currently pending before theOffice of Administrative Law ; and

WHEREAS, the Parties are desirous of resolving the issues raised by the BTEA and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the Parties agree as follows:

1. The Board will offer a health plan equivalent to the NJEHP during the Board's open enrollment period in the Spring of 2023, which will go into effect (for those employees who select it and for those employees who are required to be automatically enrolled in the NJEHP pursuant to Chapter 44) on July 1, 2023.

2. In the event that the NJEHP is modified by the SEHBP Plan Design Committee, State Treasurer, or any other State entity/agency prior to January 1, 2024, the Board will offer the equivalent to the modified plan during the Board's open enrollment period in the Spring of 2024, which will go into effect (for those employees who select it and for those employees who are required to be automatically enrolled) on July 1, 2024. In the event that the NJEHP is discontinued by the SEHBP, the Board will mirror said action with its NJEHP-equivalent plan and employees will be permitted to enroll in the other health insurance plans offered by the Board during the next open enrollment period. The Board shall offer employees any new health plan as required in accordance with the provisions of the implementing law.

3. Within seven (7) calendar days of the Board's approval of this Agreement at a public Board meeting, representatives of the Parties will execute a sidebar agreement to the CBA

to memorialize this Agreement.

4. Nothing in this Agreement prohibits the Parties from entering into negotiations to discuss a new health benefits plan that would go into effect no earlier than July 1, 2025.

5. The terms of this Agreement represent the compromise of disputed claims between the Parties.

6. This Agreement shall not constitute, be interpreted, construed, or used as evidence of any admission of fact, law, responsibility, or liability on the part of any party.

7. The Parties agree to submit this Agreement to an Administrative Law Judge for approval in full settlement of all issues pertaining to this matter. If approved, this Agreement shall be incorporated into a Final Decision by an Administrative Law Judge. Nothing contained herein shall be interpreted as preventing the Parties from filing a lawsuit to enforce the terms of this Agreement.

8. The BTEA, individually, and on behalf of all of its members, hereby forever and fully waives and releases the Board from any and all claims and demands raised in its underlying Petition of Appeal (OAL Docket No. EDU 06238-2021), and from any and all claims that may have accrued with respect to the subject matter encompassed by this Agreement (dispute over the implementation date of NJEHP/NJEHP-equivalent). Nothing in the release set forth in this paragraph shall be construed as a release or waiver of any claims that are not related to the Petition of Appeal (OAL Docket No. EDU 06238-2021) and/or the subject matter encompassed by this Agreement. Nothing in the release set forth in this paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

9. Each party shall bear their own attorneys' fees, costs, expert witness fees, and/or costs of evaluations and expert reports for the entirety of any matter or matters related to the subject

matter of this Agreement.

10. This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey.

11. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective party.

12. The Parties may execute this Agreement in counterparts, each of which is deemed an original and all of which only constitute one original.

13. This Agreement is subject to ratification by the Board and is without prejudice to any party if the terms are not agreed upon. The representatives of the District shall recommend the terms of this Agreement to the Board for approval at its next regularly scheduled BOE meeting.

14. This Agreement constitutes the entire understanding of the Parties hereto and shall supersede any prior agreements between the Parties with respect to its subject matter. Further, there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. Each party acknowledges and agrees that they are not relying upon any oral statements, representations, promises or expectations which are not expressly and explicitly set forth in this Agreement, which alone fully and completely expresses all agreements between the Parties.

15. A modification or waiver of any of the provisions of this Agreement shall be effective and enforceable, only if made in writing, signed and duly authorized by all Parties and executed with the same formality as the Agreement.

16. The terms and conditions set forth herein shall be deemed severable. If any clause or provision contained herein shall be held unenforceable by a court of competent jurisdiction, it shall not affect the validity of any other clause or provision, all of which shall continue in full force and effect.

17. The Parties acknowledge that they are entering into this Agreement of their own accord and without any undue influence, coercion or pressure of any kind; that all the provisions of this Agreement, as well as all questions pertinent thereto, have been fully and satisfactorily explained to them; that they have given due consideration to such provisions and questions and understand them clearly; that the provisions of this Agreement are in all respects acceptable to them and that they, therefore, accept these provisions in full and final satisfaction of all claims and demands which have been raised or which could have been raised in any litigation related to the within Agreement.

18. The Parties recognize that each had the opportunity to be represented by legal counsel and that they sign this within Agreement as their own voluntary act and deed, and that they understand the duties and obligations enumerated herein.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and

BRICK TOWNSHIP SCHOOL DISTRICT

By: _____
Stephanie Wohlrab, Board President

Dated:

Witness:

Dated:

By: _____
James Edwards, Business Administrator

Dated: 5/12/22

Witness:

5/11/2022

BRICK TOWNSHIP EDUCATION ASSOCIATION

By: Wayne Puglisi
Wayne Puglisi, BTEA President

Dated:

BRICK TOWNSHIP PUBLIC SCHOOLS
101 HENDRICKSON AVENUE
BRICK, NJ 08724

CERTIFICATION

I hereby certify that I, the undersigned, am the Brick Township Board of Education Secretary and am duly authorized to certify resolutions adopted by the Board of Education at the Regular Meeting held on the 12th day of May, 2022.

To approve a Settlement and Release Agreement, OAL Docket EDU 06238-2021.

James W. Edwards, Jr., CPA
Business Administrator/Board Secretary

143-22
OAL Dkt. No. EDU 00869-22
Agency Dkt. No. 8-1/22

New Jersey Commissioner of Education

Final Decision

D.G., on behalf of minor child, B.K.,

Petitioner,

v.

Board of Education of the Lenape Regional High School District, Burlington County,

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 30, 2022
Date of Mailing: June 30, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00869-22
AGENCY DKT. NO. 8-1/22

D.G. on behalf of B.K.,
Petitioner,
v.
LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, BURLINGTON COUNTY,
Respondent.

D.G. on behalf of B.K., petitioner, pro se

R. Taylor Ruilova, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: May 27, 2022 Decided: June 1, 2022

BEFORE **SUSAN M. SCAROLA,** ALJ (Ret., on recall):

This matter was transmitted to the Office of Administrative Law on February 4, 2022, 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.

June 1, 2022 — Susan Scarola

DATE — **SUSAN M. SCAROLA**, ALJ
(Ret., on recall)

Date Received at Agency: 6/2/2022

Date Mailed to Parties: 6/2/2022

SMS/nmn

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
(856) 234-4114
(856) 234-4262 [Fax]
Attorneys for the Respondent,
Lenape Regional High School District Board of Education

BY: R. TAYLOR RUILOVA, ESQUIRE

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2022 MAY 27 P 12: 00

STATE OF NEW JERSEY

D.G. o/b/o B.K.,

Petitioners,

vs.

LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

AGENCY REF No.: 8-1/22

OAL DKT No.: EDU 00869-22

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (the "Agreement") is entered into by and between Petitioner, D.G. ("Petitioner"), individually and on behalf, B.K., and Respondent, the Lenape Regional High School District Board of Education (the "Board") (the Board and Petitioner collectively, the "Parties").

WHEREAS, the Board operates the Lenape Regional High School District (the "District"); and

WHEREAS, beginning in December 2021, Petitioner sought to enroll B.K. in school in the District; and

WHEREAS, given that B.K., a non-resident student to whom Petitioner was not biologically or legally related at the time, was not legally entitled to attend school in the District, Petitioner's requests for enrollment were denied; and

WHEREAS, Petitioner commenced the instant action in January 2022 seeking to challenge the denial of B.K,'s attendance at school in the District; and

WHEREAS, the Board filed a Motion for Summary Disposition seeking to have Petitioner's appeal dismissed and an order for tuition assessment issued against Petitioner; and

WHEREAS, on March 17, 2022, Petitioner obtained a court order in a proceeding before the Superior Court of Burlington County which granted him physical custody of B.K.; and

WHEREAS, the Board accepted the custody court order as of March 17, 2022, but maintained that Petitioner owed tuition for the period of time in which B.K. attended school in the District from when Petitioner commenced this action up until the court order was issued; and

WHEREAS, following subsequent good faith negotiations, the Parties have amicably resolved this matter in order to avoid expending resources in connection with litigation of this matter; and

NOW, THEREFORE, in consideration of the mutual promises, covenants and other good and valuable consideration set forth herein, it is hereby agreed by and between the Parties hereto as follows:

1. Petitioner understands, agrees and stipulates that B.K. was not legally entitled to attend school in the District until the March 17, 2022, custody court order was issued.

2. The Board agrees to waive its claim against Petitioner for the payment of tuition for the period of time which B.K. attended school in the District following Petitioner's commencement of this matter until the custody court order was issued.

3. The Board agrees and stipulates that so long as the custody court order remains in place and in effect, B.K. shall be eligible to attend school in the District, consistent with the Board's other policies, practices and procedures.

4. This Agreement is made without any admission of liability by the Board that any of its actions with respect to B.K.'s attendance at school in the District until the custody court order was issued were not in all respects appropriate.

5. The Parties consent to this Agreement being memorialized in a Decision and Order issued by the Office of Administrative Law.

6. In consideration of the above, the Parties hereby forever and fully waive release each other from any and all claims that have accrued as of the date this Agreement is fully approved, under any law, regulation, or legal theory, without limitation. However, nothing in the release set forth in this Paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

7. No Party will be considered to be a "prevailing party" for any purpose and the Parties agree that they shall be responsible for their own fees and costs.

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STATE OF NEW JERSEY

8. This Agreement is dispositive of all issues in dispute between the Parties and is intended to constitute a final resolution of the instant dispute between the Parties.

9. The Parties shall keep terms of this Agreement strictly confidential to the fullest extent permitted by law and shall not share or communicate the terms of same with any third party unless enforcement of this Agreement is sought by either Party in a court of law or as may otherwise be required by applicable law.

10. The Parties acknowledge that they have read and understand the terms of this Agreement and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

11. Petitioner represents that he has the sole authority to enter into this Agreement, and that it shall be binding as if entered into by any other parent and/or guardian of B.K. not a party hereto.

12. 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.

13. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the dates written below.

FOR PETITIONER:

BY: _____ DATED: 5/26/22
David Garagozzo, individually and o/b/o B.K.

FOR THE LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION:

BY: _____ DATED: 05-27-2022
Carol Birnbohm, Ed.D., Superintendent

COMEGNO

R. TAYLOR RUILOVA, ESQUIRE
MEMBER NJ AND PA BARS

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2022 MAY 27 P 12:00
STATE OF NEW JERSEY

521 PLEASANT VALLEY AVENUE
MOORESTOWN, NJ 08057
888.313.4332
856.234.4114
856.234.4262 FAX
COMEGNOLAW.COM

May 27, 2022

VIA ELECTRONIC MAIL ONLY

The Honorable Susan M. Scarola, A.L.J.
New Jersey Office of Administrative Law
9 Quakerbridge Plaza
Mercerville, New Jersey 08619

RE: D.G. o/b/o B.K. v. Lenape Regional High School District Board of Education
OAL Dkt. No. EDU 00869-2022S, Agency No. 8-1/22

Dear Judge Scarola:

As Your Honor is aware, this firm represents the Lenape Regional High School District Board of Education (the "Board") in connection with the above matter.

We are pleased to attach a fully executed Settlement Agreement which resolves the above matter. This Agreement will not require further approval of the Board.

Accordingly, we respectfully request that Your Honor enter a decision approving the Agreement and closing the matter. Furthermore, we respectfully request that the telephone conference scheduled with Your Honor for June 1, 2022, at 3:00 PM be adjourned.

Should Your Honor have any questions or require anything further, please do not hesitate to contact us.

Respectfully submitted,

R. TAYLOR RUILOVA

RTR/
Enclosure
c: Petitioner (via email w/enclosure)
Client (via email w/enclosure)

COMEGNO
LAW GROUP P.C.

RECEIVED
2022 JUN -1 A 11:31
STATE OF NEW JERSEY

R. TAYLOR RUILOVA, ESQUIRE
MEMBER NJ AND PA BARS

521 PLEASANT VALLEY AVENUE
MOORESTOWN, NJ 08057
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June 1, 2022

VIA ELECTRONIC MAIL ONLY

The Honorable Susan M. Scarola, A.L.J.
New Jersey Office of Administrative Law
9 Quakerbridge Plaza
Mercerville, New Jersey 08619

RE: D.G. o/b/o B.K. v. Lenape Regional High School District Board of Education
OAL Dkt. No. EDU 00869-2022S, Agency No. 8-1/22

Dear Judge Scarola:

As Your Honor is aware, this firm represents the Lenape Regional High School District Board of Education (the "Board") in connection with the above matter. We are in receipt of correspondence from Your Honor's chambers indicating that in order to submit an Initial Decision on Settlement to the Commissioner of Education, a resolution from the Board would be needed.

Pursuant to N.J.A.C. 6A:3-1.13(d), in order for a proposed settlement to be submitted to the Commissioner of the OAL where a board of education is a party, there must be an indication of the board's consent to the agreement, either through a submission of a board resolution or the signature of the board's attorney that the board has consented to the terms of the settlement.

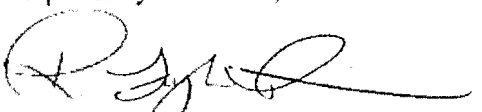
The Settlement Agreement here has been executed by the Superintendent, on behalf of the Board and with the consent of the Board. I am signing this correspondence in my capacity as the attorney for the Board confirming that consent.

We respectfully submit that with this correspondence, the requirements of N.J.A.C. 6A:3-1.13(d) have been satisfied. However, if Your Honor believes that a further Board resolution is necessary, the Board does not meet again until June 22, 2022, so we will not be able to obtain a resolution until after that time.

We respectfully request that Your Honor advise as to whether you still require a Board resolution. In any event, our request that the status telephone conference scheduled for this afternoon be adjourned, or, if Your Honor requires a Board resolution, rescheduled until after the June 22, 2022, Board meeting date.

As always, we thank Your Honor for your continuing courtesies and consideration.

Respectfully submitted,



R. TAYLOR RUILOVA

RTR/
c: Petitioner (via email)
Client (via email)

144-22
OAL Dkt. No. EDU 01632-22
Agency Dkt. No. 16-2/22

New Jersey Commissioner of Education

Final Decision

Morris Lucky,

Petitioner,

v.

Board of Education of the City of Englewood, Bergen 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 have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 30, 2022
Date of Mailing: June 30, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01632-22
AGENCY REF. NO. 16-2/22

MORRIS LUCKY,
Petitioner,

v.

CITY OF ENGLEWOOD BOARD OF EDUCATION,
BERGEN COUNTY,
Respondents.

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

Roshan D. Shah, Esq., for Respondent (Anderson & Shah, LLC, attorneys)

Record Closed: May 19, 2022 Decided: May 19, 2022

BEFORE **JOHN P. SCOLLO,** ALJ:

NATURE OF PROCEEDINGS

Petitioner alleges that respondent Board violated his tenure and seniority rights by failing to notify him of the preferred eligibility list of a full time position to which he is entitled after he was previously terminated as part of a RIF.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on March 2, 2022.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached Stipulation and Settlement Agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that Petitioner's petition is withdrawn 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.

John P. Scollo

May 19, 2022
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: May 23, 2022

Date Mailed to Parties: May 23, 2022
db

SETTLEMENT AGREEMENT AND RELEASE

This agreement by and between the:

Englewood Board of Education (The District)
And
Morris Lucky (LUCKY)

WHEREAS, LUCKY, was a tenured teacher who was subject to a Reduction in Force (RIF) on or about June 30, 2017; and

WHEREAS, as a result of his tenure status and seniority in the district, LUCKY was placed upon the preferred eligibility list for re-employment in the District; and

WHEREAS, the District failed to recall LUCKY when he was eligible for re-employment causing him a financial loss and denial of the opportunity to work in the District; and

WHEREAS, LUCKY has filed a Petition of Appeal with the New Jersey Commissioner of Education under docket number **EDU 01632-22;** and

WHEREAS, LUCKY and the District wish to resolve the referenced dispute in the public interest and to conserve the time and resources needed to fully litigate the matter;

NOW THEREFORE, the District and LUCKY agree to resolve the referenced dispute under the terms and conditions set forth below, in the best interests of all of the parties:

1. LUCKY agrees to surrender any and all rights to future employment in the District including but not limited to, his tenure, seniority and recall rights, permanently and irrevocably to employment;
2. The district, in consideration for the surrender of LUCKY's tenure, seniority and recall rights to employment in the District the District agrees to pay LUCKY the sum of Six Thousand Five Hundred Dollars ($6,500.00) The District shall issue a form 1099 to LUCKY representing the receipt of "other compensation". LUCKY will absorb any tax liability arising out of this payment. No withholding shall be taken from this payment and LUCKY will receive a lump sum of $6,500.00.
3. This agreement is subject to the approval of the Englewood Board of Education and the adoption of a resolution authorizing the same.
4. In the event this settlement requires the approval of the Commissioner of Education, it is likewise subject to that approval. If approved, LUCKY, will withdraw said Petition of Appeal, with prejudice, and without costs to any party;
5. LUCKY acknowledges that he had an opportunity to review this Settlement Agreement and is satisfied with the representation that he received.

6. This Agreement shall in all respects be interpreted, enforced, and governed by the Laws of the State of New Jersey.
7. Each party acknowledges and represents that they have the authority to enter this agreement, subject only to the conditions stated above.

The parties hereby acknowledge their agreement to the terms set forth above by signing below.

M. Lucky
MORRIS LUCKY

4/7/2022
Date

ENGLEWOOD BOARD OF EDUCATION

By: _____

4-1-22
Date

145-22

New Jersey Commissioner of Education

Final Decision

D.M., on behalf of minor child, A.H.,

Petitioner,

v.

Board of Education of the Township of Washington, Gloucester County,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that her grandchild, A.H., is not domiciled within the district, and therefore not entitled to a free public education in Washington Township. In September 2020, petitioner and her husband were awarded joint custody of A.H. and designated as the parents of primary residence for school purposes by order of the Superior Court. Petitioner subsequently enrolled A.H. in Washington Township schools. Thereafter, the Board conducted a residency investigation that determined A.H. was living with his parents in Philadelphia. The Board requested that the Commissioner assess the petitioner the cost of tuition for the period of A.H.'s alleged ineligible attendance.

The ALJ found, *inter alia*, that: the issue here is whether A.H. resided in Washington Township during the 2020-2021 and 2021-2022 school years, and if not, what amount of tuition is due to the Board for the period of A.H.'s ineligible attendance; the testimony of respondent's witness was credible and, together with supporting documents, established that A.H. was not domiciled with petitioner during the period at issue; petitioner's testimony lacked details and, while her responses to interrogatories indicated that A.H. resided full time with D.M. in Washington Township, D.M. testified that she is immunocompromised and was unable to have A.H. in her home until April 2021 when she was able to receive the COVID 19 vaccine; and although the court orders granted petitioner joint custody for school purposes, there was no attempt to have A.H. reside at D.M.'s residence or within the district. The ALJ concluded that petitioner failed to establish that A.H. was domiciled with her during the 2020-2021 and 2021-2022 school years, and A.H. was therefore ineligible to attend school in the district. Accordingly, the ALJ dismissed the petition and ordered the petitioner to reimburse the Board for tuition in the amount of $23,587.12.

Upon review, the Commissioner disagreed with the ALJ's findings and conclusion in this matter, determining instead that A.H. was eligible to attend school in Washington Township from September 18, 2020 through December 23, 2021. In so deciding, the Commissioner emphasized, *inter alia,* that when there is a court order that designates the school district of attendance, the amount of time a child spends with either party to the order does not dictate where the child must attend school. Further, given the unprecedented circumstances of the COVID 19 pandemic, A.H.'s physical location during the period in question is irrelevant in light of a custody order specifically designating a parent of residence for school purposes. Petitioner owes no tuition reimbursement to the Board.

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

145-22
OAL Dkt. No. EDU 05034-2021
Agency Dkt. No. 60-4/21

New Jersey Commissioner of Education

Final Decision

D.M., on behalf of minor child, A.H.,

Petitioner,

v.

Board of Education of the Township of Washington, Gloucester County,

Respondent.

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

Petitioner is the grandmother of minor child A.H. On September 10, 2020, petitioner and her husband were awarded joint custody of A.H. and designated as the parents of primary residence for school purposes.[1] On September 18, 2020, petitioner registered A.H. for school in Washington Township. Thereafter, the Board conducted a residency investigation and concluded that A.H. was domiciled with his parents in Philadelphia, not with petitioner in

[1] The custody order was updated on March 25, 2021 and indicated that the parties would continue to share joint legal custody, and that petitioner and her husband are the parents of primary residence for school purposes only to allow A.H. to continue to attend his elementary school in Washington Township. On August 3, 2021, full custody was granted to petitioner and her husband. The record also contains a custody agreement dated December 27, 2022 – which the Commissioner presumes is a typo for December 27, 2021 – transferring fully custody of A.H. to his mother.

Washington Township. Petitioner appealed the Board's determination.[2] The Administrative Law Judge (ALJ) found that A.H. was not domiciled in Washington Township and that A.H. was therefore not entitled to attend school in the district. The ALJ ordered that petitioner reimburse the Board for A.H.'s tuition during the period of ineligibility, in the amount of $23,587.12.

Upon review, the Commissioner disagrees with the ALJ that A.H. was ineligible to attend school in Washington Township. *N.J.S.A.* 18A:38-1(a) provides that public schools shall be free to "[a]ny person who is domiciled within the school district." *N.J.A.C.* 6A:22-3.1(a)(1) provides that a "student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district." In analyzing A.H.'s eligibility to attend school in Washington Township, the ALJ disregarded the implications of a court order on a residency determination.

> When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year.
>
> *N.J.A.C.* 6A:22-3.1(a)1.i (emphasis added)

Here, A.H.'s parents and his guardians – petitioner and her husband – are domiciled within different school districts. In the absence of a court order, the amount of time A.H. lived with his parents and with petitioner would be relevant. However, the corollary is also true – with the

[2] Following the appeal, A.H. remained enrolled in the Washington Township school district until December 23, 2021, when he transferred to the Glassboro school district, where his mother apparently resides.

existence of a court order, the court order controls.[3] When there is a court order that designates the school district of attendance, the amount of time spent with either party does not dictate where the children must attend school. *K.H., on behalf of minor children, A.H. and V.H. v. Board of Education of the Borough of Butler, Morris County,* Commissioner Decision No. 70-17 (March 2, 2017). It is undisputed that there was a custody order designating D.M. as the parent of residency for school purposes, and it is undisputed that D.M. resides in the Washington Township school district. Therefore – under *N.J.A.C.* 6A:22-3.1(a)1.i – as of September 10, 2020, A.H. was entitled to attend school in the Washington Township school district.[4]

In its summation brief submitted to the ALJ, the Board attempts to suggest that the case of *C.G., on behalf of minor child, G.G. v. Board of Education of the Township of Morris, Morris County*, OAL Dkt. No. EDU 07231-2018 (Nov. 13, 2018), *aff'd*, Commissioner Decision No. 35-19 (Jan. 30, 2019), supports the conclusion that a custody order is not sufficient to establish residency when the evidence demonstrates that the child resides elsewhere. However, the Board misinterpreted the Commissioner's decision in *C.G.* and reached an erroneous conclusion about the holding in that case. The Commissioner found that the student was not domiciled in the district for a time period prior to the entry of the residential custody

[3] The ALJ noted that there was no indication as to what testimony or evidence the parties provided the Superior Court judge during the custody proceedings. However, the Commissioner lacks jurisdiction to contradict a Superior Court custody order. The existence of the order is sufficient by itself to establish petitioner as the parent of primary residence for school purposes.

[4] As this conclusion is reached as a matter of law, the ALJ's credibility determinations regarding the witnesses who testified as to A.H.'s domicile are not relevant.

order.[5] While the Initial Decision in *C.G.* recounts testimony from the district's residency investigator regarding the child's location following the entry of the residential custody order, the ALJ's and the Commissioner's conclusions about the period of ineligibility are limited to the time prior the custody order and, accordingly, *C.G.* does not constitute relevant precedent for any conclusions regarding A.H.'s residency following the entry of the order granting custody to petitioner.[6]

The Commissioner further notes that all of the Board's evidence pertains to the portion of the 2020-2021 school year during which A.H. attended school virtually due to the COVID-19 pandemic.[7] In *A.M., on behalf of minor child, A.S. v. Board of Education of the City of Elizabeth, Union County*, OAL Dkt. No. EDU 00255-21 (June 16, 2021), *aff'd*, Commissioner Decision No. 158-21 (Aug. 3, 2021), the parents shared joint custody, with the mother residing in Elizabeth and the father residing in Hillside. During the time that Elizabeth schools were teaching remotely, the child participated in class from her father's residence, as he was the only adult available to assist her due to her mother's work schedule and the inability of a grandparent living with the mother to overcome technology barriers. At one point, both the mother and child stayed with the father in Hillside for two weeks when they were diagnosed with COVID-19, in order to protect the grandmother from the virus. Furthermore, both the

[5] In *C.G.*, the residential custody order was issued on March 22, 2018, and the period of ineligible attendance was January 18, 2017 through February 2, 2018.

[6] Nonetheless, to some extent, the *C.G.* matter is similar to the current matter, in that A.H.'s parents have previously been assessed tuition for the period of A.H.'s attendance in Washington Township schools for the period prior to the entry of the custody order. *Board of Education of the Township of Washington, Gloucester County v. J.M. and R.H.*, Commissioner Decision No. 128-21 (June 22, 2021). Just as in *C.G.*, while the assessment of tuition for a period prior to a custody order was appropriate, no tuition is owed for the period after the entry of the custody order.

[7] The district's surveillance was conducted in September and October 2020, and January and February 2021.

mother and child spent two to three nights at the father's residence in Hillside when the parents resumed their romantic relationship but continued to maintain separate residences. The ALJ found that the "Board's choice to turn a blind eye and deaf ear to A.M.'s reasonable explanations for A.S.'s presence in Hillside for childcare, remote learning, and quarantine purposes during the worst pandemic this world has seen in more than a century was callous, to put it mildly. We have all had to make unforeseen, creative adjustments during this pandemic, and A.M. deserves credit, not punishment, for finding coping mechanisms that work for her family." The ALJ and Commissioner concluded that A.S. was entitled to attend school in Elizabeth and that A.M. did not owe any tuition reimbursement.

Here, D.M. testified that because she is immunocompromised, she was not comfortable having A.H. in her home until she was vaccinated for COVID-19 in April 2021.[8] The district's own investigator reported that A.H.'s mother took A.H. with her to work every day, and that A.H. completed his online learning from there. Ex. R-12. While these factual circumstances are not precisely the same as those in *A.M.*, the Commissioner nonetheless finds that A.H.'s physical location during these unprecedented events is irrelevant in light of a custody order specifically designating a parent of residence for school purposes.

The Commissioner further cautions the Board regarding the statements made to D.M. that falsifying residency information could constitute a disorderly persons offense. *N.J.S.A.* 18A:38-1 provides, "Any person who fraudulently allows a child of another person to use his

[8] The Commissioner notes that while the ALJ found that some of petitioner's testimony was inconsistent with her answers to interrogatories, both the ALJ's summary of the testimony and petitioner's responses to the interrogatories reference her medical condition and her concerns prior to receiving the COVID-19 vaccine in April 2021. Accordingly, because there is no inconsistency in this aspect of petitioner's testimony, the Commissioner presumes that the ALJ's credibility determination does not extend to this information.

residence and is not the primary financial supporter of that child and any person who fraudulently claims to have given up custody of his child to a person in another district commits a disorderly persons offense." Under no circumstances should petitioner, who was in possession of a valid Superior Court order awarding her joint custody of A.H. and designating her as the parent of primary residence for school purposes, be deemed to have falsified information or to have perpetrated a fraud when she registered A.H. for school in Washington Township. Faced with a difficult family situation, petitioner availed herself of the proper legal channels to obtain custody of A.H., and, as in *A.M.*, her efforts to look out for A.H.'s best interests should be commended, not threatened.

Accordingly, the Initial Decision is reversed. A.H. was entitled to attend school in Washington Township for the period of September 18, 2020 through December 23, 2021, and petitioner owes no tuition reimbursement to the Board.

IT IS SO ORDERED.[9]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 30, 2022
Date of Mailing: July 1, 2022

[9] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05034-2021
DOE DKT. NO. 60-4/21

D.M. ON BEHALF OF MINOR CHILD A.H.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,

Respondent.

D.M., appearing pro se

Geoffrey N. Stark, Esq., for Respondent (Capehart Scatchard, P.A., attorneys)

BEFORE **WILLIAM T. COOPER, III**, ALJ:

Record Closed: February 22, 2022, Decided: April 5, 2022

STATEMENT OF THE CASE

Petitioner, D.M., filed an Appeal with the Department of Education from the determination of the Board of Education of the Township of Washington ("District"), that her grandchild, A.H., was not domiciled within the district and could not continue to attend school in the district. The Board is demanding tuition repayment for the periods of September 18, 2020, to June 17,2021 and September 1, 2021, to December 23, 2021.

PROCEDURAL HISTORY

On April 1, 2021, the Board issued a Final Notice of Ineligibility to D.M. that A.H. was ineligible to attend school within the district. The Petitioner filed a notice of appeal on or about April 19, 2021. The Board filed an Answer and requested the Commissioner assess petitioner the cost of tuition.

The matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on June 7, 2021. N.J.S.A. 52:14 B-1 to-15; N.J.S.A. 52:14 F-1 to-13.

A hearing was conducted on January 26, 2021, and the record remained open for the parties to furnish closing statements by February 22, 2022. The record closed on that date.

TESTIMONY AND EVIDENCE

For Respondent:

Katherine Carey testified that she is the Director of Registration, for the district and her office is responsible for verifying residency of the students. Her office is responsible for keeping residency and registration information up to date for each student to ensure the student resides within the district. She oversees any investigations that are necessary and has a staff that includes a registration coordinator, registration assistant, and two residency officers.

Carey explained that questions as to residency of students typically come from school sources, for example, the chronic tardiness of a student or excessive absences of a student, or student's admission to a teacher or support staff. When this occurs, her staff will review a student's file to confirm residency and, if there are doubts or questions, request an investigation.

Carey was familiar with A.H. as there were previous questions concerning his residency. She was aware that D.M. was A.H.'s grandson and that D.M. resided in the district on M. Drive, Sewell, New Jersey. Beginning in December 2016, when A.H. was in first grade, questions arose concerning his residency triggered by excessive absences. Then in January 2017, two outside school sources advised staff that A.H. was not living at D.M.'s residence.

In 2018, A.H. told a school nurse that he was living in Lindenwold. Formal investigation was conducted and, it was determined that A.H. was not residing at the M. Drive address. In June 2019, the District sent a notice to D.M. as well as A.H.'s mother J.M., and his father R.H., advising them of the preliminary finding and that a formal hearing to determine residency would occur. (R-5).

J.M. responded to the notice by providing proof that she and A.H. resided with D.M. This proof included her driver's license and an affidavit verifying their residency at the M. Drive address. (R-6). Based upon the documents submitted the District reversed its preliminary finding and allowed A.H. to continue to attend school in the District.

In February 2020, Carey received additional information concerning the residency of A.H. and determined that further investigation was necessary. This investigation led the district to conclude that A.H. was living at South M. Street, Philadelphia, Pennsylvania (South M. Street address), with his mother J.M. and father R.H. (R-4).

On April 30, 2020, the district issued a preliminary notice to J.M. advising her that A.H. had not been eligible to attend school in the district since September 15, 2018, that tuition reimbursement would be sought, and that A.H. was no longer eligible to attend school in the district. J.M. verbally advised Carey that she was granting D.M. custody, but no document supporting this claim was submitted prior to the Board hearing scheduled for June 8,2020. Neither J.M. or D.M. attended the hearing, and a Final Notice was issued by the Board disenrolling A.H.

On September 18, 2020, a new registration package for A.H. was received by the district. It included an Order from the Superior Court, issued by the Honorable Benjamin Morgan, J.S.C., dated September 10, 2020. This order, was entered with the consent of J.M. and R.H., granted D.M. joint custody of A.H. The order acknowledged that D.M. is "the parent of primary residence for school purposes only." (R-9). Based upon this document A.H. was allowed to re-enroll in the district for the 2020-2021 school year listing M. Drive as his home address. (R-3).

Carey advised that based upon computer login information the staff still had concerns regarding A.H. home address and the formal investigations continued. Surveillance was conducted by School Residency Officer Robert Jones as detailed in his Special Reports dated October 25, 2020, and January 25, 202.

Jones' surveillance of J.M. at the South M. Street address was conducted on seventeen occasions between September 24, 2020, to October 22, 2020. He photographed A.H. leaving the location with J.M. on thirteen occasions, observed but did not photograph A.H. leaving the location with J.M. on two occasions, may have observed A.H. on one occasion. leaving one time without J.M.

Jones' surveillance of J.M. at the South M. Street address continued on twelve occasions between January 28,2021 and February 18, 2021. During that time, he observed J.M. and A.H. leaving the South M. Street address on eleven occasions. Typically, J.M. and A.H. would travel from the South M. Street address to J.M.'s workplace in Pitman, New Jersey.

As a result of the investigations, the district concluded that A.H. had not been residing within it since the beginning of the 2020 – 2021 school year. A Preliminary Notice of Ineligibility was issued to D.M and her husband on February 26, 2021. No objection was submitted, and a Final Notice of Ineligibility for Continued Enrollment was issued to J.M. and D.M. on April 1, 2021. (R-1).

On April 19, 2021, D.M. filed an appeal of the determination and, as a result, A.H. could not be disenrolled until the appeal was resolved. A.H. continued to attend school in the district until December 23, 2021, when he transferred into the Glassboro School District.

For Petitioner:

D.M. testified that her grandson A.H. had been attending school within the district since he was in kindergarten. Her daughter had a volatile relationship with A.H.'s father, R.H. which, caused them to move regularly. Because of this, she always kept a room at the M. Drive address for A.H. It was important to her that A.H. always had a space he could call home. She considers her home as his primary residence.

She explained that during the summer of 2020, she undertook efforts to obtain joint custody of A.H. Those efforts resulted in the Honorable Benjamin Morgan, J.S.C., granting her joint custody of A.H. on September 10, 2020. The Board accepted this document on September 18, 2020 and allowed A.H. to enroll back into the District.

She admitted that J.M. and R.H. took A.H. to the South M. Street address and did not deny the observations made by the investigators. However, she explained that because she was immunocompromised, she was unable to have A.H. back home until she received the COVID-19 vaccine which she was unable to do so until April 2021. Further, she did not believe this was a problem because classes were virtual, and A.H. did not have to be physically present in school.

D.M. obtained full custody of A.H. in the summer of 2021 after R.H. was incarcerated. She has since started the process of returning custody back to her daughter because J.M. has since moved out of Philadelphia and is now living in Glassboro, N.J.

Documentary Evidence:

In her responses to interrogatories petitioner indicated that as of September 10, 2020, A.H. was residing full time at the M. Drive address. She denied that he was residing full time at the South M. Street address but acknowledged that A.H. regularly visited his father R.H. Petitioner could not specify how often these visits occurred. She also acknowledged that A.H. would travel to his mother's place of work simply because there was no one to watch him during the day.

The interrogatories asked her how many nights A.H. spent at the South M. Street address between September 10, 2020, and October 31, 2020, and January 1, 2021, and January 31, 2021, and D.M. answered those questions as follows;

> "I have no idea how many nights. These nights were not planned. He would go and spend the night to see his father at times. No specific date and times."
>
> and
>
> "[A.H.] does reside and always resided at M. Drive address. He goes to Philly most weekends and on nights when he has therapy or other doctors' appointments."

In another response D.M. stated;

> "He [A.H.] did stay with his mother during the pandemic. I have Lupus and could not be compromised with him staying at my home and I specifically could not help him with his schoolwork. I got very sick in March of 2021 and then received the covid shot on April 7th. At that time, I felt more comfortable with him being here. Also, during the pandemic I could not keep him from his mother for the whole time, since he could not go back and forth because of my disease."

FACTUAL DISCUSSION AND FINDINGS

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. It must elicit evidence that is from such common experience and observation that it can be approved as proper 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 witnesses' story considering 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). Also, "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.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

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).

As to the credibility of Respondents' witness, I accept the testimony of Carey as credible. She was personally knowledgeable as to this matter and easily detailed the actions taken by her staff to verify A.H.'s residence. Her testimony together with the supporting documents clearly established that A.H. was not domiciled at the M. Drive address.

The documentary evidence submitted by respondent included residency reports prepared by school investigators who did not testify during the hearing. Such out-of-court statements, if offered to prove the truth of the matters stated, are hearsay. While the rules of evidence applicable to proceedings in the Judicial Branch permit certain hearsay to be accepted as competent evidence under recognized exceptions to the general rule excluding hearsay, in administrative hearings the rule governing the admissibility of hearsay evidence is different. That rule is codified at N.J.A.C. 1:1-15.5:

> (a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> (b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

N.J.A.C. 1:1-15.5 (b) recites what is commonly referred to as the residuum rule, which was best described in Justice Francis' foundational opinion for the New Jersey Supreme Court in Weston v. State, 60 N.J. 36, 50–51 (1972):

> It is common practice for administrative agencies to receive hearsay evidence at their hearings. . . . As Judge Learned Hand said for the Court of Appeals for the Second Circuit in NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (1938), mere rumor would not support a board finding, "but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." And see, Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810 (1943) . . . . However, in our State as well as in many other jurisdictions the rule is that a fact finding, or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it. . . .

In this matter the petitioner consented to the residency reports being entered into evidence. In addition, she admitted to the observations made and stipulated that A.H. was at his parents, J.M. and R.H.'s South M. Street residence as stated in the residency

reports. Therefore, I accept that there was competent evidence to support the hearsay statements contained in the residency reports.

Overall, Petitioner's testimony lacked detail regarding A.H.'s time at the M. Drive address. She did not dispute the observations made by the investigators and did not refute the inference that A.H. was living full time with his parents during the 2020-2021 school year. D.M.'s responses to interrogatories maintained that A.H. resided full time at the M. Drive address. However, she testified that she was immunocompromised, thus, she was unable to have A.H. in the home until April 2021.

The responses to interrogatories were inconsistent with her testimony and as such negatively impacted petitioner's credibility.

Having had the opportunity to examine the documents presented and to hear the witnesses and to assess their credibility, I **FIND**:

1. Student A.H. is the child of parents J.M. and R.H., his maternal grandparents are Petitioner D.M., and her husband D.M.

2. At all relevant times during the 2020-2021 school year D.M. resided at the M. Drive address, within the district borders.

3. At all relevant times during the 2020-2021 school year A.H.'s parents resided at the South M. Street address, outside of the boundaries of the district.

4. A.H. was registered for school using the M. Drive address, even though A.H.'s parents lived in Philadelphia at the South M. Street address.

5. The District began conducting a residency investigation in the Fall of 2019 and issued a Preliminary Notice of Ineligibility to J.M. on October 30, 2019.

6. In response, A.H.'s mother provided several documents to the district, including affidavits signed by both herself and D.M.

7. After several months, the district re-opened its residency investigation to determine whether A.H. was indeed living at the M. Drive Address. The investigation confirmed that A.H. was living at the South M. Street Address in Philadelphia. Subsequently, the district issued another PNI on April 30, 2020.

8. The District Superintendent issued a Final Notice of Ineligibility on June 8, 2020.

9. A.H.'s parents did not appeal the FNI.

10. On September 10, 2020, the Hon. Benjamin Morgan, J.S.C. issued an Order granting joint custody of A.H. to his parents and to D.M. and D.M., and specifically designating D.M. as the parent of primary residence for school purposes only.

11. On September 18, 2020, Petitioner registered A.H. for school in the district listing the M. Drive Address as his home. (R-3).

12. The residency officers conducted surveillance in September and October 2020, and January and February 2021.

13. On October 25, 2020, officer Robert Jones filed a report with Katherine Carey which summarized the following: Jones conducted surveillance on seventeen occasions between September 24, 2020, and October 22, 2020. He photographed A.H. leaving the South M. Street Address with J.M. on thirteen of those occasions, observed, but did not photograph, A.H. leaving the South M. Street Address with J.M. on two additional occasions, and may

have observed him on one additional occasion. Finally, on one occasion he observed J.M. but did not observe A.H

14. In February 2021, in an undated report, Investigator Jones filed another report with Ms. Carey in which he detailed surveillance of A.H. and J.M. leaving the South M. Street address on eleven occasions from January 28, 2021, to February 18, 2021. On an additional date, February 1, 2021, A.H. did not go to school due to inclement weather.

15. Based upon the surveillance and other investigatory results, the District issued a PNI on February 26, 2021, which found that A.H. was not domiciled in the District, and therefore not entitled to attend school in the District. (R-13).

16. On March 25, 2021, Judge Morgan, J.S.C. modified the Joint-Custody Order, making D.M. and her husband D.M. the parents of primary residence for school purposes "only to allow [A.H.] to continue to attend the Birches Elementary School."

17. Petitioner did not participate in the Board's hearing into A.H.'s residency and on April 1, 2021, the District issued a FNI finding that A.H. was ineligible to attend school in the district because he did not reside within it.

18. A.H. attended school within the district for a total of 172 days during the 2020-2021 school year.

19. A.H. continued attending school within the district for a total of 73 days during the pendency of D.M.'s appeal, from April 2, 2021, through December 23, 2021.

20. The daily tuition rate for a fifth-grade student in the Washington Township School District during the 2020-2021 school year is $94.37.

21. The daily tuition rate for a sixth-grade student in the District during the 2021-2022 school year is $100.76.

LEGAL ANALYSIS AND CONCLUSIONS

ISSUES

The issues here are; did A.H reside in Washington Township, New Jersey, during the 2020–2021 and 2021-2022 school years? If residency is not established, what is the amount of the tuition reimbursement due to respondent from petitioner for 2020-2021 and 2021-2022?

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals 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). The domicile of an unemancipated child is the domicile of the parent, 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). Thus, a child would routinely attend school in the District where his or her parents live.

A student is a resident of a school District if his parent or guardian has a permanent home in the district such that "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." N.J.A.C. 6A:22-3.1(a)(1). The regulation further provides:

> When a student's parents or guardians are domiciled within different school Districts and there is no court order or written agreement between the parents designating the school District of attendance, the student's domicile is the school District of the parent or guardian with whom the student lives for most of the school year.

The evaluation of the facts of the case determines the distinction between residence and domicile. Where a person has more than one residence, some of the factors to be evaluated are:

> The physical characteristics of each place, the time spent and things done in each place, the other person 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. the City of Paterson, 111 N.J. Super 35, 39-40 (Ch. Div. 1970) aff'd, 58 N.J. 112 (1971).

Pursuant to N.J.S.A. 18A:38-1(b)(2) parents have the burden of establishing domicile in the school District by a preponderance of the evidence.

Here, the petitioner has failed to meet her burden as the credible evidence submitted establish that A.H. was residing with his parents J.M. and R.H. at the South M. Street address for the 2020-2021 and the 2021-2022 school years. Petitioner offered the court orders as proof that A.H.'s domicile was her M. Drive address which she considered as A.H.'s permanent home. No other witness was called to support this conclusion.

From the evidence submitted it was clear that A.H.'s parents, J.M. and R.H. had no intention to make the M. Drive address A.H.'s permanent home or that he would abandon the South M. Street address. The court orders granted petitioner joint custody for school purposes but there was no attempt to have A.H. reside at D.M.'s residence or within the district.

Petitioner was obviously mindful of the residency requirement as she went through some efforts to obtain custody orders in September of 2020 and March of 2021.

On September 10, 2020, the Hon. Benjamin Morgan, J.S.C. issued an order granting D.M. and her husband D.M. joint custody as the parent of primary residence for school purposes only. That order was amended on March 25, 2021, wherein joint custody was continued and D.M. and her husband were still parent of primary residence but "only

to allow [A.H.] to attend Birches Elementary School." Petitioner offered only limited testimony concerning these orders so there was no explanation as to why they were necessary. Crucially, there is no indication as to what testimony and/or evidence petitioner or any of the parties provided Judge Morgan with during the hearings. Regardless, implicit in both orders was the condition that A.H. reside with petitioner and within the district.

Applying the law to the facts of this case I **CONCLUDE** that Petitioner has failed to establish by a preponderance of the evidence that A.H. was domiciled at the M. Drive address. I **CONCLUDE** A.H. was ineligible to attend school within the district.

A.H. attended the fifth grade in the district during the 2020-2021 school year for a total of 172 days and the daily tuition rate is $94.37. A.H. also attended the sixth grade in the district during the 2021-2022 for 73 days and the daily tuition rate is $100.76.

I **CONCLUDE** that A.H. was ineligible for 172 days during the 2020-2021 school year resulting in tuition of $16,231.64 and 73 days during the 2021-2022 school year resulting in tuition of $7,355.48. Therefore, the total tuition reimbursement due is $16,231.64 plus $7,355.48 for a total of $23,587.12.

ORDER

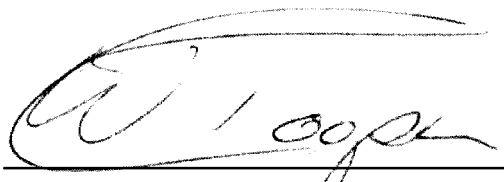
It is **ORDERED** that the determination of the Washington Township Board of Education that A.H. was not domiciled in the Washington Township School District for the 2020–2021 school year is **AFFIRMED.** The appeal is hereby **DISMISSED.**

Based upon the foregoing, it is hereby **ORDERED** that it is further that D.M. reimburse Respondent the total sum of $23,587.12 for tuition costs associated with the attendance of A.H. in the Township of Washington school District for the 2020-2021 and 2021-2022 school years.

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

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision 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, 2022
DATE

WILLIAM T. COOPER III, ALJ.

Date Received at Agency: April 5, 2022

Date E-Mailed to Parties: April 5, 2022

lr

APPENDIX

Witnesses

For Appellant:

Katherine Carey

For Respondent:

D.M.

Exhibits

R-1 Final Notice of Ineligibility ("FN1")- April1, 2021
R-2 Petition of Appeal – 4/19/21
R-3 Registration Documents- AH-2020-2021 school year
R-4 Residential Lease at Mole Street
R-5 PN1-10/30/19
R-6 Affidavit in Response to PN1 from J.M. and D.M. re; AH residency
R-7 PN1- 4/30/20
R-8 FNI- 6/8/20
R-9 Shared Custody Order -9/10/20
R-10 Interactive Sign -Ins, 9-13-20 t0 10-13-20
R-11 Special Report of Residency Officer-February 26, 2021
R-12 Special Report of Residency Officer-February 26,
R-13 Preliminary Notice of Ineligibility("PN1")-February 26,2021
R-14 Facebook post by J.M.- 3/17/21
R15 Facebook post by D.M.- 3/17/21
R-16 Shared Custody Order – 3/25/21
R-17 Full Custody Order August 8, 2021
R-18 Doctor's Note
R-19 Photos – 9/24/20
R-20 Photos – 9/28/20

R-21 Photos – 9/29/20

R-22 Photos – 10/2/20

R-23 Photos – 10/5/20

R-24 Photos – 10/6/20

R-25 Photos – 10/7/20

R-26 Photos – 10/ 8/20

R-27 Photos – 10/13/20

R-28 Photos – 10/14/20

R-29 Photos – 10/15/20

R-30 Photos – 10/19/20

R-31 Photos – 10/20/20

R-32 Photos – 10/21/20

R-33 Photos – 10/22/20

R-34 Photos – 1/28/21 AM PHILLY

R-35 Photos- 1/28/21 AM PITMAN

R-36 Photos – 1/29/21 AM PHILLY

R-37 Photos- 1/29/21 AM PITMAN

R-38 Photos – 2/1/21

R-39 Photos – 2/3/21 AM PHILLY

R-40 Photos- 2/3/21 AM PITMAN

R-41 Photos- 2/4/21 AM PITMAN

R-42 Photos – 2/5/21 AM PHILLY

R-43 Photos- 2/5/21 AM PITMAN

R-44 Photos- 2/5/21 AM PITMAN

R-45 Photos- 2/8/21 AM PHILLY

R-46 Photos- 2/8/21 AM PITMAN

R-47 Photos- 2/8/21 AM PITMAN

R-48 Photos- 2/9/21 AM PITMAN

R-49 Photos- 2/10/21 AM PHILLY

R-50 Photos- 2/10/21 AM PHILLY

R-51 Photos- 2/11/21 AM PITMAN

R-42 Photos- 2/12/21 AM PHILLY

R-53 Photos- 2/12/21 AM PITMAN

R-54 Photos- 2/12/21 AM PITMAN

R-55 Photos- 2/15/21 AM PHILLY

R-56 Photos- 2/15/21 AM PITMAN

R-57 Photos- 2/15/21 AM PITMAN

R-58 Photos- 2/16/21 AM PHILLY

R-59 Photos- 2/16/21 AM PITMAN

R-60 Photos- 2/17/21 AM PHILLY

R-61 Photos- 2/17/21 AM PITMAN

R-62 Interrogatory Responses

R-63 Supplementary Discovery Responses

146-22

New Jersey Commissioner of Education

Final Decision

Julie Witkowski,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent New Jersey State Board of Examiners (SBE) that she had not met the requirements for issuance of a Teacher of Art Certificate of Eligibility (CE) because she failed to attain the required grade point average (GPA) mandated by *N.J.A.C.* 6A:9B-8.3(b). Petitioner did not dispute the fact that she fell short of the required 2.75 GPA required by regulations but argued that an exception should be made because of difficult personal circumstances she faced in college. The SBE filed a motion for summary decision.

The ALJ found, *inter alia*, that: an applicant for a certificate to teach Art must meet the requirements set forth in *N.J.A.C.* 6A:9B-8.3(b); pursuant to the plain language of the regulations, an applicant who graduates prior to September 1, 2016, must have a cumulative GPA of 2.75; petitioner only attained a 2.74 cumulative GPA; the regulations do not allow for any exceptions to this requirement; petitioner did not dispute the facts herein, but argued that she struggled for two semesters in college because of having been on her own for the first time; petitioner has the burden of demonstrating by a preponderance of the credible evidence that she is entitled to the certification she seeks; petitioner did not deny that she failed to meet the minimum GPA requirement; the decision by the Board in this matter was consistent with the applicable statutory and regulatory provisions; and unfortunately there are no exceptions allowed to the applicable licensing requirements. The ALJ concluded that the petitioner failed to meet her burden in this matter; accordingly, the SBE's decision denying petitioner the CE that she sought was upheld.

Upon review, the Commissioner concurred with the ALJ that the petitioner did not satisfy the requirements necessary to qualify for a CE and the Board's decision to deny petitioner's application was correct. Accordingly, the Board's motion for summary decision was granted, and the petition of appeal was dismissed.

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

146-22
OAL Dkt. No. EDU 00812-22
Agency Dkt. No. 247-12/21

New Jersey Commissioner of Education

Final Decision

Julie Witkowski,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

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

Petitioner challenged the State Board of Examiners' (Board) decision denying her application for a Teacher of Art Certificate of Eligibility (CE). Following the Board's motion for summary decision, the Administrative Law Judge (ALJ) determined that petitioner did not satisfy the requirements necessary to obtain a CE because she had not attained the required grade point average (GPA) mandated by *N.J.A.C.* 6A:9B-8.3(b).

Upon review, the Commissioner concurs with the ALJ that the petitioner did not satisfy the requirements necessary to qualify for a CE. *N.J.A.C.* 6A:9B-8.3(b) requires a GPA of at least 2.75, which petitioner did not achieve, and *N.J.A.C.* 6A:9B-4.12(c) prohibits the Board from waiving any GPA requirement. Therefore, the Board's decision to deny petitioner's application was consistent with the applicable regulatory provisions.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 30, 2022
Date of Mailing: July 1, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00812-22
AGENCY DKT. NO. 247-12/21

JULIE WITKOWSKI,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,
Respondent.

Julie Witkowski, petitioner pro se

Michal Czarnecki, Deputy Attorney General, for respondent (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

Record Closed: April 5, 2022 Decided: May 18, 2022

BEFORE **EDWARD J. DELANOY, JR.**, Deputy Director and ALAJ:

STATEMENT OF THE CASE

Petitioner Julie Witkowski challenges the State Board of Examiners' decision denying her application for a Teacher of Art Certificate of Eligibility. The denial was issued because Witkowski failed to meet the regulatory requirements for issuance of this

certificate as set forth in N.J.A.C. 6A:9B-8.3 and N.JA.C. 6A:8B-10.3(a)(1). The reason for the denial was that she lacked the requisite cumulative grade point average (GPA) requirements in the regulations.

PROCEDURAL HISTORY

At its meeting on October 28, 2021, the State Board of Examiners (Board) voted to deny Witkowski's request for issuance of a Teacher of Art Certificate of Eligibility (CE) pursuant to N.J.A.C. 6A:9B-8.3(b). Petitioner filed a pro se petition of appeal on December 30, 2021. Respondent filed a motion to dismiss, consisting of a letter brief, on January 6, 2022. The Department of Education, Office of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL), where it was filed on February 1, 2022, for determination as a contested case.

Respondent's January 6, 2022, letter brief requested that if the matter were transmitted to the OAL, the motion to dismiss be converted to a motion for summary decision. Petitioner's opposition to the motion for summary decision was filed on March 30, 2022, and respondent's letter reply was filed on April 5, 2022. The record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

The facts of this matter are not in dispute, and accordingly, I **FIND** the following **FACTS**: Witkowski graduated college with a Bachelor of Fine Arts degree with a concentration in painting in 2014. Thereafter, Witkowski sought to obtain a CE as a Teacher of Art. The required grade point average (GPA) to receive a CE is 2.75. Witkowski achieved a GPA of 2.74. Because she has graduated college, there is no opportunity for her to improve the 0.01 difference in the required GPA.

LEGAL ANALYSIS AND CONCLUSION

An applicant for a certificate to teach Art must meet the requirements set for in N.J.A.C. 6A:9B-8.3(b). Pursuant to the plain language of these regulations, an applicant who graduates

prior to September 1, 2016, must have a cumulative GPA of 2.75 and have received course or experiences in certain areas. The petitioner had only a 2.74 cumulative GPA. The regulations do not allow for any exceptions to this requirement. The petitioner does not dispute the facts herein. She argues that she struggled for two semesters in college, because of having been on her own for the first time. She was harassed by other students, which harassment involved not only destruction of her projects, but also threats to her safety. The stress of dealing with these situations heavily affected the results of her grades. Not knowing how to advocate for herself led to a slip in grades. She is currently working at Edison High School, after having passed a rigorous interview process. Pulling her out of the classroom would affect her students and hurt the school district. Denial of the CE would permanently exclude her from her career and change the course of her life.

Unfortunately, while I wholeheartedly understand the plight of petitioner, and wish there were some remedy for her, she has not demonstrated that she met the requirements of the regulations, or that there was anything improper about the Board's decision. The decision by the Board in this matter was consistent with the applicable statutory and regulatory provisions. The petitioner has the burden of demonstrating by a preponderance of the credible evidence that she is entitled to the certification she seeks. Farrar v. State Bd. of Exam'rs, EDU 13763-08, Initial Decision (April 27, 2010), aff'd, Comm'r (July 26, 2010), <http://njlaw.rutgers.edu/collections/oal/>. Moreover, an administrative agency's interpretation of its own regulations is entitled to substantial weight. Allen v. PFRS, 233 N.J. Super. 197, 207 (App. Div. 1989). There are no exceptions allowed to these requirements, and I am not permitted to make an exception in this matter. Therefore, the petitioner has failed to meet this burden.

I, therefore, **CONCLUDE** that the Board's decision was consistent with applicable law and thus, must be upheld.

ORDER

It is hereby **ORDERED** that Witkowski's request for issuance of a Teacher of Art CE is **DENIED** and her 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.

May 18, 2022
DATE

EDWARD J. DELANOY, JR., Deputy Director and ALAJ

Date Received at Agency: 5/18/2022

Date Mailed to Parties: 5/18/2022

mph

WITNESS LIST

For petitioner:

None

For respondent:

00812-2022None

EXHIBIT LIST

For petitioner:

None

For respondent:

Letter brief in support of motion to dismiss

147-22
Agency Dkt. No. 54-3/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Ashanti Wallace, Board of Trustees of the Marion P. Thomas Charter School, Essex County.

For petitioner, Bernice Martina Jalloh, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on February 24, 2022, by way of an Order to Show Cause served by petitioner (Marion P. Thomas Charter School) upon respondent (Ashanti Wallace), requiring respondent to show cause why an order should not be entered suspending her teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for resigning without giving the notice required by law. By notice dated March 30, 2022, the Office of Controversies and Disputes (Office) acknowledged 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, on May 16, 2022, the Office sent respondent a second and final notice – via certified and regular mail – directing that she must 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. No answer to the Order to Show Cause has been filed as of this date.

The petition and supporting exhibits submitted by petitioner in this matter indicate that: respondent entered into a contract to work as a teacher for the 2021-22 school year; the contract provides that it can be terminated by either party upon sixty days' written notice; and on January 24, 2022, respondent sent correspondence indicating that she was resigning, effective

January 14, 2022, thereby providing less than the required 60 days' notice. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certificates are 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.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 30, 2022
Date of Mailing: July 1, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

149-22SEC
SEC Dkt. No. T06-21
Agency Dkt. No. 115-5/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Jeffrey Vasser,
Board of Education of the Mainland Regional School District, Atlantic County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the April 26, 2022 Order to Show Cause but prior to the SEC's May 24, 2022 meeting; therefore, a penalty of censure is recommended. Respondent filed exceptions in which he maintains that the recommended penalty of a censure was too harsh under the circumstances surrounding his effort to complete the training.

Upon review, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the SEC's meeting date – the penalty has been a reprimand. *See, In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 223-21SEC, decided October 13, 2021; *In the Matter of Marcos Garciga, Cliffside Park Board of Education, Bergen County*, Commissioner Decision No. 224-21SEC, decided October 13, 2021; *In the Matter of Gary Yedman, Seaside Park Board of Education, Ocean County*, Commissioner Decision No. 230-21SEC, decided October 13, 2021. As the instant case arises from the same circumstances, the Commissioner finds that a reprimand is the appropriate penalty

for the respondent's failure to timely complete the requisite training.[1] Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2022
Date of Mailing: July 6, 2022

[1] The SEC has previously recommended a penalty of a censure when a board member completed the training after the issuance of the Order to Show Cause but prior to the SEC's next meeting; however, the Commissioner rejected the penalty recommendation in that case and advised that a reprimand is the appropriate penalty under those circumstances. *In the Matter of Robyn Schneider, The Ethical Community Charter School, Hudson County*, Commissioner Decision No. 140-16SEC, decided April 11, 2016.

[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).

Before the School Ethics Commission
Docket No.: T06-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Jeffrey Vasser,
Mainland Regional Board of Education, Atlantic County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 26, 2022, and also served via electronic mail.[1] The OTSC directed Jeffrey Vasser (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Mainland Regional Board of Education (Board), located in Atlantic County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by December 31, 2021.

On or about April 15, 2022, the NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated

[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from the NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of the NJSBA to communicate with Respondent and/or Business Administrator about mandated training is set forth in the attached Certification from the NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on May 10, 2022. In correspondence to the Commission following the issuance of the OTSC, Respondent advised that he did not recall receiving notices about the required training prior to January of this year, due mainly to the fact that the Business Administrator was unavailable because of health issues. Respondent thought he made a "good faith effort to cure" his deficiency after receiving a letter from NJSBA on January 14, 2022, but he experienced many road blocks and "understaff[ing] issues." Importantly, Respondent did not deny that he did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked

"Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T06-21

Whereas, Jeffrey Vasser (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, and also filed a response to the Commission's OTSC that did not dispute that he did not complete training in a timely fashion; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on May 24, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq., Director

150-22SEC

Agency Dkt. No. 117-5/22
SEC Dkt. No. T11-21

New Jersey Commissioner of Education

Final Decision

In the Matter of Alice Myers,
Board of Education of the City of Somers Point,
Atlantic County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the April 26, 2022 Order to Show Cause but prior to the SEC's May 24, 2022 meeting; therefore, a penalty of censure is recommended. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the SEC's meeting date – the penalty has been a reprimand. *See, In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 223-21SEC, decided October 13, 2021; *In the Matter of Marcos Garciga, Cliffside Park Board of Education, Bergen County*, Commissioner Decision No. 224-21SEC, decided October 13, 2021; *In the Matter of Gary Yedman, Seaside Park Board of Education, Ocean County*, Commissioner Decision No. 230-21SEC, decided October 13, 2021. As the instant case arises from the same circumstances, the Commissioner finds that a reprimand is the appropriate penalty

for the respondent's failure to timely complete the requisite training.[1] Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2022
Date of Mailing: July 6, 2022

[1] The SEC has previously recommended a penalty of a censure when a board member completed the training after the issuance of the Order to Show Cause but prior to the SEC's next meeting; however, the Commissioner rejected the penalty recommendation in that case and advised that a reprimand is the appropriate penalty under those circumstances. *In the Matter of Robyn Schneider, The Ethical Community Charter School, Hudson County*, Commissioner Decision No. 140-16SEC, decided April 11, 2016.

[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).

Before the School Ethics Commission
Docket No.: T11-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Alice Myers,
Somers Point Board of Education, Atlantic County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Alice Myers (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Somers Point Board of Education (Board), located in Atlantic County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by December 31, 2021.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated

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[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on May 10, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent stated she was unable to complete training due to personal reasons, and the Business Administrator was subsequently "able to assist [her]" with completion of the training. Importantly, Respondent did not deny that she did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked

"Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T11-21

Whereas, Alice Myers (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, and also filed a response to the Commission's OTSC that did not dispute that she did not complete training in a timely fashion; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen, Esq., Director

151-22SEC

Agency Dkt. No. 118-5/22
SEC Dkt. No. T12-21

New Jersey Commissioner of Education

Final Decision

In the Matter of Donato Marable,
Board of Education of the City of Beverly,
Burlington County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the April 26, 2022 Order to Show Cause but prior to the SEC's May 24, 2022 meeting; therefore, a penalty of censure is recommended. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the SEC's meeting date – the penalty has been a reprimand. *See, In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 223-21SEC, decided October 13, 2021; *In the Matter of Marcos Garciga, Cliffside Park Board of Education, Bergen County*, Commissioner Decision No. 224-21SEC, decided October 13, 2021; *In the Matter of Gary Yedman, Seaside Park Board of Education, Ocean County*, Commissioner Decision No. 230-21SEC, decided October 13, 2021. As the instant case arises from the same circumstances, the Commissioner finds that a reprimand is the appropriate penalty

for the respondent's failure to timely complete the requisite training.[1] Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2022
Date of Mailing: July 6, 2022

[1] The SEC has previously recommended a penalty of a censure when a board member completed the training after the issuance of the Order to Show Cause but prior to the SEC's next meeting; however, the Commissioner rejected the penalty recommendation in that case and advised that a reprimand is the appropriate penalty under those circumstances. *In the Matter of Robyn Schneider, The Ethical Community Charter School, Hudson County*, Commissioner Decision No. 140-16SEC, decided April 11, 2016.

[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).

Before the School Ethics Commission
Docket No.: T12-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Donato Marable,
Beverly Board of Education, Burlington County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Donato Marable (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Beverly Board of Education (Board), located in Burlington County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 3 training program by December 31, 2021.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated

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[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on May 5, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent stated that he "believed that he had completed" the training requirement on December 7, 2021. Upon receipt of the Order to Show Cause, Respondent "immediately contacted [the] Board Secretary" and asked for assistance with registration for the training. Importantly, Respondent did not deny that he did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked

"Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T12-21

Whereas, Donato Marable (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, and also filed a response to the Commission's OTSC that did not dispute that he did not complete training in a timely fashion; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen, Esq., Director

152-22SEC

Agency Dkt. No. 119-5/22
SEC Dkt. No. T14-21

New Jersey Commissioner of Education

Final Decision

In the Matter of Keith Peacock,
Board of Education of the Township of Hainesport,
Burlington County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the April 26, 2022 Order to Show Cause but prior to the SEC's May 24, 2022 meeting; therefore, a penalty of censure is recommended. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the SEC's meeting date – the penalty has been a reprimand. *See, In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 223-21SEC, decided October 13, 2021; *In the Matter of Marcos Garciga, Cliffside Park Board of Education, Bergen County*, Commissioner Decision No. 224-21SEC, decided October 13, 2021; *In the Matter of Gary Yedman, Seaside Park Board of Education, Ocean County*, Commissioner Decision No. 230-21SEC, decided October 13, 2021. As the instant case arises from the same circumstances, the Commissioner finds that a reprimand is the appropriate penalty

for the respondent's failure to timely complete the requisite training.[1] Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2022
Date of Mailing: July 6, 2022

[1] The SEC has previously recommended a penalty of a censure when a board member completed the training after the issuance of the Order to Show Cause but prior to the SEC's next meeting; however, the Commissioner rejected the penalty recommendation in that case and advised that a reprimand is the appropriate penalty under those circumstances. *In the Matter of Robyn Schneider, The Ethical Community Charter School, Hudson County*, Commissioner Decision No. 140-16SEC, decided April 11, 2016.

[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).

Before the School Ethics Commission
Docket No.: T14-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Keith Peacock,
Hainesport Township Board of Education, Burlington County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Keith Peacock (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Hainesport Township Board of Education (Board), located in Burlington County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2021.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated

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[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on May 19, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent claimed that the online system would not permit him to register for the class, so the Business Administrator needed to assist him with the process. Importantly, Respondent did not deny that he did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked

"Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T14-21

Whereas, Keith Peacock (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, and also filed a response to the Commission's OTSC that did not dispute that he did not complete training in a timely fashion; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq., Director

153-22SEC
SEC Dkt. No. T28-21
Agency Dkt. No. 122-5/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Anthony Remy,
Board of Education of the City of Asbury Park,
Monmouth County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the April 26, 2022 Order to Show Cause but prior to the SEC's May 24, 2022 meeting; therefore, a penalty of censure is recommended. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the SEC's meeting date – the penalty has been a reprimand. *See, In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 223-21SEC, decided October 13, 2021; *In the Matter of Marcos Garciga, Cliffside Park Board of Education, Bergen County*, Commissioner Decision No. 224-21SEC, decided October 13, 2021; *In the Matter of Gary Yedman, Seaside Park Board of Education, Ocean County*, Commissioner Decision No. 230-21SEC, decided October 13, 2021. As the instant case arises from the same circumstances, the Commissioner finds that a reprimand is the appropriate penalty

for the respondent's failure to timely complete the requisite training.[1] Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2022
Date of Mailing: July 6, 2022

[1] The SEC has previously recommended a penalty of a censure when a board member completed the training after the issuance of the Order to Show Cause but prior to the SEC's next meeting; however, the Commissioner rejected the penalty recommendation in that case and advised that a reprimand is the appropriate penalty under those circumstances. *In the Matter of Robyn Schneider, The Ethical Community Charter School, Hudson County*, Commissioner Decision No. 140-16SEC, decided April 11, 2016.

[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).

Before the School Ethics Commission
Docket No.: T28-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Anthony Remy,
Asbury Park Board of Education, Monmouth County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Anthony Remy (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Asbury Park Board of Education (Board), located in Monmouth County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by December 31, 2021.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and

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[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on May 3, 2022, but did not respond to the Commission's OTSC as to why he did not complete training by December 31, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T28-21

Whereas, Anthony Remy (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by December 31, 2021; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq., Director

154-22SEC

SEC Dkt. No. T29-21
Agency Dkt. No. 123-5/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Ada Gonzalez,
Board of Education of the Township of Lakewood,
Ocean County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the April 26, 2022 Order to Show Cause but prior to the SEC's May 24, 2022 meeting; therefore, a penalty of censure is recommended. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the SEC's meeting date – the penalty has been a reprimand. *See, In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 223-21SEC, decided October 13, 2021; *In the Matter of Marcos Garciga, Cliffside Park Board of Education, Bergen County*, Commissioner Decision No. 224-21SEC, decided October 13, 2021; *In the Matter of Gary Yedman, Seaside Park Board of Education, Ocean County*, Commissioner Decision No. 230-21SEC, decided October 13, 2021. As the instant case arises from the same circumstances, the Commissioner finds that a reprimand is the appropriate penalty

for the respondent's failure to timely complete the requisite training.[1] Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2022
Date of Mailing: July 6, 2022

[1] The SEC has previously recommended a penalty of a censure when a board member completed the training after the issuance of the Order to Show Cause but prior to the SEC's next meeting; however, the Commissioner rejected the penalty recommendation in that case and advised that a reprimand is the appropriate penalty under those circumstances. *In the Matter of Robyn Schneider, The Ethical Community Charter School, Hudson County*, Commissioner Decision No. 140-16SEC, decided April 11, 2016.

[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).

Before the School Ethics Commission
Docket No.: T29-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Ada Gonzalez,
Lakewood Board of Education, Ocean County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Ada Gonzalez (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Lakewood Board of Education (Board), located in Ocean County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2021.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated

[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on April 28, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent indicated that she thought she completed her training; however, although she started it, "unbeknownst to" her, she failed to complete it. Importantly, Respondent did not deny that she did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked

"Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T29-21

Whereas, Ada Gonzalez (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, and also filed a response to the Commission's OTSC that did not dispute that she did not complete training in a timely fashion; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen, Esq., Director

155-22

In the Matter of Arbitration Between:

SCHOOL DISTRICT OF THE TOWNSHIP OF MORRIS

and

JESSICA HIDALGO

OPINION AND ORDER

Agency Docket No. 12-1/22

Pursuant to the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), P. L. 2012, c. 26, N.J.S.A. 18A:6-115 *et seq.* and regulations adopted thereunder by the New Jersey Department of Education ("DOE"), the undersigned Arbitrator was appointed by letter dated January 31, 2022 from Jennifer Killough-Herrera, Director, Office of Controversies and Disputes, to hear and determine arguments regarding Tenure Charges filed by the School District of the Township of Morris, Morris County ("District") against Jessica Hidalgo ("Respondent").

Throughout these proceedings, Randi Doner April, Esquire represented the Respondent. Frances L. Febres, Esquire represented the District.

A hearing for this matter was scheduled for March 28, 2022. At that time, the parties entered into a settlement. This settlement was subsequently codified in a Global Settlement Agreement & Release of Claims ("Agreement"). Respondent signed this Agreement on May 12, 2022. It was approved by the District's Board of Education on June 6, 2022.

The parties have provided the Arbitrator with a copy of the Agreement, "Exhibit A" to that Agreement signed by Respondent and the Certified Board Resolution concerning this Agreement, all of which are attached hereto. The Sworn Tenure Charges, filed by the District on December 6, 2021, which set forth the nature of the charges against Respondent, are incorporated herein by reference as if set forth in full.

As set forth in the Agreement and/or confirmed by Counsel, Respondent and the District in this case have consented to settlement and withdrawal of the Charges in this case. As set forth in the Agreement and confirmed by Counsel for the Respondent, Respondent entered into the Agreement with a full understanding of her rights. The Agreement is in the public interest as it resolves the issues raised by the various charges and countercharges made by the parties, and also effectuates the District's desire to have Respondent terminate her employment with the District, as the Agreement includes Respondent's irrevocable resignation. Counsel for Respondent has advised Respondent of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible action against Respondent.

ORDER

The Arbitrator approves the Global Settlement Agreement & Release of Claims and recommends it be approved by the Commissioner of Education.

Signed this 1st day of July 2022.

SCOTT E. BUCHHEIT, ARBITRATOR

Frances L. Febres, Esq. (Attorney ID No. 01852012)
Cleary, Giacobbe, Alfieri, Jacobs, LLC
169 Ramapo Valley Road
Upper Level, Suite 105
Oakland, New Jersey 07436
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Fax: (201) 644-7601
E-mail: ffebres@cgajlaw.com
Attorneys for Morris School District Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST JESSICA HIDALGO, TENURED SCHOOL COUNSELOR, EMPLOYED BY THE MORRIS SCHOOL DISTRICT BOARD OF EDUCATION	**GLOBAL SETTLEMENT AGREEMENT & RELEASE OF CLAIMS**

This Agreement is hereby made this ___ day of April, 2022, by and between JESSICA HIDALGO (hereinafter "Ms. Hidalgo") and the MORRIS BOARD OF EDUCATION (hereinafter the "Board") (collectively the "Parties").

WHEREAS, 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, and is entrusted with maintain and conducting the public schools of the Morris School District;

WHEREAS, Ms. Hidalgo is currently employed by the Board as a tenured school counselor;

WHEREAS, on or about August 23, 2021, Governor Murphy signed Executive Order 253 ("EO 253") that required covered workers of public schools to demonstrate their full-vaccination status or undergo weekly testing for COVID-19; and

WHEREAS, Ms. Hidalgo requested a religious accommodation to EO 253; and

WHEREAS, after having considered whether Ms. Hidalgo's request for exemption to the testing and vaccination requirement could be accommodated, the Board communicated its denial to Ms. Hidalgo; and

WHEREAS, Ms. Hidalgo never met, either in person or via zoom, with any administrator or supervisor from the district with regard to her request; and

WHEREAS, the parties dispute the implementation of Governor Philip Murphy's EO 253 and ability for the Board to exempt Ms. Hidalgo from the weekly testing requirement as a religious accommodation, or provide another accommodation that would enable her to provide school counseling and other school support services to students attending school in-person; and

WHEREAS, the Board certified tenure charges with the Commissioner of Education seeking Ms. Hidalgo's dismissal as a result of not undergoing weekly testing as required by EO 253; and

WHEREAS, Ms. Hidalgo filed a Petition of Appeal before the Commissioner of Education challenging her reduction in compensation in what she thought was a violation of the tenure statute and further challenging the Board's refusal to place Ms. Hidalgo on paid, administrative leave prior to the filing of the tenure charges; and

WHEREAS, to avoid the expense, time and uncertainty of litigation and legal proceedings, the Board and Ms. Hidalgo wish to fully and finally resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which either party may have against them as provided herein, to their mutual satisfaction.

NOW THEREFORE, Ms. Hidalgo and the Board in consideration of the mutual covenants and promises contained herein, the legal sufficiency

of which is hereby acknowledged by the parties, the Parties agree as follows:

1. **RESIGNATION DATE:** Ms. Hidalgo agrees to sign and submit to the Board simultaneously with her execution of the Global Settlement Agreement and Release of Claims ("Agreement"), an irrevocable letter of resignation in lieu of termination ("letter of resignation") from all employment with the Board effective December 31, 2021. The irrevocable letter of resignation shall be in the form attached hereto as Exhibit A. The letter of resignation and this Agreement shall be subject to Ms. Hidalgo's right to rescind pursuant to the Older Workers Benefit Protection Act, 29 U.S.C. 626(F)(1)(G), within seven (7) calendar days of signing the Agreement. If Ms. Hidalgo does not rescind her letter of resignation and this Agreement within seven (7) calendar days of signing them, and provided that this Agreement is approved by the Commissioner of Education, her resignation and this Agreement shall be binding and irrevocable. The Board shall accept Ms. Hidalgo's letter of resignation simultaneously with the acceptance of this Agreement via resolution at a meeting of the Board, subject to Commissioner of Education approval.

   a. Should the Commissioner of Education not approve this Agreement, the parties maintain their respective positions and abilities to pursue their claims and charges before the Commissioner of Education. Nothing herein shall constitute an admission or representation for any legal proceeding except as to enforce the terms of this Agreement.

2. **PAYMENT OF SALARY.** In exchange for Ms. Hidalgo's Release of Claims and withdrawal, with prejudice, of her Petition of Appeal with the Commissioner of Education, the Board shall pay Ms. Hidalgo for 39 days of work, between October 25, 2021 and December 31, 2021, in the amount of Fifteen Thousand Two Hundred Seventy-Two Dollars and Seventy-Nine Cents ($15,272.79).

3. **EXCHANGE OF PROPERTY:** Ms. Hidalgo shall return all Board property in her possession but not limited to the Board's laptop computer, district keys and the like, contemporaneously with the signing of the Agreement. Upon her request, Ms. Hidalgo shall be given an appointment to come onto Board property to obtain her personal belongings. Permission must be received from the Interim Superintendent for the appointment.

4. **CONTINGENCY:** This Agreement is contingent upon the approval of the Commissioner of Education and receipt by the Board of an irrevocable letter of resignation from Ms. Hidalgo effective December 31, 2021. The irrevocable letter of resignation shall be provided contemporaneously with the execution of this Agreement by both parties.

5. **CONSIDERATION:** Ms. Hidalgo specifically waives any and all other payments she may ordinarily be due under her employment contract with the District or under Board Policy, except as specifically set forth herein.

6. **RELEASE OF CLAIMS:** Ms. Hidalgo, on behalf of herself and her heirs, successors, and assigns, forever releases the Board, and its past and present Board Members, officers, directors, employees, agents, successors and assigns, hereby releases, waives and forever discharges any and all past, present or future claims that relate to any action that predates this Agreement that she may have against the Board, including but not limited to, the Petition of Appeal currently before the Commissioner of Education, captioned: Jessica Hidalgo v. Board of Education of the Morris School District, Morris County, OAL DKT NO. EDU 10042-21, Agency Ref. No. 215-11/21, along with any and all claims for back pay, benefits, or any other claim related to her employment by the Board, including, but not limited to, any claims arising under the New Jersey Conscientious Employee Protection Act, New Jersey Law Against Discrimination, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the federal

Age Discrimination in Employment Act of 1967 ("ADEA"), the Older Workers Benefit Protection Act ("OWBPA"), the federal Equal Pay Act, the New Jersey Wage Payment Law, the United States Constitution, the New Jersey State Constitution, the federal Americans With Disabilities Act, the Families First Coronavirus Response Act, the Family and Medical Leave Act, New Jersey Family Leave Act, the Equal Pay Law, the Equal Rights Act, any other federal, state or local law or ordinances, and/or any common law claims under tort, contract (including any collective bargaining agreement she is subject to or part of) or any other theories now or hereafter recognized. The release recited in this paragraph shall include any and all claims which Ms. Hidalgo may have at the time of the execution of this Global Settlement Agreement and Release for any type of damages cognizable under any of the laws referenced herein, including, but not limited to, any and all claims for wages, vacation, sick leave, personal days, compensatory damages, punitive damages, and/or attorneys' fees. Specifically excluded from this general release are Ms. Hidalgo's rights, upon cessation of employment with the Board to obtain continued medical coverage at her own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1986 (COBRA), unless specifically modified herein; any rights she may have arising under the Teachers' Pension and Annuity Fund ("TPAF") and related statutes and regulations; any rights she may have for indemnification by the Board pursuant to N.J.S.A. 18A:16-6 and 6.1; and any rights she may have under the New Jersey Workers' Compensation Law, N.J.S.A. 34:15-1, et seq.

a. This Release does not preclude Ms. Hidalgo from suing for enforcement or for a violation of this Settlement Agreement. The Release does not preclude Ms. Hidalgo from filing for unemployment which the Board will not challenge. With respect to any inquiries from the Department of Labor, however, concerning Ms. Hidalgo's reason for separation, the Board will respond truthfully that her resignation was in settlement of an

employment matter, the details of which shall remain confidential to the greatest extent permitted by law. Upon request from a prospective employer, the Board's Director of Human Resources or designee shall clearly indicate that the employment separation was the result of mutual agreement.

b. Nothing in this Settlement Agreement shall preclude either Party from bringing an action to enforce performance of any term of this Settlement Agreement should there be a default in performance.

c. Ms. Hidalgo understands that nothing in this Agreement shall be construed to prohibit her from filing a charge with, or participating in any investigation or proceeding conducted by, the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC), or with any other Federal, State or local court or agency. Notwithstanding the foregoing, Ms. Hidalgo hereby waives any and all rights to recover any and all damages, such as, but not limited to, monetary damages and attorney's fees in any charge, complaint or lawsuit filed by her based on events occurring which arose or existed prior to and through the date this Agreement is fully-executed and approved by the Commissioner of Education.

7. WAIVER & FORFEITURE OF TENURE RIGHTS: Ms. Hidalgo agrees that, by tendering her resignation, she is waiving and forfeiting her tenure and seniority rights with the Morris Board of Education. Ms. Hidalgo further acknowledges and agrees that, despite forfeiting her tenure and seniority, she maintains the ability to apply for positions that become available as could any qualified individual.

8. Ms. Hidalgo acknowledges that she has had the opportunity to consult with legal counsel and representatives of her choice regarding this Global Settlement Agreement and Release

of Claims, and Waiver that accompanies it prior to executing it; and that she represents that she has read this Agreement and Waiver and fully understands them and agrees to be bound by them. Ms. Hidalgo also acknowledges that she has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement, Release and Waiver prior to executing them.

9. NON-DISPARAGEMENT: The parties agree that they will not directly or indirectly disparage the name, reputation, services or competency of one another. The Board shall direct all inquiries regarding Ms. Hidalgo's employment to the Director of Human Resources or designee who shall be limited to responding with the statement provided in Paragraph 11 below. The parties also agree that, to the maximum extent permitted by law and regulation, they will not make statements for publication or public dissemination accusing one another of wrongful, improper, unlawful or unfair actions or conduct.

10. OLDER WORKER BENEFIT PROTECTION ACT OF 1990: To comply with the Older Worker Benefit Protection Act of 1990, this Agreement advises Ms. Hidalgo of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement as follows"

a. Ms. Hidalgo fully understands the terms and conditions of this Agreement;

b. Ms. Hidalgo has been advised to consult with an attorney to review the Agreement;

c. Ms. Hidalgo specifically waives her right to pursue any claims under the Age Discrimination in Employment Act;

d. Ms. Hidalgo does not waive any rights or claims under the Age Discrimination in Employment Act that may arise after the date the waiver is executed;

e. Ms. Hidalgo is receiving consideration above and beyond anything of value to which she already is entitled;

f. Ms. Hidalgo waives her right to at least twenty-one (21) calendar days within which to consider this Agreement as evidenced by Exhibit B, attached hereto; and

g. Ms. Hidalgo has seven (7) calendar days from the date of the execution of this waiver to revoke it.

11. EMPLOYMENT REFERENCES: Responses to any inquiries as to Ms. Hidalgo employment with the Board, including but not limited to, job reference inquiries shall be limited to an acknowledgement of her position, length of employment with the Board, her last annual base salary, and her voluntary resignation. All such inquiries shall be directed only to the Director of Human Resources or designee. Responses to any inquiries to Ms. Hidalgo, shall be responded to with the statement "I resigned and the terms of the resignation are confidential."

12. CONFIDENTIALITY: This Agreement shall remain confidential to the maximum extent permitted by law and neither party shall disclose the terms of this Agreement to third parties. Ms. Hidalgo may disclose the terms of this agreement to her immediate family, tax advisor and attorney who shall be subject to the confidential provision of this agreement, and also maintain the confidentiality of this Agreement.

13. ENTIRE AGREEMENT: This Agreement, Release and Waiver contain 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 that the Parties reserve their right to enforce this Agreement, if necessary;

14. CHOICE OF LAW: This Agreement shall be governed by the laws of the State of New Jersey.

15. SEVERABILITY: If 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.

16. BINDING EFFECT: The parties shall be bound by the terms and conditions of this agreement.

17. APPROVAL: The terms and conditions of this Agreement and Ms. Hidalgo's irrevocable letter of resignation are subject to ratification and approval by the Morris Board of Education, along with the approval of the Commissioner of Education.

18. 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.

19. ADMISSION OF LIABILITY: The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have entered into this Agreement solely to compromise disputed claims.

20. OPPORTUNITY TO CONSULT WITH COUNSEL: The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this Agreement freely and voluntarily and without coercion or duress. The Parties further

acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

21. 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 but not limited to, reasonable attorneys' fees.

22. RATIFICATION: 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. Upon ratification of this Agreement, the Board authorizes its Board President to execute same on its behalf.

23. GOOD FAITH: The Parties expressly agree that they shall act in good faith to ensure implementation of this Global Settlement Agreement, Release and Waiver.

24. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

25. EXECUTION IN COUNTERPARTS AND FACSIMILIE SIGNATURES: This Agreement may be executed in two (or more) counterparts each of which, when executed and delivered shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for the purposes of this Agreement and for the accompanying letter of resignation.

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT EACH HAS READ THE TERMS OF THIS AGREEMENT, UNDERSTANDS THE TERMS OF THIS AGREEMENT AND INTENDS TO BE LEGALLY BOUND BY THIS AGREEMENT AND ITS PROVISIONS. ADDITIONALLY, THE PARTIES ARE SIGNING BELOW VOLUNTARILY AND WITHOUT THREAT OR COERCION OF ANY KIND.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Jessica Hidalgo, have executed the foregoing Agreement this ___ day of April, 2022.

_____

JESSICA HIDALGO

Date:

_____

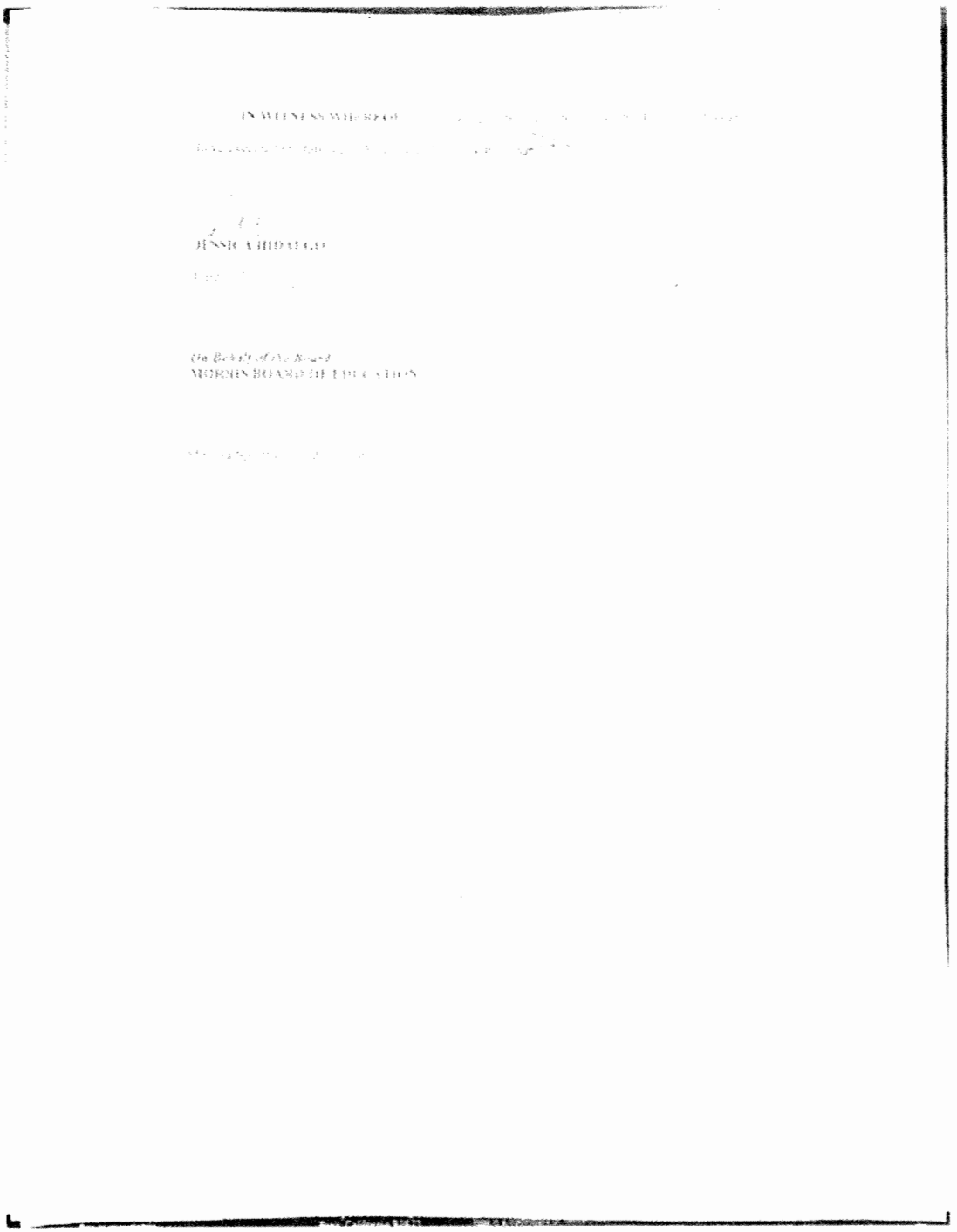
On Behalf of the Board,

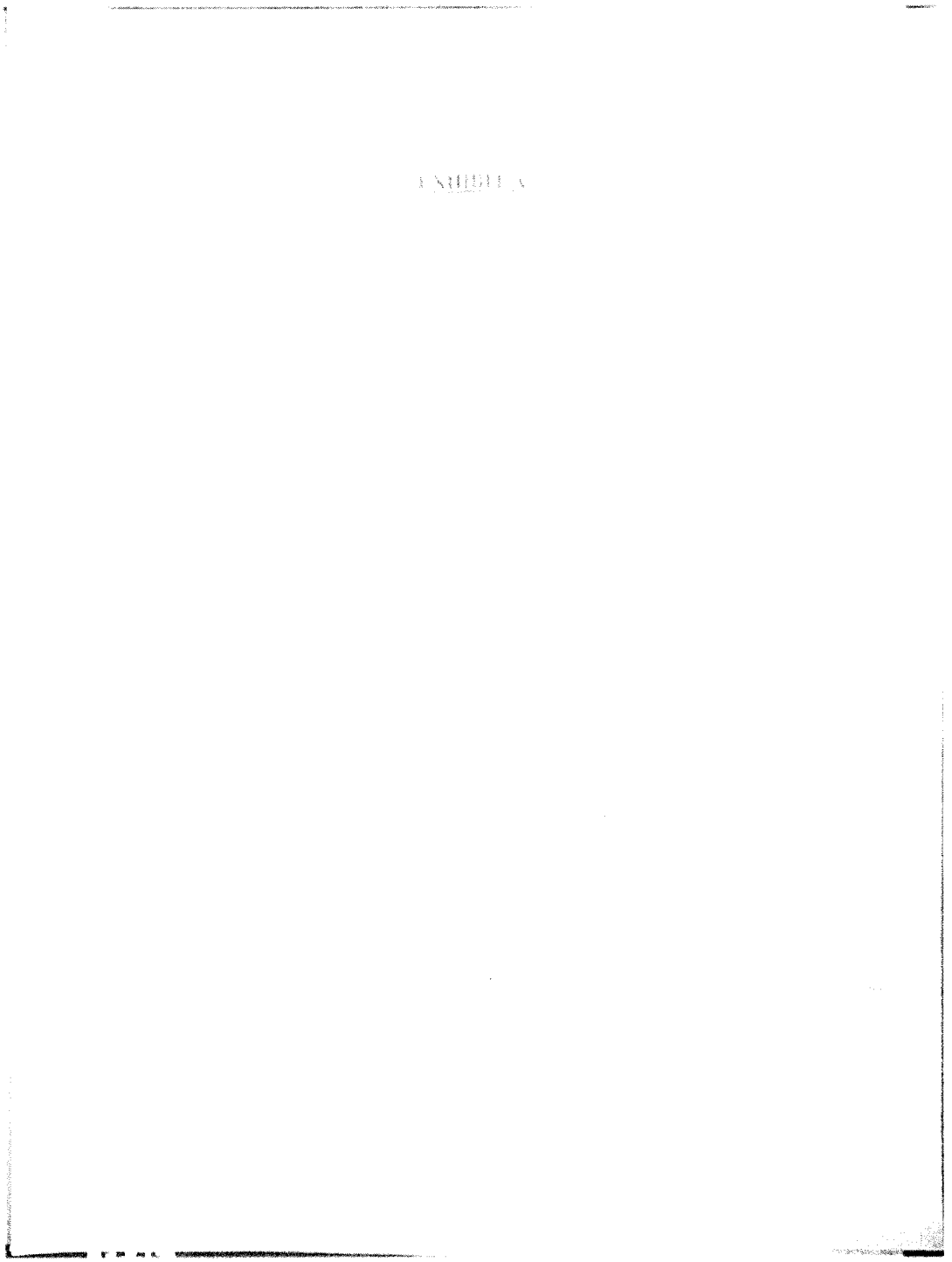
MORRIS BOARD OF EDUCATION

_____

Melissa Spiotta, Board President

Date:





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

The Board of Education of Morris School District, in the County of Morris, New Jersey, convened in Regular Session on **Monday, June 6, 2022, at 6:30 p.m.** at Morristown High School Learning Commons, 50 Early Street, Morristown, NJ 07960.

The following members of the Board of Education were present: **Mrs. Katie Cole, Mrs. Meredith Davidson, Ms. Linda K. Murphy, Mrs. Susan Pedalino, Dr. Vivian Rodriguez, Mr. Alan Smith, Mrs. Melissa Spiotta, and Mrs. Beth Wall.**

The following Resolution was offered by **Ms. Murphy,** seconded by **Mr. Smith** and adopted by the Board of Education by the following roll call vote:

Roll Call:

AYES:	Mrs. Cole, Mrs. Davidson, Mrs. Pedalino, Dr. Rodriguez, Mr. Smith, Mrs. Wall, Ms. Murphy, Mrs. Spiotta
NOES:	None
ABSTAIN:	None
ABSENT:	Mrs. Bangiola, Ms. Galdi

BUSINESS MATTERS

Motion #28 that, upon the recommendation of the Interim Superintendent, the Board of Education approve the Settlement Agreement and Mutual Release between the Morris School District Board of Education and Employee #5864.

STATE OF NEW JERSEY)
)ss
COUNTY OF MORRIS)

I, **Anthony Lo Franco, Business Administrator/Board Secretary** of Morris School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Meeting of the Board of Education of said district, duly called and held on **Monday, June 6, 2022** compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Morris School District Board of Education, and is a true complete copy thereof and of the whole of said original Minutes so far as the same relate to the subject matter referred to in said Extract.

In witness, I have hereunto set my hand and affixed the corporate seal of said Board of Education this **16th day of June, 2022.**

(Seal)

Business Administrator/Board Secretary

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

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The following Resolution was offered by **Ms. Murphy,** seconded by **Mr. Smith** and adopted by the Board of Education by the following roll call vote:

Roll Call:

AYES:	Mrs. Cole, Mrs. Davidson, Mrs. Pedalino, Dr. Rodriguez, Mr. Smith, Mrs. Wall, Ms. Murphy, Mrs. Spiotta
NOES:	None
ABSTAIN:	None
ABSENT:	Mrs. Bangiola, Ms. Galdi

BUSINESS MATTERS

Motion #28 that, upon the recommendation of the Interim Superintendent, the Board of Education approve the Settlement Agreement and Mutual Release between the Morris School District Board of Education and Employee #5864.

STATE OF NEW JERSEY)
)ss
COUNTY OF MORRIS)

I, **Anthony Lo Franco, Business Administrator/Board Secretary** of Morris School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Meeting of the Board of Education of said district, duly called and held on **Monday, June 6, 2022** compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Morris School District Board of Education, and is a true complete copy thereof and of the whole of said original Minutes so far as the same relate to the subject matter referred to in said Extract.

In witness, I have hereunto set my hand and affixed the corporate seal of said Board of Education this **16th day of June, 2022.**

(Seal)

Business Administrator/Board Secretary

157-22

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

July 1, 2022

Ms. Patricia Montana
5 Emory Court
Cedar Grove, New Jersey 07009

Jeffrey Merlino, Esq.
Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC
238 St. Paul Street
Westfield, New Jersey 07090

Re: ***Patricia Montana, et al. v. Christine Dye, et al. SEC Dkt. No. C32-21, OAL Dkt. No. EEC 01633-22, Agency Dkt. No. 152-6/22***

Dear Parties:

The undersigned Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, has considered the papers filed in connection with the complainants' request for interlocutory review of Administrative Law Judge Kelly Kirk's Order dated June 10, 2022 in the above-captioned matter.

Upon full consideration 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, the complainants' request for interlocutory review is hereby denied.

Sincerely,

Kevin Dehmer
Assistant Commissioner

KD/JKH
c: Honorable Kelly J. Kirk
Director, School Ethics Commission

157-22SEC

158-22SEC

Agency Dkt. No. 120-5/22
SEC Dkt. No. T20-21

New Jersey Commissioner of Education

Final Decision

In the Matter of Marissa Ranello,
Board of Education of the City of Millville,
Cumberland County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the April 26, 2022 Order to Show Cause but prior to the SEC's May 24, 2022 meeting; therefore, a penalty of censure is recommended. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the SEC's meeting date – the penalty has been a reprimand. *See, In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 223-21SEC, decided October 13, 2021; *In the Matter of Marcos Garciga, Cliffside Park Board of Education, Bergen County*, Commissioner Decision No. 224-21SEC, decided October 13, 2021; *In the Matter of Gary Yedman, Seaside Park Board of Education, Ocean County*, Commissioner Decision No. 230-21SEC, decided October 13, 2021. As the instant case arises from the same circumstances, the Commissioner finds that a reprimand is the appropriate penalty

for the respondent's failure to timely complete the requisite training.[1] Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2022
Date of Mailing: July 6, 2022

[1] The SEC has previously recommended a penalty of a censure when a board member completed the training after the issuance of the Order to Show Cause but prior to the SEC's next meeting; however, the Commissioner rejected the penalty recommendation in that case and advised that a reprimand is the appropriate penalty under those circumstances. *In the Matter of Robyn Schneider, The Ethical Community Charter School, Hudson County*, Commissioner Decision No. 140-16SEC, decided April 11, 2016.

[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).

Before the School Ethics Commission
Docket No.: T20-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Marissa Ranello,
Millville Board of Education, Cumberland County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Marissa Ranello (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Millville Board of Education (Board), located in Cumberland County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by December 31, 2021.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated

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[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed her training requirement on April 27, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent stated (through counsel), "I coordinated with the Business Administrator of my District to schedule said training using my personal computer in my home ... I attempted to access the training programs; however, I encountered computer problems which prevented me from completing the training session ... With the help of the District, I was able to access and successfully complete ... on April 27, 2022 ... I apologize for my delay ... and will faithfully complete all required trainings in the future." Importantly, Respondent did not deny that she did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o

Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T20-21

Whereas, Marissa Ranello (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, and also filed a response to the Commission's OTSC that did not dispute that she did not complete training in a timely fashion; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq., Director

159-22SEC
Agency Dkt. No. 116-5/22
SEC Dkt. No. T07-21

New Jersey Commissioner of Education

Final Decision

In the Matter of Mark Winterbottom,
Board of Education of the Township of Mullica,
Atlantic County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the April 26, 2022 Order to Show Cause but prior to the SEC's May 24, 2022 meeting; therefore, a penalty of censure is recommended. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the SEC's meeting date – the penalty has been a reprimand. *See, In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 223-21SEC, decided October 13, 2021; *In the Matter of Marcos Garciga, Cliffside Park Board of Education, Bergen County*, Commissioner Decision No. 224-21SEC, decided October 13, 2021; *In the Matter of Gary Yedman, Seaside Park Board of Education, Ocean County*, Commissioner Decision No. 230-21SEC, decided October 13, 2021. As the instant case arises from the same circumstances, the Commissioner finds that a reprimand is the appropriate penalty

for the respondent's failure to timely complete the requisite training.[1] Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2022
Date of Mailing: July 6, 2022

[1] The SEC has previously recommended a penalty of a censure when a board member completed the training after the issuance of the Order to Show Cause but prior to the SEC's next meeting; however, the Commissioner rejected the penalty recommendation in that case and advised that a reprimand is the appropriate penalty under those circumstances. *In the Matter of Robyn Schneider, The Ethical Community Charter School, Hudson County*, Commissioner Decision No. 140-16SEC, decided April 11, 2016.

[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).

Before the School Ethics Commission
Docket No.: T07-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Mark Winterbottom,
Mullica Township Board of Education, Atlantic County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Mark Winterbottom (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Mullica Township Board of Education (Board), located in Atlantic County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2021.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated

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[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on April 28, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent stated, he was unable to previously complete training due to "personal reasons." Importantly, Respondent did not deny that he did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T07-21

Whereas, Mark Winterbottom (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, and also filed a response to the Commission's OTSC that did not dispute that he did not complete training in a timely fashion; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen, Esq., Director

162-22SEC
SEC Dkt. No. T13-21
Agency Dkt. No. 124-5/22

New Jersey Commissioner of Education

Final Decision

In the Matter of D. Robert Dovey,
Delanco Township Board of Education,
Burlington County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent failed to complete the training. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, as of the filing date of this decision, respondent is removed from the board for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 7, 2022
Date of Mailing: July 8, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T13-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O D. Robert Dovey,
Delanco Township Board of Education, Burlington County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 16, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed D. Robert Dovey (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Delanco Township Board of Education (Board), located in Burlington County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by December 31, 2021.

On or April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated training

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[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by December 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of the Commissioner of Education's decision. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon issuance of the Commissioner of Education's 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o

Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T13-21

Whereas, D. Robert Dovey (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by March 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq., Director

163-22SEC
SEC Dkt. No. T16-21
Agency Dkt. No. 125-5/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Marquis Garnett,
Chesilhurst Board of Education,
Camden County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Ultimately, respondent completed the training after the SEC's May 24, 2022 decision. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, as of the filing date of this decision, respondent is suspended from the board for 30 days for violating the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 7, 2022
Date of Mailing: July 8, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T16-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Marquis Garnett,
Chesilhurst Board of Education, Camden County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 16, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Marquis Garnett (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Chesilhurst Board of Education (Board), located in Camden County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by December 31, 2021.

On or April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated training

[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by December 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of the Commissioner of Education's decision. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon issuance of the Commissioner of Education's 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o

Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T16-21

Whereas, Marquis Garnett (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by March 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen, Esq., Director

164-22SEC
SEC Dkt. No. T21-21
Agency Dkt. No. 126-5/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Stephanie Risley,
Millville Board of Education,
Cumberland County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent failed to complete the training. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, as of the filing date of this decision, respondent is removed from the board for violating the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 7, 2022
Date of Mailing: July 8, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T21-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Stephanie Risley,
Millville Board of Education, Cumberland County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Stephanie Risley (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Millville Board of Education (Board), located in Cumberland County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by December 31, 2021.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated

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[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of the Commissioner of Education's decision. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon issuance of the Commissioner of Education's 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o

Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T21-21

Whereas, Stephanie Risley (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen, Esq., Director

165-22SEC
SEC Dkt. No. T22-21
Agency Dkt. No. 127-5/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Fred Pierce,
Upper Deerfield Township Board of
Education, Cumberland County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent failed to complete the training. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, as of the filing date of this decision, respondent is removed from the board for violating the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 7, 2022
Date of Mailing: July 8, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T22-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Fred Pierce,
Upper Deerfield Township Board of Education, Cumberland County

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I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 16, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Fred Pierce (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Upper Deerfield Township Board of Education (Board), located in Cumberland County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2021.

On or April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated training

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[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by December 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of the Commissioner of Education's decision. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon issuance of the Commissioner of Education's 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o

Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T22-21

Whereas, Fred Pierce (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by March 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq., Director

166-22SEC
SEC Dkt. No. T25-21
Agency Dkt. No. 130-5/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Michele Bowes,
Lawrence Township Board of Education,
Mercer County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Ultimately, respondent completed the training after the SEC's May 24, 2022 decision. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, as of the filing date of this decision, respondent is suspended from the board for 30 days for violating the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 7, 2022
Date of Mailing: July 8, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T25-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Michele Bowes,
Lawrence Township Board of Education, Mercer County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Michel Bowes (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Lawrence Township Board of Education (Board), located in Mercer County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 4 training program by December 31, 2021.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated

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[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of the Commissioner of Education's decision. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon issuance of the Commissioner of Education's 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o

Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T25-21

Whereas, Michele Bowes (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why she did not complete training by December 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen, Esq., Director

167-22
OAL Dkt. No. EDU 01694-22
Agency Dkt. No. 20-2/22

New Jersey Commissioner of Education

Final Decision

R.C. and B.C., on behalf of minor child, A.C.,

Petitioner,

v.

Board of Education of the Township of Galloway, Atlantic County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioners pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

Petitioners challenge a harassment, intimidation, and bullying (HIB) decision made by the Board. The Administrative Law Judge (ALJ) scheduled a telephone conference for May 26, 2022. Petitioners did not participate in the telephone prehearing conference; accordingly, the ALJ dismissed the matter based on petitioners' apparent abandonment of their appeal.

[1] The Board did not file a reply to petitioners' exceptions. Petitioners also filed a motion to vacate the Initial Decision, making the same arguments included in their exceptions. As there is no statutory or regulatory provision for the filing of a motion to vacate an Initial Decision, neither the motion nor the Board's reply thereto were considered. Petitioners also filed a motion to vacate the Initial Decision on the grounds that the ALJ had a conflict. Again, neither this motion nor the Board's reply thereto were considered, although petitioners are free to raise the issue of conflict should the same ALJ be assigned on remand.

In their exceptions, petitioners indicate that they did not see the email scheduling the telephone conference, nor did opposing counsel contact them when they failed to appear for the conference. They state that they would have attended if they had they been aware that it was scheduled. Accordingly, they urge the Commissioner to overturn the Initial Decision.

Upon review, the Commissioner finds that petitioners did not abandon this matter. Petitioners offered a reason why they failed to appear for the May 26, 2022 telephone prehearing conference, namely that the email – which, according to the Initial Decision, is the only method by which the OAL sent the scheduling notice – was not received.

Accordingly, this matter is remanded to the OAL for further proceedings necessary to reach a determination on the merits.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 8, 2022
Date of Mailing: July 8, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAIL DECISION

DISMISSAL

OAL DKT. NO. EDU 01694-22

AGENCY DKT. NO. 20-2/22

R.C. AND B.C. ON BEHALF OF MINOR CHILD, A.C.,

Petitioners,

v.

TOWNSHIP OF GALLOWAY BOARD OF EDUCATION, ATLANTIC COUNTY,

Respondent.

R.C. and B.C., petitioners on behalf of minor, child A.C., pro se

Amy Houck Elco, Esq., for respondent (Cooper Levenson, P.A., attorneys)

Record Closed: May 31, 2022 Decided: May 31, 2022

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

Petitioners challenge the respondent's, Township of Galloway Board of Education's (Board or respondent) harassment, intimidation, and bullying (HIB) decision.

PROCEDURAL HISTORY AND FACTUAL DISCUSSION

This matter was transmitted to the Office of Administrative Law (OAL), where it was filed on March 4, 2022. A telephone prehearing conference was scheduled to be heard on April 25, 2022. Notice of that that telephone conference was emailed to the petitioners on March 29, 2022. The notice included the following language:

> If you do not participate in the telephone conference, the file will be returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party.

Petitioners did not participate in the April 25, 2022, telephone conference. However, the petitioners did send an email later that day apologizing for not participating in the call and requesting that the matter be rescheduled.

Another telephone prehearing conference was scheduled to be heard on May 26, 2022. Notice of that that telephone conference was emailed to the petitioners on April 26, 2022. The notice included the following language:

> **If you do not participate in the telephone conference, the file will be returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party. (emphasis included.)**

The petitioners did not participate in the May 26, 2022, telephone conference and did not contact the OAL to explain why they were unable to do so.

CONCLUSION

To date, the petitioners have not provided a request for an adjournment of the May 26, 2022, telephone conference or an explanation for their nonappearance for the same. Neither has this office received notice of legal representation on behalf of the petitioners. Therefore, I **CONCLUDE** that petitioners have failed to appear and abandoned their appeal.

ORDER

It is hereby **ORDERED** that this matter is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 31 ,2022
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: May 31, 2022 (email)

Date Mailed to Parties: May 31, 2022 (email)

JRW/tat

168-22

New Jersey Commissioner of Education

Final Decision

P.V., on behalf of minor child, T.S.,

Petitioner,

v.

Board of Education of the Township of Verona, Essex County,

Respondent.

Synopsis

Pro se petitioner challenged the respondent Board's decision to deny her minor child, T.S., admission into the Verona High School National Honor Society (NHS). Following an emergent hearing via Zoom on May 20, 2022, the record closed. The parties agreed during the proceedings that no underlying issues remain in this matter.

The ALJ found, *inter alia*, that: T.S. – a junior at Verona High School – applied for admission to the school's NHS in 2022; membership in the NHS is conferred upon students in recognition of outstanding accomplishments in scholarship, leadership, character, and service; in April 2022, T.S. was denied admission because his "student conduct record is inconsistent with the character requirements of the NHS."; this determination stemmed from a one day, in-school suspension during T.S.'s freshman year, issued following an in-class remark directed at his Spanish teacher; petitioner's assertion that her child's chances of admission to selective colleges will be impacted by the fact that he is not a member of NHS is speculative and not supported by the record; *N.J.A.C.* 6A:3-1.6(b) sets forth the standards governing motions for emergent relief, and instructs that parties seeking such relief must meet all of the four standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982); petitioner here has failed to meet all four of the required standards for emergent relief. Accordingly, the ALJ denied petitioner's request for emergent relief.

Upon review, the Commissioner concurred with the ALJ's conclusion that petitioner has not met the standards for emergent relief. Further, as the parties agreed during the proceedings that no underlying issues remain, no further proceedings are necessary to bring this matter to a close. 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.

168-22
OAL Dkt. No. EDU 03920-22
Agency Dkt. No. 87-4/22

New Jersey Commissioner of Education

Final Decision

P.V., on behalf of minor child, T.S.,

Petitioner,

v.

Board of Education of the Township of Verona, Essex County,

Respondent.

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

Upon such review, and for the reasons detailed in the Initial Decision, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Furthermore, as the parties agreed during the proceedings at the OAL that there are no underlying issues that remain, no further proceedings are necessary to bring this matter to a close.

Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 8, 2022
Date of Mailing: July 8, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03920-22
AGENCY DKT. NO. 087-04-22

P.V. ON BEHALF OF MINOR CHILD, T.S.,

Petitioner,

v.

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

Respondent.

P.V., petitioner, pro se

Daniel Roberts, Esq., for respondent (Kenney, Gross Kovats & Parton, attorneys)

Record Closed: May 20, 2022 Decided: May 23, 2022

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Petitioner, P.V. on behalf of T.S. (student), seeks an order by way of emergent relief, to reverse the decision of respondent, Board of Education of the Township of Verona (the District or the Board), denying the student admission into the Verona High School, National Honor Society.

PROCEDURAL HISTORY

On April 22, 2022, petitioner, filed a petition of appeal (petition) with the Commissioner of the New Jersey Department of Education, Office of Controversies and Disputes (Department of Education). Thereafter, on May 16, 2022, petitioner converted the petition to an emergent petition, seeking emergent relief pursuant to N.J.A.C. 6A-31.6. The Department of Education then transferred this matter to the Office of Administrative Law (OAL) and the same was filed at the OAL on May 16, 2022, as an emergent and contested matter. The parties agree that there are no other underlying issues that remain.

A telephonic status conference was held on May 18, 2022, and the parties agreed to conduct oral argument on May 20, 2022, to allow time for the submission of respective legal briefs.

Oral argument was scheduled remotely via zoom on May 20, 2022. Petitioner and the student appeared at oral argument and were placed under oath and presented oral statements concerning petitioner's application herein. The Board did not present any witness and relied on its opposition brief filed herein. The record closed on May 20, 2022.

FACTUAL SUMMARY

The following essential facts in this matter are not in dispute. The student is a junior in the eleventh grade at Verona High School. When the student was a freshman in the ninth grade, Verona High School issued a one-day in school suspension of the student related to his conduct in class. Specifically, the student made an in-class remark directed at his Spanish class teacher, which resulted in his suspension. The student stated that he and the teacher presented their respective versions of the incident to the vice principal, who then issued the one-day in school suspension. Petitioner stated that the student has not been issued any other disciplinary suspension.

Petitioner confirmed that Verona Highs School notified her of the suspension, and she had several discussions with the vice principal regarding her objection to the student's suspension. Petitioner stated that she was not aware at the time that a suspension could

lead to the student being denied admission into the Verona High School National Honor Society (NHS). Petitioner argues further that the school should not have issued a "Level III" suspension against the student, as his conduct was more in line with a "Level II" suspension. The Petitioner did not appeal the suspension to the State Department of Education under N.J.A.C. 6A:3-1.3(i), as she claims she "was not made aware" of the same by the vice principal.

The Verona High School NHS guidelines for student induction and participation membership in the NHS follows the same criteria as the National NHS chapter. Membership is limited to juniors and seniors and is conferred upon students in recognition of outstanding accomplishments in scholarship, leadership, character, and service. Induction and continued participation in the NHS are based upon the criteria in the Verona High School NHS by-laws, and Student Handbook.

In 2022, the student applied for admission into the NHS, as well as subject NHS membership, which Verona High School also maintains. Petitioner also presented an email from Paula Ramos Santiago addressed to the student informing him that his application to the Science National Honor Society was denied because of his past school offense. (P-2). (No other documents regarding the subject NHS chapters were presented.)

By letter dated April 29, 2022, (April 29 letter) the student was informed that he was denied admission into the NHS because his "student conduct record is inconsistent with the character requirements of the NHS." (P-1). The April 29 letter also provided the student an opportunity to meet with the NHS advisors to "understand the reason for denial", and "advocate for themselves (Id.). Petitioner and the student did not meet with the NHS advisors, and petitioner filed the within petition on April [1]

[1] It is noted that although not addressed in the papers filed herein, or at oral argument, petitioner filed the within petition dated April 13, 2022, on April 22, 2022, and Verona High School notified the student on April 29, 2022, that he was denied admission into the NHS (P-1).

Petitioner argues that the student's denial in the NHS and the subject NHS chapters are unfair and will have a "detrimental effect" on the student's admission into an elite college or university. Petitioner bases her argument on the competitive college application process as any college that the student applies to will "question" why the student is not on the NHS despite his academic record. Petitioner argues that Verona High School does not report the student's disciplinary record on his school transcript and the colleges are therefore, not made aware of the same.

The District argues that petitioner's written submission does not address any of the applicable factors for emergent relief set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and instead appears to contest whether the student's prior suspension was warranted. The District argues further that emergent relief cannot be granted in this matter as petitioner has not alleged irreparable harm with any specificity, except a purely "speculative belief" that Verona High School's denial of the student in the NHS will detrimentally effect the student's ability to apply to college. The District argues further that lacking any demonstrable factual support, this belief is not sufficient to demonstrate irreparable harm, and further the student is a junior student, and is eligible to apply for admission to the National Honor Society his senior year.

LEGAL ANALYSIS AND CONCLUSION

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 her favor.

Irreparable harm

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 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 is 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.)

In the instant matter, I **CONCLUDE** there has not been a showing of "immediate irreparable injury" or a "presently existing actual threat". Petitioner's argument that the student's opportunities to attend college will be harmed because he has been denied admission to the NHS is unsubstantiated by the record presented before me. I **CONCLUDE** that no proofs were presented by petitioner that would satisfy the first prong

in Crowe, and I therefore **CONCLUDE** that petitioner has not demonstrated that the student will suffer irreparable harm if the requested relief is not granted.

Right to the underlying claim must be settled

A board of education's actions are entitled to a presumption of lawfulness and good faith. In challenges to board actions, the challenger bears the burden of proving that such acts were unlawful, arbitrary, capricious, or unreasonable. Schuster v. Bd. 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).

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, 1 965 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."

Given this standard in Crowe, that the legal right underlying petitioner's claim is settled, it is particularly notable that petitioner fails to cite any precedent whatsoever for holding that petitioner has an underlying legal right to admission to the National Honor Society. To the contrary, the Commissioner of Education has recognized, admissions criteria to the National Honor Society are matters of local determination for each school district, and the Commissionerwill not substitute his judgment for that of the school district except where the District's actionsare arbitrary, capricious, or unreasonable. J.B.A. and A.M.A. v. Bernardsville Board of Education, 4 N.J.A.R. at 152. An applicant must meet the applicable standards for entry into theNational Honor Society, and that admission is not so "automatic" as to be considered a "right." Id. See also Roberts Cert, Ex. A, National Honor Society Handbook, 2020 P. 41 Terminology (noting that admission is "not a right"), P49 (again noting admission is not a right), P99 (legal memorandum addressing "legal right" to entry into NHS). Clearly, therefore, in light of NHS own procedures, petitioner

cannot demonstrate an underlying legal right to the requested admission, mandating that emergent relief be denied.

I **CONCLUDE** that petitioner has failed to establish a right to the underlying claim has been settled.

Likelihood of prevailing on the merits

Emergent relief requires petitioner to demonstrate a likelihood of prevailing on the merits of the underlying claim, and when significant factual issues exist, petitioner cannot prevail. Petitioner has not set forth exactly how she is likely to prevail on the merits of this matter. At best, her underlying legal argument is that the student should not have received what she terms an "indoor suspension," and if he did not, he would have been accepted into National Honor Society. The issue of suspension of the student is moot as petitioner admits that she did not file a timely appeal with the Department of Education under N.J.A.C. 6a:3-1.3(i).

I **CONCLUDE** that petitioner has failed to establish that she has a likelihood of prevailing on the merits.

Balancing of the Equities

The student admitted that he was suspended his freshman year related to his conduct and petitioner has admitted that she did not appeal the suspension at the time because she was not aware she could. The time to appeal the student suspension has passed and petitioner has failed to present any proofs that they were denied due process to challenge the suspension. The petition filed herein seeks emergent relief to reverse the decision of Verona High School to admit the student in the NHS, not litigate the prior suspension.

Petitioner must demonstrate that the student will suffer more significant harm than the Board if this tribunal does not grant petitioner the requested relief. However, no proofs have been presented that admission into the NHS alone will guarantee or enhance the

student's prospects of admission into a college of his choosing. The Board has set forth the standards for admission into the Verona High School NHS, which are set forth in the National NHS chapter, which are: academic eligibility, service, leadership, and character. (Exhibit A, Certification of Counsel). In applying these criteria the Board has determined that the student's prior "student conduct record is inconsistent with the character requirements of the NHS". Under the circumstances of this matter, I **CONCLUDE** that the Board's interests outweigh the student's interest in seeking admission into the NHS.

For the reasons set forth herein, I **CONCLUDE** that petitioner is not entitled to emergent relief because the proofs submitted fail to establish all of the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b), and as set forth in Crowe v. DeGioia, 90 N.J. 126.

ORDER

It is hereby **ORDERED** that petitioner's request for emergent relief is **DENIED.**

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

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

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

May 23, 2022
DATE

Julio Morejon
JULIO C. MOREJON, ALJ

Date Received at Agency: May 23, 2022

Date Mailed to Parties: May 23, 2022
lr

STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	::	AGENCY DOCKET NO. 235-12/21
between	::	
WEST NEW YORK BOARD OF EDUCATION, HUDSON COUNTY,	::	
Petitioner,	::	**OPINION & AWARD**
-and-	::	
YESENIA CAMILO,	::	
Respondent	::	

BEFORE: Michael J. Pecklers, Esquire, Arbitrator

DATE OF HEARING: May 12, 2022

LOCATION OF HEARING: The Annex, 5401 Polk Street, West New York, N.J.

DATE OF AWARD: July 5, 2022

APPEARANCES:

For the Petitioner:

Lester E. Taylor, III, Esq., FLORIO PERRUCCI STEINHARDT CAPPELLI TIPTON & TAYLOR, LLC
David J. Kass, Esq., "
Scott Wohlrab, Assistant Superintendent of Administrative Services

For the Respondent:

Albert J. Leonardo, Esq., ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FREIDMAN, PC
Jacinda Chen, Esq., "
Yesenia Camilo, Respondent

I. BACKGROUND CONSIDERATIONS

Respondent Yesenia Camilo is employed as an instructor by the West New York, New Jersey, Board of Education. Ms. Camilo is certified as a Teacher of English as a Second Language; Teacher of the Deaf and Hard of Hearing; Teacher of the Handicapped; and Elementary School Teacher. Over her roughly nineteen (19) years in West New York, tenure was acquired pursuant to N.J.S.A. 18A:28-5(a). During the 2019-2020 School Year, Ms. Camilo taught Special Education. On August 11, 2020, the Board brought tenure charges against the instructor in Agency Docket No. 189-9/20.

That matter was assigned to Arbitrator Joyce Klein, pursuant to the provisions of the TEACHNJ Act, N.J.S.A. 18A:6-16 et seq. After conducting numerous evidentiary hearings, Arbitrator Klein issued her Award on June 3, 2021. See Board Exhibit 4. This sustained Counts 3 & 4 of Charge II (Conduct Unbecoming, Neglect and Incapacity) and Count 1 of Charge III (Insubordination and Conduct Unbecoming for Failure to Follow Directives). The remaining charges were dismissed. In addition to withholding Ms. Camilo's increment for the 2021-2022 School Year, Arbitrator Klein ordered that her reinstatement be conditioned on the successful completion of a Fitness For Duty Examination.

When Respondent failed to comply with this arbitral directive, the WNY Board of Education adopted REVISED TENURE CHARGES against Ms. Camilo at its Meeting of November 29, 2021. These suspended her without pay for the

statutory one hundred twenty-day (120) period, pursuant to N.J.S.A. 18A:6-14. See CERTIFICATE OF DETERMINATION. On January 3, 2022, Respondent's then-Counsel James R. Zazzali, Jr. sent a letter of representation to Jennifer Killough-Herrera, Director of Controversies and Disputes for the New Jersey State Department of Education. This additionally memorialized counsel's intention to file a Motion to Dismiss the instant revised tenure charges before an arbitrator, based upon his understanding that the DOE would not entertain the application.

Ms. Killough-Herrera subsequently notified me on January 7, 2022 that I had been appointed to serve as the Arbitrator, per N.J.S.A. 18A:6-16, with instructions to review all charges that were not dismissed as a result of the motion. On March 11, 2022, Colin M. Lynch, Esq., of the Zazzali Law Firm filed a NOTICE OF MOTION TO DISMISS IN LIEU OF FILING AN ANSWER, with supporting brief and case citation. On March 25, 2022, Lester E. Taylor, III, Esq., and David J. Kass, Esq., of the Florio Law Firm filed a BRIEF IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS IN LIEU OF AN ANSWER. This was submitted on behalf of the Board of Education and accompanied by case citation.

On April 29, 2022, I issued an INTERIM AWARD ON MOTION TO DISMISS, which dismissed Charges II through V of the Revised Charges with prejudice. The surviving charge provides as follows:

CHARGE I

CONDUCT UNBECOMING A TEACHING STAFF MEMBER REGARDING RESPONDENT'S ABANDONMENT OF POSITION

> The foregoing background information, and the facts alleged therein, are incorporated by reference as if fully set forth herein. Ms. Camilo has engaged in unbecoming conduct by abandoning her teaching position. On June 3, 2021, Arbitrator Joyce M. Klein ("the Arbitrator"), issued an Opinion and Award as a result of the initial tenure charges. The Opinion and Award, in addition to the facts found therein, is incorporated by reference as if fully set forth herein.
>
> The Arbitrator concluded Ms. Camilo shall be reinstated to her teaching position "pending successful completion of a Fitness For Duty examination." Although the Arbitrator did not specify a timeline for said completion, it has been – as of this date – more than four (4) months since the Opinion and Award was issued, and nearly two (2) months since the 2021-2022 School Year began. Ms. Camilo has not presented proof of a successfully completed Fitness For Duty examination, nor has she submitted other medical documentation justifying her continued absence. Ms. Camilo has failed to comply with the terms of the Opinion and Award and has not returned to her position. These acts and omissions, constituting an abandonment of her position, amount to just cause for immediate dismissal.

A hearing on the merits of this charge was held on May 12, 2022 at the Annex, located at 5401 Polk Street, West New York, New Jersey. At that time, the parties were provided with a full opportunity to enter relevant and admissible documentary evidence; to participate in oral argument; and to undertake the direct and cross-examination of witnesses, who testified under oath. No sequestration order was invoked, and a verbatim transcription of the proceeding was provided by RIZMANRAPPAPORT CERTIFIED COURT REPORTERS. Post-hearing briefs were thereafter submitted in lieu of closing argument, with the record closed on June 3, 2022. At my request, on May 18, 2022 Ms. Killough-Herrera graciously extended the second forty-five (45) day statutory period during which my AWARD would be due to July 6, 2022.

II. FRAMING OF THE ISSUE[1]

Whether Ms. Camilo failed to comply with the terms of the Klein Opinion and Award and whether a failure to submit for a Fitness For Duty examination as of the date of the filing of the tenure charges constitutes an abandonment of position and/or other just cause for removal.

III. POSITIONS OF THE PARTIES

Petitioner West New York Board of Education

Yesenia Camilo was hired by the Board approximately nineteen (19) years ago. T82:21. She holds a certificate as a Teacher of English, Teacher of English as a Second Language, Teacher of the Deaf or Hard of Hearing, Teacher of the Handicapped, and Elementary School Teacher. T84:1-6. She subsequently earned tenure in the position. During the entirety of her employment, Respondent was subject to the terms and conditions of the collective bargaining agreement between the Board and the West New York Education Association, which was admitted into evidence as Board Exhibit 1.

There is little doubt that for most of Respondent's tenure as a teacher, there were no issues with her behavior and/or conduct. Yet that changed starting in the 2019-2020 School Year, in which she began behaving erratically. Upon becoming aware of her concerning conduct at the school in or around October 2019, the

1/ The second part of the framing was proposed by the Petitioner. I indicated to the parties that the Respondent's proffer was really subsumed therein, and that in framing the issue I would focus just on what the Board stated in Charge 1. The initial language was lifted from the second paragraph of the same. T7:16-25, T8:1-10.

Board placed Ms. Camilo on administrative leave and required her to attend a Fitness For Duty examination. T13:13-15. Ms. Camilo's last day of work was October 16, 2019. T17:21. However, over the next several months, the Board attempted to schedule a Fitness For Duty examination for Ms. Camilo. Given Ms. Camilo's repeated failure to attend a Fitness For Duty examination in that period, the Board certified tenure charges alleging the erratic behavior constituted conduct unbecoming and warranted her termination.

The matter proceeded to binding arbitration, which resulted in Arbitrator Klein's June 3, 2021 Opinion and Award. Unfortunately, while the June 3, 2021 Opinion and Award purported to resolve these issues, the lack of clarity therein precipitated the events resulting in the Revised Tenure Charges. Specifically, although Arbitrator Klein determined that Ms. Camilo should have an increment withheld and "be reinstated pending successful completion of a Fitness For Duty Examination," Arbitrator Klein did not specify a time frame in which same must be completed. See Board Exhibit 4, at 42. Nevertheless, testimony from the May 12, 2022 arbitration hearing demonstrates that both parties interpreted the award to mean Ms. Camilo was required to submit for a Fitness For Duty examination prior to the start of the 2021-2022 School Year. See T40:18; see also T128:22-129:1; T141:23-142:3. Ms. Camilo twice acknowledged her interpretation of the June 3, 2021 Opinion and Award was that she had to complete the Fitness For Duty examination "ASAP."

This admission at arbitration stands in stark contrast to her counsel's

representations throughout the months following the June 3, 2021 Opinion and Award. Despite the Board's attempt to immediately schedule a Fitness For Duty examination for Ms. Camilo, her counsel, on June 25, 2021, rejected the Board's chosen physician and advised Ms. Camilo would submit to same with Dr. Nicole J. Rafanello, offering dates of "either July 1st and July 6, 2021, or July 8th and July 13, 2021. See Board Exhibit 6. This examination, quite clearly, was never completed. The Board never received any correspondence reflecting that Ms. Camilo submitted to these appointments with Dr. Rafanello. T45:2-13.

Despite Ms. Camilo's offering of dates for early to mid-July, she testified during the hearing, "July 27th was my first appointment" with Dr. Rafanello. T85:18. Ms. Camilo apparently attended an initial session with Dr. Rafanello on July 27, 2021 and testified that Dr. Rafanello wanted her to complete the evaluation on a later date, August 3, 2021. T87:13. During the May 12th hearing Mr. Camilo stated — and the Board learned for the first time — she did not submit to an examination on August 3, 2021 because she "woke up with ... 3 feet of water in [her] apartment," and arrived forty-five minutes later to her appointment. So, Dr. Rafanello's office rescheduled her appointment for two weeks later on August 14, 2021. T84:3-4; T89:11-12.

Regarding her August 14, 2021 appointment, Ms. Camilo further testified that that morning, she "woke up with a foot of raw [sewage] in her apartment." T89:17. Nevertheless, Ms. Camilo went to the exam, still wearing the clothing she "put [on] to deal with the situation," but did not complete the exam because, in her words, "I

[didn't] think I was ready for this evaluation because mentally I was so disgusted. T91:21-22; T92:3-5. As a result of the incomplete exam, Dr. Rafanello rescheduled Ms. Camilo for August 24, 2021. T93:8. Yet Ms. Camilo testified that misfortune plagued her calendar once again. On the date of the thrice-rescheduled exam, Ms. Camilo testified her daughter was in a car accident. T93:17. Despite this, Ms. Camilo was able to arrange for her father picking up her daughter so that she could attend the exam.

Although Ms. Camilo testified she "finished" the exam, she further testified that Dr. Rafanello told her she "was not in any state of mind" to complete the exam. T94:19. Ms. Camilo did not indicate in her testimony any effort to schedule a further visit to finally complete the exam between August 24, 2022 and November 29, 2021, the date the instant charges were filed. It bears emphasizing that Ms. Camilo did not introduce any documentary evidence supporting the reasons she provided for failing to complete the exam on various dates in July and August 2021. Nor did her attorney ever mention any of these purported "reasons" for the substantial delay in the numerous communications between counsel between June and October 2021.

Instead, Ms. Camilo, nearly two (2) months later — and presumably with the assistance of her legal counsel — took it upon herself to enroll in an Employee Assistance Program at Rutgers University ("the EAP") because, in her words, she needed "psychological help." T99:18; 100:12. This enrollment commenced absent authorization from her employer, the Board. Interestingly, Ms. Camilo, in her

nineteen (19) plus years of experience "didn't even know this program existed," until it was "brought up to [her] attention." T100:18-24. She did not testify who advised her to enter the EAP. There is simply no evidence Ms. Camilo made any attempt to complete a Fitness For Duty exam in the more than six (6) weeks between August 24, 2021 and October 11, 2021.

It was at this juncture the Board determined the Revised Tenure Charges should be filed, which is reflected through email correspondence between Board counsel and Ms. Camilo's counsel. See Board Exhibit 7. After receiving the initial June 25, 2021 email from Ms. Camilo's attorney, James R. Zazzali, Jr., Esq. ("Mr. Zazzali"), explaining that Ms. Camilo would be submitting to a Fitness For Duty exam with Dr. Rafanello, the Board's counsel continued following up urging completion of the same, and seeking a status update. Ibid. This is reflected in emails from Board counsel dated July 15, 2021 and July 23, 2021.

Having not heard from Mr. Zazzali in several weeks, Board counsel emailed Mr. Zazzali on September 29, 2021, requesting a status update, given the Board's desire to have this matter finally resolved. Id. at 6. Mr. Zazzali then advised he would have an update no later than Tuesday, October 5, 2021. Mr. Zazzali did not mention the possibility of an EAP. On October 6, 2021, Mr. Zazzali advised Board counsel via email that while he now believed he was getting a status update on Friday, October 8, 2021, he stated "Ms. Camilo is unlikely to be in the classroom this Fall, perhaps obviously." Id. at 5.

To be clear, it was not obvious to the Board that Ms. Camilo would not be back in the classroom that Fall. Mr. Zazzali still did not mention the possibility of an EAP. Board counsel responded via email that same date, and explained Ms. Camilo "cannot dictate when she goes into the classroom," and "if she is not cleared on or before [October 15, 2021], my client will likely direct me to pursue additional steps to terminate her employment. We have been extremely patient." Id. at 4.

Mr. Zazzali acknowledged receipt — without mentioning the EAP — and then, five (5) days later on October 11, 2021, advised Board counsel that Ms. Camilo enrolled in the EAP on October 8, 2021. Id. at 2. The email further stated: "[a]t the successful completion of that program, Ms. Camilo will presumably submit for a completion of her Fitness For Duty examination, for pending return to employment, as required by the Board of Education." Id. It bears repeating this requirement was not set forth by the Board, but rather Arbitrator Klein's June 3, 2021 Opinion and Award. Moreover, Mr. Zazzali specified no timeline in which either the EAP or the Fitness For Duty exam would be completed.

None of the communications between the Board and Mr. Zazzali between June 2021 and October 2021 mentioned an EAP, until October 11, 2021. Moreover, as was testified to at length by Mr. Wohlrab, Ms. Camilo never sought authorization for a leave of absence to enroll in the EAP. Accordingly, justifiably frustrated with Ms. Camilo's obstruction of this process and failure to communicate her progress, the Board filed the Revised Tenure Charges in Count 1 that Ms.

Camilo abandoned her position.

A tenured public-school employee cannot be dismissed from employment "except for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. The Board bringing tenure charges must prove that the factual allegations are true, and that the penalty is just, by a "preponderance of the credible evidence." In the Matter of the Tenure Hearing of Mark C. Bringhurst, School District of the City of Vineland, Cumberland County, Agency Docket. No. 236-8/12; see also In the Matter of the Tenure Hearing of Jill Buglovsky, School District of the Township of Randolph, Morris County, Agency Docket. No. 484-12. The court in In re Polk 90 NJ 550, 560 (1982), outlined that the evidence "need not have the attribute of certainty, but it must be well founded in reason and logic." Lesniewski v. W.B. Furze Corp., 308 N.J. Super., 270, 279 (App. Div. 1998) (quoting Lister v. J.B. Eurell Co., 234 N.J. Super. 64, 72 (App. Div. 1989)).

Regarding abandonment of position, "excessive or chronic absenteeism of a tenured teacher, even if related to legitimate medical or health problems, has been held to constitute "incapacity," "unbecoming conduct," and/or "just cause" within the meaning of 18A:6-10. State-Operated School District of Jersey City, Hudson County v. Vincent Pellecchio, 92 N.J.A.R. 2d. (EDU) at *7 (1992).

The rationale behind abandonment warranting termination is justified."[T]here is no question that repeated and excessive absenteeism of regular teachers poses a threat to the integrity of the educational process." Trenton

Board of Education v. Williamson, OAL Docket No. EDU 7335-85 at *4 (April 14, 1986) aff'd by Comm'r (May 28, 1986). In other words, it is not merely the teacher's prolonged absence that supports termination, but the effect it has on the school's efficient operations as well. Importantly, "the point at which absenteeism is judged to be chronic falls within the prerogative and discretionary authority of the Board." Pellechio, supra at *6 (internal citation omitted).

To determine whether abandonment of position has occurred, three (3) factors must be considered: (1) the particular circumstances of the absences and not merely the number of absences; (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred; and (3) whether some warning had been given to the employee that his or her supervisors were dissatisfied with the pattern of absences. See In the Matter of the Tenure Hearing of Lena White, State-Operated School District of Jersey City, Hudson County, 92 N.J.A.R. 2d (EDU) 157 (1991); see also Kelsey v. Board of Education of the City of Trenton, Mercer County, Commissioner Decision No. 127-89 (May 11, 1989).

Perhaps most critical to this analysis is the fact that the employee's intent to return to his or her position is largely not dispositive. In I/M/O Tenure Hearing of Giuseppe Amodei, supra, the respondent teacher had a knee issue which was preventing him from performing his duties. Id. at *2. Yet, the Commissioner of Education, in issuing the decision, found that "respondent's decision to undergo a knee replacement was driven, at least in part, by his desire to restore his ability to

physically handle his teaching position. It would thus be counterintuitive to conclude that his actions signified an intent to abandon that position." Id. at *3.

However, and essential to this analysis, the Commissioner emphasized: "[t]he determination that respondent did not abandon his position, however, does not dispose of the ultimate issue in this case. Frequent or prolonged absences can, regardless of the reason warrant dismissal from a position." In the Matter of the Tenure Hearing of Giusseppe Amodei, New Jersey State Juvenile Justice Commission, No. 575-9/10, 2011 WL 7030981, at *3 (EFPS October 13, 2011) (citing State-Operated School District of Jersey City v. Vincent Pellechia, supra).

The argument here is simple. Ms. Camilo had ample time to complete the required Fitness For Duty examination, and her failure to do so constitutes abandonment of position, thus warranting her termination. Alternatively, Ms. Camilo's evidenced inability to remain in the classroom also warrants termination. To address the three (3) factors prescribed by relevant law, the argument is summarized as follows: Ms. Camilo's protracted absence from work was in large part due to her own failure to receive clearance to return, notwithstanding the administrative leave. Furthermore, given Ms. Camilo's role as a special education teacher of which there are limited personnel, her absence detrimentally affected the students most in need. Lastly, the evidence produced substantiates the Board's myriad attempts to return her to the classroom and expressed the Board's significant dissatisfaction with her absence from work. The Board submits the evidence produced at the May 12, 2022 hearing substantially supports the

conclusion Ms. Camilo abandoned her position, based upon a preponderance of the evidence, as required by relevant case law.

During the May 12th hearing, Ms. Camilo acknowledged that she had several appointments scheduled — after rejecting the Board's chosen physician — and still failed to comply with the June 3, 2021 Opinion and Award. As previously discussed, Ms. Camilo testified she endured several "obstacles" preventing her examination, including: waking up to water in her apartment, waking up to raw sewage in her apartment, and learning that her daughter was in a serious motor vehicle accident. Even assuming, *arguendo*, the Arbitrator determines Ms. Camilo had justifiable excuses for missing those summer appointments, no such justification was proffered for the month of September 2021, i.e. the first month of the 2021-2022 School Year. There is nothing to suggest she even attempted to submit for examination in September 2021. Ms. Camilo testified she knew in August 2021 that the Board was considering refiling tenure charges. T144:7-9. Moreover, she testified she had this knowledge before she was even aware of the EAP program's existence. T144:10-13.

It further bears emphasizing the issue underscoring the entire matter: Ms. Camilo's actual fitness for duty. Ms. Camilo testified that, on multiple occasions, she could not complete her Fitness For Duty examination because she was not in the right "mental" or "emotional" state of mind. See T118:21-23 ("I needed help for, [sic] to handle my emotional status at that point of time."). This goes to the heart of the matter. Ms. Camilo intentionally delayed her Fitness For Duty examination

because she did not believe she would successfully complete the exam.

Ms. Camilo has argued previously that she submitted for a Fitness For Duty examination in February 2022 and was successful in same. But as the Board noted at the time, reliance on that examination is misplaced due to its inconclusive nature. In fact, it is the Board's position that the February 2022 examination — occurring more than 3 months after the Revised Tenure Charges were filed — should have no bearing on this matter. Indeed, the Arbitrator has previously determined that the results of said examination do not preclude a judgment on the merits for the abandonment charge, as the Revised Tenure Charges were filed before the exam was conducted. This aligns with the Board's case: the question presented is whether Ms. Camilo had abandoned her position at the time the Revised Tenure Charges were filed.

Mr. Wohlrab testified to the particular issues caused by Ms. Camilo's protracted absence. Specifically, he testified that at the time Ms. Camilo was first placed on leave in October 2019, she was "in the middle school supporting special education." T58:22-23. He further testified that currently the Board is suffering a "shortage of teachers," which makes it "very difficult for [the Board] to find special education teachers." T59:8-11.

In fact, Mr. Wohlrab testified that the Board has in its employ only fifteen (15) special education teachers with the same certification that Ms. Camilo holds, such that "when we don't know what staff is in place or when they're going to be in place,

there's a lot of shuffling. And it's a huge deterrent to the education process and affects the students greatly." T60:15-16; 61:8-12. This is particularly the case for special education teachers who teach self-contained students, meaning "it's a different education from the special education teacher." T60:21-22. In other words, when a special education teacher is absent, "[i]t prohibits the growth of students, "because the special education students are "the most-needy' pupils. T59:11-13. As Mr. Wohlrab testified: "[e]specially in time of COVID with the internet and trying to learn over remote, not to have a full-time teacher and the scheduling, it is a lot of dominoes that fall when you don't have your staff in place by September." T59:13-18.

Lastly, it is virtually undisputed that the Board repeatedly expressed its dissatisfaction to Ms. Camilo about her nearly three (3) year absence. The email chain in Board Exhibit 7 demonstrates several attempts to receive the status of Ms. Camilo's still-outstanding Fitness For Duty examination. See Id. As Ms. Camilo testified, she had received a Rice notice in August 2021, and was aware the Board was considering additional tenure charges due to her continued noncompliance. T144:7-9.

Simply put, there is substantial evidence in the record showing the Board was persistent in warning Ms. Camilo, through counsel, that her continued absence would not be tolerated. Her absence, indefinitely prolonged upon her own volition, created significant instructional issues within the district and the Board repeatedly sought to have her return. Ms. Camilo's unilateral delay of this process

effected several warnings from the Board that she needed to successfully complete her Fitness For Duty examination. Accordingly, it is respectfully requested that this third factor of the analysis is satisfied as well.

In conclusion, the Board is responsible for providing an environment in which students are provided a thorough and efficient education through engaged and active instructors. It is impossible to achieve that objective when a teacher does not satisfy her obligations and is absent for nine hundred and sixty-one (961) days. In this matter, Ms. Camilo has effectively abandoned her position by failing to timely complete a Fitness For Duty examination as of the filing of the Revised Tenure Charges. Her absence was unduly protracted upon her own volition; her absence created significant issues for a district trying to meet the needs of special education students; and she was warned through counsel on several occasions her continued absence would not be tolerated.

Lastly, and significantly, her continued absence was in direct contravention of Arbitrator Klein's June 3, 2021 Opinion and Award, as admitted by Ms. Camilo on several occasions through cross-examination. Thus, based upon the preponderance of the evidence, Ms. Camilo has abandoned her position and her termination is justified pursuant to relevant New Jersey law.

Respondent Yesenia Camilo

TEACHNJ Act tenure charge proceedings are required to be determined pursuant to the American Arbitration Association Labor Arbitration Rules. N.J.S.A.

18A:6-22 (c), and not the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. That being the case, and depending on the nature of the charges, the arbitrator is vested with discretion to determine the quantum of proof required to support the discipline or discharge of an employee.

Whatever standard of proof is applied, it is well settled that when evidence is in equipoise, and there is no other persuasive evidence, the question in issue must go against the party who has the burden of persuasion. In re Tenure Hearing of Clare Miller, Union County Educational Services Commission, O.A.L. Docket No. 5812-01, Agency Docket No. 240-7/01 (decided April 8, 2002); see also In re Tenure Hearing of Elbert Smith, Hudson County Area Vocational-Technical Schools, 96 N.J.A.R. 2d (EDU) 903, 910; Pacifico v. Pacifico, 2009 WL 436465 (N.J. Super. App. Div. 2009); Concord Insurance Co. v. Miles, 118 N.J. Super. 551 (App. Div. 1972); Ford Motor Co. v. Coleman, 402 F. Supp. 475, 493 (D.C. 1975); United States v. Dudley, 62 F.3d 1275, 1276-77 (10th Cir. 1995).

The Board failed to carry its burden of proof with respect to the Tenure Charge and it should therefore be dismissed. The charge is based on Ms. Camilo's alleged abandonment of her position by allegedly failing to submit to and complete a Fitness For Duty examination as required by Arbitrator Klein's June 3, 2021 Opinion and Award. The evidence shows, however, that Ms. Camilo made reasonable and good faith efforts to complete a Fitness For Duty examination and ultimately successfully completed such an examination with the Board's in-house doctor. The evidence also shows that throughout Ms. Camilo's efforts to submit to

and complete a Fitness For Duty examination, unexpected and uncontrollable events took place in her personal life that delayed the completion of the examination.

Arbitrator Klein's Opinion and Award does not specify precisely when Ms. Camilo was required to complete a Fitness For Duty examination. Nonetheless, at all material times, Ms. Camilo attempted to promptly complete a Fitness For Duty examination. She searched for a doctor to conduct the examination following receipt of Arbitrator Klein's Award. Ms. Camilo initially had difficulty retaining a doctor due to the impacts of Covid-19 on doctors' schedules and availability. Ultimately, Ms. Camilo made an appointment with Dr. Rafanello in July 2021, however Dr. Rafanello required Ms. Camilo to attend multiple appointments to complete the examination.

Ms. Camilo completed the first portion of the examination on July 27, 2021. Thereafter, another appointment was scheduled for August 3, 2021. That was when Ms. Camilo began encountering unexpected events in her personal life that interfered with her ability to complete the examination with Dr. Rafanello. On the day of Ms. Camilo's second appointment, her home flooded. Despite that circumstance, Ms. Camilo appeared for the appointment, albeit late and emotionally upset because her intention was to complete the examination, comply with Arbitrator Klein's award and return to work. However, when she arrived for the appointment, Ms. Camilo was directed to reschedule it by Dr. Rafanello's office. Ms. Camilo rescheduled it for August 14, 2021.

On August 14th, Ms. Camilo's home flooded once again, this time with sewage due to a backup in the sewage line. Despite the sewage flood in Ms. Camilo's home, she appeared in Dr. Rafanello's office for her appointment on August 14, 2021, because she appreciated the need to complete the examination in order to return to work. However, she was visibly upset when she arrived and did not feel mentally prepared to complete that portion of the examination that day. As such, Ms. Camilo requested that the appointment be rescheduled and it was for August 24, 2021.

On August 24, 2021, however, Ms. Camilo's daughter was involved in a car accident. Ms. Camilo attended to her daughter following the accident and then appeared for her appointment with Dr. Rafanello. When she arrived for the appointment, she was upset and emotionally distraught. The series of events began to have a cumulative effect on Ms. Camilo. When Dr. Rafanello met with her, she stated that she could not "read" Ms. Camilo and advised that the examination could not go forward that day.

After this series of events, and being unable to complete the examination on August 24, 2021, Ms. Camilo contacted her Union president for guidance because she was concerned that she would be unable to return to work for the commencement of the school year. At that time, Ms. Camilo was faced with significant stress in her personal life. The flooding in Ms. Camilo's home resulted in the loss of her water heater, her furnace, and her refrigerator. Ms. Camilo did not have an income and was unable to pay for her child's college tuition. And most

recently, her daughter was injured in a car accident.

After consulting with her Union president, Ms. Camilo determined to seek psychological treatment from an Employee Assistance Plan ("EAP"), Ms. Camilo's EAP provides employees with skills and therapy for emotional issues. In order to enter an EAP, an individual such as Ms. Camilo must be screened and accepted. Ms. Camilo was accepted into the EAP in early October 2021. Her enrollment in the EAP shows that it was her intention all along to return to work. Entrance into the EAP was a responsible and reasonable step to take in light of the stressors Ms. Camilo was confronted with at the time, which were interfering with her ability to successfully complete a Fitness For Duty Examination. Her intention was to obtain the help she required, and then submit to and complete a Fitness For Duty examination.

Monica Valencia was Ms. Camilo's social worker from the EAP. Ms. Valencia certified that Ms. Camilo enrolled in the EAP and was receiving treatment three (3) days a week for three (3) hours a day. See Respondent Exhibit 1. Immediately following Ms. Camilo's receipt of the letter from Ms. Valencia, it was sent to the Board through its attorney by Ms. Camilo's then-attorney. T103:3-104:12. See also Board Exhibit 7. Moreover, by email dated October 11, 2021, Camilo's then-attorney advised the Board's attorney that Ms. Camilo had enrolled in an EAP and begun to receive counseling and treatment. Id. at p. 2. The Board was therefore aware, as of October 11, 2021, that Ms. Camilo had entered an EAP for treatment and counseling.

In or around the end of November 2021, Ms. Camilo progressed sufficiently for her sessions to be reduced to once a week for one (1) hour. After showing more progression, Ms. Camilo was discharged from the EAP on December 15, 2021. When she was discharged, she promptly sought to submit to and complete a Fitness For Duty examination. After Ms. Camilo consulted with her then-attorney who spoke with the Board's attorney, the Board proposed a doctor to perform Ms. Camilo's Fitness For Duty examination.

After agreeing to see Dr. Vincent Z. Ruiz, an examination was scheduled to take place on February 1, 2022. Dr. Ruiz is the Board's in-house psychiatrist. Ms. Camilo appeared for the February 1, 2022 appointment and completed the Fitness For Duty examination with Dr. Ruiz on that date. Dr. Ruiz issued a report following Ms. Camilo's Fitness For Duty examination. See Respondent's Exhibit 2. In his report, Dr. Ruiz clears Ms. Camilo to return to duty.

Abandonment of position takes place where a teaching staff member is absent from their position for an extended period of time with no explanation for the absence. See In re Tenure Hearing of Linda Lane, Newark School District, 1987 S.L.D. 1073; In re Tenure Hearing of Noemia Gomes, Elizabeth Board of Education, Agency Docket No. 69-3/18 (DeTreux, March 4, 2019). The evidence shows that Ms. Camilo intended to return to work from the day she received Arbitrator Klein's Award. And she made a good faith attempt to comply with Arbitrator Klein's Award throughout the relevant time period. Indeed, it can be inferred that the fact that Arbitrator Klein did not set a date certain for the

examination to be completed in her Award is a recognition of the nature and realities of scheduling and completing a Fitness For Duty examination in a Covid-19 setting and an acknowledgement that at times, employees can be confronted with unforeseeable and uncontrollable circumstances that could interfere with the completion of a Fitness For Duty examination. As such, because the Board failed to carry its burden with respect to the abandonment of position charge, this Charge should be dismissed.

The Board's policy, generally, is that when it directs an employee to submit to a Fitness For Duty examination, it places the employee on administrative leave pending the results of the examination and a clearance to return to work. And an employee on administrative leave need not request a leave of absence or have such a request approved by the Board. The Board has the prerogative to place the employee on administrative leave. Additionally, when the Board certified tenure charges against an employee, the employee is placed on administrative leave without pay by the Board pending the results of the tenure charges.

Ms. Camilo was ordered reinstated by Arbitrator Klein pending the successful completion of a Fitness For Duty examination. By definition, Ms. Camilo was ordered out from work by an arbitrator until she completed an examination. And, in any event, when an employee is directed to submit to such an examination, the Board places the employee on an involuntary administrative leave. Under these circumstances, Ms. Camilo was not required to, nor was it necessary to, request a leave of absence while she was making efforts to complete the examination. The

Board's witness, Scott Wohlrab, conceded that he knew that Ms. Camilo was out from work by order of an arbitrator pending the results of the Fitness For Duty examination. Moreover, the collective negotiations agreement ("CNA") between Ms. Camilo's Union and the Board has no provision governing Fitness For Duty examinations and administrative leave pending the results of the examination are unaddressed by the CNA.

The Board was well-aware of the fact that Ms. Camilo had enrolled in an EAP before it determined to file tenure charges against her. That action against Ms. Camilo was and is barred by N.J.S.A. 34:13A-42, which provides in pertinent part: "[n]o public employer shall take any action against an employee of the employer, including termination, because the employee . . . has obtained counseling, referrals or other services from an employee assistance program or has obtained treatment or other services from any program to which the employee assistance program refers the employee . . ."

Here, by October 13, 2021, Ms. Camilo began treatment with the Rutgers University Employee Assistance program ("EAP"). Contrary to its assertion that Ms. Camilo has failed to present medical documentation justifying her absence, the Board was informed of Ms. Camilo's enrollment in the EAP on October 11th and 13, 2021. She was not referred to the EAP by the Board; and did not fail to make a good faith attempt to comply with the recommendations made by the EAP. Rather, Ms. Camilo successfully completed the EAP. Further, the Charge is not based on any alleged workplace misconduct by Ms. Camilo or poor work

performance as contemplated by the statute.

Instead, the Charge is based solely on Ms. Camilo's alleged failure to complete a Fitness For Duty examination which was ordered by an arbitrator and not by the Board. And the Board's determination to file tenure charges against Ms. Camilo was made shortly after she entered the EAP and provided the Board with notice that she had entered the EAP. It can thus be inferred that the Board took umbrage to Ms. Camilo's entrance into the EAP and that it served as the impetus for the Board's decision to move forward with tenure charges. And that is the precise circumstance and adverse action that N.J.S.A. 34:13A-42 seeks to prevent and make unlawful. Based on the above, under the plain language of N.J.S.A. 34:13A-42, the Board is prohibited from taking any action against Ms. Camilo, including the prosecution of tenure charges seeking Camilo's termination. Accordingly, the tenure charge should be dismissed for this reason as well.

Due to all of the above, it is respectfully submitted that the Charge should be dismissed in its entirety and with prejudice. The Board did not carry its burden of proof as the charge is not supported by the evidence presented. Consequently, the Board should be ordered to reinstate Ms. Camilo to her tenured teaching position together with an award of back salary (to wit: the salary withheld while on suspension without pay pursuant to N.J.S.A. 18A:6-14) and re-crediting of all other benefits and emoluments of employment that should have accrued to her during that period.

If it is determined that the charge is true, it then becomes necessary to address the question of the appropriate penalty to impose upon Ms. Camilo. N.J.S.A. 18A:28-5 speaks of dismissal or reduction in compensation. The standard for administrative proceedings holds 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; the effect of such conduct on the maintenance of discipline among the students and staff; and the likelihood of such behavior recurring. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

However, in arbitrations which are litigated pursuant to the American Arbitration Association Labor Arbitration Rules, it is eminently clear that much broader discretion is vested in the arbitrator to review the reasonableness of the penalty which has been imposed, or is being sought by the employer, in relation to the employee's wrongful conduct. Consequently, the Arbitrator is required to bring his informed judgment to bear in order to reach a fair solution of a problem, especially when it comes to formulating remedies.

Due to the facts of this matter, the conduct for which Ms. Camilo has been charged demonstrated at most a delay in completing the required Fitness For Duty Examination, which she respectfully submits was unforeseeable and out of her control. However, importantly, Ms. Camilo's actions evidenced a clear intent to return to work. In light of her efforts to comply with the terms of Arbitrator Klein's Opinion and Award; her effort to successfully complete an EAP; and her eventual successful completion of a Fitness For Duty examination on February 1, 2022,

dismissal and/or any further loss of salary would be too harsh a penalty under these circumstances.

If it is determined that the charges are true, standing alone, this incident does not merit the imposition of any further penalty upon Ms. Camilo beyond that which has already been imposed — to wit: her loss of pay from the effective date of Arbitrator Klein's Opinion and Award on June 3, 2021 through her unpaid suspension pursuant to N.J.S.A. 18A:6-14.

In conclusion, based on all of the above, it is respectfully submitted that the Tenure Charge be dismissed in its entirety, together with a Order requiring the Board to return Ms. Camilo to her tenured teaching position forthwith, together with back pay and all emoluments and benefits of employment.

IV. STATEMENT OF THE CASE

It is axiomatic that the tenure laws of our State were originally enacted and designed to establish a "competent and efficient school system," and to protect teaching and other staff from dismissal for "unfounded, flimsy or political reasons." See generally Viemeister v. Prospect Park Board of Education, 5 N.J. Super., 215, 218 (App. Div. 1949); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). The statutory status of a tenured individual should accordingly not be lightly removed. See In re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (January 12, 2009) adopted by the Commissioner of Education (May 2, 2009).

N.J.S.A. 18A:6-10 provides that a tenured teacher may not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause..." Because the Petitioner is the moving party in this disciplinary matter, the Board encumbers the prefatory burden of making a *prima facie* showing that it has satisfied or established the sufficiency of the unbecoming conduct or abandonment of position tenure charge by a preponderance of the credible evidence. See In the Matter of the Arbitration of the Tenure Charge between the School District of the City of Burlington, Burlington County and Penny Keough, Agency Docket No. 119-4/16 (Pecklers, 2016 at pp. 67-68); see also In the Matter of the Tenure Hearing of Mark C. Bringhurst, School District of the City of Vineland, Cumberland County, Agency Docket No. 236-8/12; In the Matter of the Tenure Hearing of Jill Buglovsky, School District of the Township of Randolph, Morris County, Agency Docket No. 484-12; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971).

In that event, the burden of production will shift to Respondent to plead and prove her affirmative or exculpatory defenses. And if a determination is made that the tenure charge has been established, Petitioner shoulders the additional burden of demonstrating that dismissal for the charged conduct is warranted and proportional. I am then tasked with the consideration of the totality of the circumstances; the nature of the act(s); and the impact on Ms. Camilo's career. See In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967). Following a comprehensive analysis of the record evidence, with careful consideration of the

respective positions and the indexing of the transcript, I find that the instant tenure charge is **SUSTAINED IN PART**, as while Ms. Camilo violated the Fitness For Duty examination directive of the Klein Opinion and Award, she did not abandon her position at the time of the filing of the subject Revised Tenure Charge.

The majority of the material facts in this case are undisputed and fully developed in the position statements of counsel. At the outset of this discussion, arbitral notice is taken that there is no question that repeated and excessive absenteeism poses a threat to the integrity of the education process. See Trenton Bd. Of Ed. V. Williamson, OAL Docket No. EDU 7335-85 at *4 (April 14, 1986) aff'd by Comm'r (May 28, 1986). This is particularly true when as here, the pupil population to be serviced is special needs, coupled with the unique educational challenges for remote learning in the COVID-19 era. The Petitioner has raised many potent and in fact compelling arguments, buttressed by the credible testimony of Assistant Superintendent Wohlrab. These related to the deleterious effect Ms. Camilo's lengthy absence has had upon her students. Included among them was the fact that a shortage of special education teachers was exacerbated by the difficulty in scheduling Respondent's uncertain return.

The Board has invited me to revisit and include many of the days Ms. Camilo was absent from school during the pendency of the initial tenure charges fully adjudicated before Arbitrator Klein. Respondent lodged a muscular standing objection to any consideration of the same, both at the May 12th hearing and in brief. That ship has sailed, however. On that count, the argument is made and

reiterated by Petitioner that "this case involves a teacher who has not worked in nine hundred and sixty-one (961) days." This contention is of course designed to conform the facts of the instant case into the well-established rubric of abandonment of position case law.

However, a review of the Board's citation makes clear that it is not on point and factually inapposite. See e.g. State-Operated School District of Jersey City, Hudson County v. Vincent Pellecchio, 92 N.J.A.R. 2d. (EDU) at *7 (1992); In the Matter of the Tenure Hearing of Lena White, State-Operated School District of Jersey City, Hudson County, 92 N.J.A.R. 2d. (EDU) 157 (1991); In the Matter of the Tenure Hearing of Giuseppe Amodei, New Jersey Juvenile Justice Comm'n, No. 575-9/10, 2011 WL 7030981. Nor has Petitioner demonstrated that the three (3) part abandonment test articulated by White is applicable in the instant case, or has been met. Instead as Respondent has underlined, abandonment of position takes place where a teaching staff member is absent from her position for an extended period of time with no explanation for the absence. See generally In re Tenure Hearing of Linda Lane, Newark School District, 1987 S.L.D. 1073; In re Tenure Hearing of Noemie Gomes, Elizabeth Board of Education, Agency Docket No. 69-3/18 (DeTreux, March 4, 2019).

My scrutiny of the operative events commences with the issuance of the Klein Opinion and Award on June 3, 2021. See Board Exhibit 4. At page 42 of the Award, Arbitrator Klein sustained Charge II, Counts 3 and 4, as well as Charge III, Count 1. The remaining tenure charges were denied. Paragraph 2 went on to

indicate: "Respondent Yesenia Camilo shall be reinstated pending successful completion of a Fitness For Duty examination. Respondent Yesenia Camilo's increment for the 2021-2022 school year shall be withheld." Ibid.

Respondent has made much of the fact that Arbitrator Klein neglected to provide a time period during which the Fitness For Duty exam would be completed by Ms. Camilo. But a fair reading of this language convinces me that the intention was to have Respondent reinstated to her position for September 2021 after she successfully passed the FFD. This was early June and the Board, which was short on special education teachers, certainly contemplated that scenario. The testimony by Ms. Camilo at the May 12th hearing also supports the Petitioner's position, which was that Respondent understood the directive to mean "ASAP." See T40:18; T128:22-129:1; T141:23-142:3.

By correspondence dated June 25, 2021, Respondent's then-counsel James R. Zazzali, Esq. responded to a letter from Board counsel regarding a Fitness For Duty examination being scheduled with Dr. Kezmarsky. This objected to the use of the physician based upon a potential, if not inherent conflict of interest. Mr. Zazzali further advised that Ms. Camilo would submit to a Fitness For Duty examination by Dr. Nicole J. Rafanello, pending Board approval and at Respondent's expense, on either July 1st and 6, 2021 or July 8th and 13, 2021. See Board Exhibit 6.

The record reflects that Ms. Camilo did not complete her Fitness For Duty

exam with Dr. Rafanello, and no documentation related to the same appears. Ms. Camilo testified that her first appointment was July 27, 2021 which she attended. T85:18. The doctor then wanted her to complete the evaluation on a later date, August 3, 2021. T87:13. According to Respondent, however, she arrived at that appointment forty-five (45) minutes late after she woke up with three (3) feet of water in her apartment. This caused Dr. Rafanello's office to reschedule her for August 14, 2021. T84:3-4; T89:11-12. However, on that date Ms. Camilo recalled, she woke up with a foot of raw sewage in her apartment. T89:17. While she went to the exam, Ms. Camilo did not complete it because "I didn't think I was ready for this evaluation because mentally, I was so disgusted." T91:21-22; T92:3-5. The exam was thereafter rescheduled one final time on August 24, 2021. But on that date, Ms. Camilo's daughter had a serious car accident. T93:17. She was nevertheless able to make the appointment, but Dr. Rafanello reportedly told her that she was not in "any state of mind" to complete the exam. T94:19.

By any measure, these circumstances constitute adversity on an epic scale, bordering on incredible. The fact remains that Ms. Camilo's testimony was unrebutted and notwithstanding the fact that no documentary evidence was introduced by Respondent, I am willing to give her the benefit of the doubt and do not find that she deliberately failed to complete the FFD with Dr. Rafanello. That said, I fully credit the Petitioner's position that during the six (6) week period between August 24, 2021 and October 11, 2021, Ms. Camilo made no attempt to complete a Fitness For Duty exam as directed by Arbitrator Klein. This was so,

even though she was aware that the same should be completed ASAP and that her students would be reporting to school in September. The email string at Board Exhibit 7 illustrates that Mr. Zazzali was likewise not kept in the loop by Respondent, as well as the Board's understandable increasing impatience to establish the status of Ms. Camilo's Fitness For Duty examination.

In its zeal to bolster its abandonment *bona fides*, Petitioner insists that none of the communications between the Board and Mr. Zazzali between June 2021 and October 2021 mentioned an EAP until October 11, 2021. Further, as testified to at length by Mr. Wohlrab, Ms. Camilo never sought authorization for a leave of absence to enroll in the EAP. Nevertheless, as brought out on cross and trumpeted by Respondent, this overlooked the fact that Ms. Camilo was placed on an unpaid administrative leave when the initial tenure charges were filed, which was extended by operation of law after the Klein Award. The assistant superintendent conceded the same during his testimony.

Under these circumstances, there was no requirement for Ms Camilo to request a leave of absence. It is also of no moment that Mr. Zazzali failed to mention an EAP-referral or that Ms. Camilo was not even aware of the possibility of the same until she spoke with her Association president. Moreover, by October 13, 2021, the Board had actual notice of this participation. See ZAZZALI TO TAYLOR Email, at Board Exhibit 7, supra at p. 2; see also OCTOBER 12, 2021 LETTER FROM MSW, LSW VALENCIA OF THE COUNSELING CENTER, at Respondent Exhibit 1.

This was well before the Revised Tenure Charges were preferred in late November of 2021. And while I decline to ascribe sinister motives to the Board, my interpretation of N.J.S.A. 34:13A:42 PROHIBITION UPON ADVERSE EMPLOYMENT ACTION AGAINST EMPLOYEES UTILIZING [EAP] PROGRAM is consonant with Respondent's, in that "[n]o public employer shall take any action against an employee of the employer, including termination, because the employee or a dependent of the employee has obtained counseling, referrals or other services from an employee assistance program or has received treatment or other services from any program to which the employee assistance program refers the employee or dependent, unless the employee was referred by the employer to the employee assistance program due to issues related to job performance and fails to make a good faith effort to comply..." The record establishes that EAP was completed in early December 2021. Ms. Camilo's absences during the relevant period are accordingly protected.[2]

The remaining question that must be addressed, is the correct penalty to be assessed in this case. This will only come into play, of course, in the event that Ms. Camilo is found fit for duty and cleared to return to work. When the totality of

2/ After the assignment of this case to me as the Arbitrator and with my assistance, a Fitness For Duty exam was scheduled for Ms. Camilo on February 1, 2022 with the Board's psychiatrist, Dr. Vincent Z. Ruiz. Ms. Camilo appeared as scheduled, and was examined. This resulted in the PSYCHIATRIC EVALUATION at Respondent Exhibit 2. The ASSESSMENT reached by Dr. Ruiz was that "Ms Camilo showed no evidence of depression or psychosis. She was not a danger to herself or others at the time of this evaluation." Ibid. The Petitioner subsequently refused to accept the Ruiz FFD, which it deemed inconclusive. There is a sharp difference of opinion between the parties on the application of this, with Respondent urging that Ms. Camilo was cleared to return to duty. For its part, Petitioner insists that it should be afforded no weight, as it also took place more than three (3) months after the revised charges were filed. In my view and on balance, I would exceed my authority were I to embrace Respondent's request, as Dr. Ruiz did not testify at the May 12th hearing. That said and as I mentioned at that time, while I do not view it as dispositive it certainly evidences a continuing desire on the part of Ms. Camilo to finally complete the Fitness For Duty examination ordered by Arbitrator Klein, and fatally undercuts Petitioner's position that she abandoned her position.

the foregoing circumstances is considered, in conjunction with the guidance provided by In re Fulcomer, I believe that a written reprimand that is conditionally removed at the completion of the 2022-2023 School Year is appropriate.

I share Respondent's view that any additional financial penalty would be harsh under the circumstances. Ms. Camilo had her 2021-2022 School Year increment held by Arbitrator Klein, and was placed on an unpaid suspension herein for the initial 120-day period per N.J.S.A. 18A:6-14. I am mindful of the fact that her six (6) week period of inaction preceded her October 11, 2022 entry into the EAP. As she was screened and accepted into the program by Rutgers, I must therefore assume that she was under emotional distress during this time.

Respondent will accordingly be afforded a final opportunity to pass an FFD and be returned to work. Should she fail to appear for this examination, it will be at her own peril. Jurisdiction will be retained for a period of thirty (30) days simply to assist counsel with any remedial issues that may surface and ensure that Ms. Camilo may return to the West New York School District and her special needs students if medically cleared in September. IT IS SO ORDERED.

V. CONCLUSION

Petitioner has established by a preponderance of the credible evidence that Ms. Camilo failed to comply with the terms of the Klein Opinion and Award, but has not demonstrated that the failure to submit to the same as of the date of the filing of the tenure charges constituted an abandonment of her position and/or other just cause for her removal.

AWARD

1. The subject Revised Tenure Charge is sustained in part. Respondent shall receive a written reprimand, which shall be expunged from Ms. Camilo's personnel file after the 2022-2023 School Year, provided that she does not receive any further discipline during this period.

2. Within five (5) business days of the receipt of this AWARD, the Board shall schedule a psychiatric Fitness For Duty examination for Ms. Camilo pursuant to N.J.S.A. 18A:16-3, which shall be held within fourteen (14) business days. The doctor administering the Fitness For Duty exam shall definitely state in the report that Ms. Camilo "is" or "is not" fit to return to her teaching duties. This timeline may be amended by mutual agreement of counsel in the event of scheduling difficulties. The failure of Ms. Camilo to attend the Fitness For Duty shall result in an adverse inference being drawn that she is unfit for duty. An absence may be excused only for an emergent and documented circumstance.

3. In the event that Ms. Camilo is declared fit for duty, she shall be immediately reinstated to her tenured teaching position with the West New York School District with full seniority and benefits and receive any lost wages and benefits beyond the 120th day, pursuant to N.J.S.A. 18A:6-14, minus any period of delay caused by Respondent as previously discussed with counsel.

4. In the event that Ms. Camilo is deemed unfit for duty, the Board shall follow the provisions of Policy 3161, as contemplated by Arbitrator Klein, in Agency Docket No. 189-9/20.

5. Jurisdiction shall be retained for a period of thirty (30) calendar days for the limited purpose of assisting counsel should any remedial issues occur. This constitutes the entire Award in this matter.

Dated: July 5, 2022

MICHAEL J. PECKLERS, ESQUIRE,
ARBITRATOR

STATE OF NEW JERSEY

COUNTY OF HUDSON

ON THIS 5TH DAY OF JULY 2022, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQUIRE**, TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN, AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

ZOILA R. VARGAS
NOTARY PUBLIC OF NEW JERSEY
Commission # 2374097
My Commission Expires 5/27/2023

172-22

New Jersey Commissioner of Education

Final Decision

Y.Y., on behalf of minor children, W.Y. and D.Y.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

Synopsis

In this matter, the Commissioner previously concluded in a July 2019 decision that petitioner's minor children were ineligible to attend school in North Arlington beginning with the 2014-2015 school year, and the petitioner was ordered to reimburse the Board in the amount of $30,720.36 for tuition costs incurred during the period of ineligible attendance. On appeal, the Appellate Division affirmed the Commissioner's finding that the children were not domiciled in North Arlington but remanded the matter to the Commissioner for factual findings regarding the calculation of tuition for the period from September 2015 to November 2015. The remand was prompted by the petitioner's argument on appeal that she disenrolled D.Y. from the district in September 2015 and began to homeschool D.Y., and the fact that it was not clear from the documents in the appellate record whether the tuition amount awarded to the Board included any period after September 2015.

On remand, the ALJ found, *inter alia*, that: the sole matter for determination here is the narrow issue of tuition calculation from September 2015 to November 2015; a review of the findings from previous proceedings at the OAL related to this matter – including the transcript of a February 14, 2019 hearing in which the ALJ received evidence regarding W.Y. and D.Y.'s dates of attendance, and certifications from business administrators at the schools attended by the children which set forth the tuition calculations in detail – confirmed that the Board is not seeking tuition for the time period after D.Y. began to be homeschooled in September 2015. The ALJ concluded that there was no issue to be addressed here, as the Board does not seek tuition for the period from September to November 2015. Accordingly, the ALJ granted the Board's request for tuition reimbursement and ordered that petitioner pay the respondent $30,720.36 for the time period in which her children were ineligible to attend North Arlington schools.

Upon review, the Commissioner, *inter alia*, concurred with the findings and conclusions of the ALJ, and directed petitioner to reimburse the Board in the amount of $30,720.36 for tuition costs incurred during the time period for which D.Y. and W.Y. were ineligible to attend school in North Arlington.

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

172-22
OAL Dkt. No. EDU 05271-17, 02504-22 (on remand)
Agency Dkt. No. 149-5/16

New Jersey Commissioner of Education

Final Decision

Y.Y., on behalf of minor children, W.Y. and D.Y.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

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

The Commissioner previously concluded that petitioner's minor children were ineligible to attend school in North Arlington beginning with the 2014-2015 school year and ordered petitioner to reimburse the Board in the amount of $30,720.36 for tuition costs incurred during that time. *Y.Y., on behalf of minor children, W.Y. and D.Y. v. Board of Education of the Borough of North Arlington, Bergen Cty.*, Commissioner Decision No. 173-19R, decided July 8, 2019. On appeal, the Appellate Division affirmed the Commissioner's finding that the children were not domiciled in North Arlington. However, the Appellate Division remanded the matter to the Commissioner for factual findings regarding the calculation of tuition for the period from September 2015 to November 2015. The remand was prompted by the petitioner's argument on appeal that she disenrolled D.Y. from the district in September 2015 and began to homeschool D.Y., and the fact that it was not clear from the documents in the appellate record whether the tuition amount awarded to the Board included any period after September 2015.

The Commissioner remanded the matter to the OAL, where the Administrative Law Judge (ALJ) reviewed the findings from the previous proceedings at the OAL, including the transcript of the February 14, 2019 hearing in which the ALJ received evidence regarding the children's dates of attendance, and the certifications of the business administrators at the schools attended by the children, setting forth the tuition calculations in detail. The ALJ's review confirmed that the Board had not sought tuition for the time period after D.Y. began to be homeschooled. The Commissioner's own review of the record confirms that the eight days of tuition awarded for the 2015-2016 school year predate D.Y.'s homeschooling. Petitioner's arguments regarding the period of homeschooling are therefore irrelevant, as no tuition was awarded to the Board for that time period.

Accordingly, petitioner is directed to reimburse the Board in the amount of $30,720.36[1] for tuition costs incurred during the time period for which D.Y. and W.Y. were ineligible to attend school in North Arlington.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 13, 2022
Date of Mailing: July 13, 2022

[1] This amount was calculated based on the dates of attendance and per diem tuition costs outlined in *Y.Y., on behalf of minor children, W.Y. and D.Y. v. Board of Education of the Borough of North Arlington, Bergen Cty.*, Commissioner Decision No. 173-19R, decided July 8, 2019. In its decision, the Appellate Division noted that it was unable to determine whether the tuition assessment previously ordered by the Commissioner was sustainable. It appears that neither party provided the Appellate Division with the transcript of the February 14, 2019 hearing or the certifications of the business administrators. Should this matter be appealed again, the parties should note that the Department of Education is not required to provide a copy of the record to the Appellate Division. The parties are responsible for providing pertinent documents to the Appellate Division pursuant to *N.J.Ct.R.* 2-6.1(a).

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 02504-22
AGENCY DKT. NO. 149-5/16

(ON REMAND EDU 05271-17)

Y.Y. ON BEHALF OF D.Y.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY,
Respondent.

Y.Y., petitioner, pro se

Eric Harrison, Esq. for respondent (Methfessel & Werbel, P.C.)

Record Closed: May 11, 2022 Decided: May 31, 2022

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

Petitioner, Y.Y. appealed the decision of respondent, Board of Education of the Borough of North Arlington, (Board) imposing tuition costs for her two children, W.Y. and D.Y., for attending school in North Arlington (District) where they were not domiciled. By way of background, Judge Gerson issued an Initial Decision under OAL

Docket Number EDU-09260-2016 whereby he determined, by Summary Decision, the children were not domiciled in North Arlington. The Commissioner of Education remanded the matter to Judge Gerson to have a hearing. Judge Gerson heard the matter on remand on July 7, 2017. OAL Docket Number EDU-05241-17. On May 8, 2018, Judge Gerson concluded that the children were not domiciled in North Arlington, but rather lived with their father in Kearney, New Jersey. Judge Gerson did not issue a Decision addressing the tuition cost for D.Y. or W.Y. for the school years 2014-2015 to that present time. The Commissioner remanded the matter again to calculate tuition owed for the two children and supplement the record if applicable.

On February 14, 2019, Judge Gerson held an in-person hearing to determine the tuition coats for both students attending school in North Arlington while domiciled elsewhere and relied upon the Certifications of John Susino, Business Administrator and Board Secretary for the Bergen County Technical and Special School Districts where W.Y. attended and the Certification of Kathleen Marano, Business Administrator for the North Arlington School District who calculated tuition owed for both children. Judge Gerson issued an Initial Decision on May 23, 2019, finding tuition owed to the District by petitioner for both children was $30,720.47. Kathleen Marano calculated the tuition based upon a daily rate of $60.24 for grade 5 during the 2014-15 school year and the daily tuition rate for D.Y. for grade 6 during the 2015-16 school year was $68.28. On July 8, 2019, the Commissioner adopted Judge Gerson's Initial Decision and rounded out the tuition to be $30,720.36. Petitioner appealed the Commissioner's Final Decision to the Appellate Division.

The Appellate Division agreed with the domicile determination but remanded for the narrow issue of tuition calculation from September 2015 to November 2015. The Appellate Division also stated that the February 14, 2019 transcript was not attached nor were the Certifications of Susino and Marano.

I held a telephone conference with petitioner and the Board's attorney of record and it was confirmed that tuition was not sought by the District from September to November 2015. The transcript of the February 14, 2019 hearing is attached hereto as well as the Certifications of John Susino and Kathleen Marano.

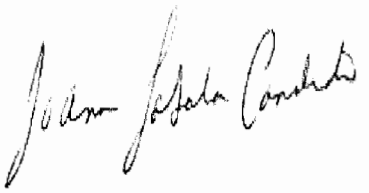
Having had the opportunity to review the ALJ's findings concerning the amount of tuition for each of the two children as well as the transcript and Certifications attached, I **CONCLUDE** that there is no issue to be addressed since the District was not seeking tuition from September to November 2015. Accordingly, this matter is dismissed, and respondent's tuition sought is granted in the amount set forth above.

Based upon the foregoing, it is hereby **ORDERED** that Petitioner is directed to reimburse the Board in the amount of $30,720.36 for tuition costs incurred during the time that W.Y. and D.Y. were ineligible to attend school in North Arlington. Accordingly, the petition of appeal is hereby **DISMISSED** with prejudice.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 31, 2022

DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: May 31, 2022

Date Mailed to Parties: May 31, 2022

ljb

173-22

New Jersey Commissioner of Education

Final Decision

J.C., on behalf of minor child, J.C.,

Petitioner,

v.

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

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that her minor child was not entitled to a free public education in the Closter School District following the family's relocation to Norwood after the property they were renting in Closter was sold in January 2022. Petitioner sought an order directing the Board to allow J.C. to continue to attend elementary school in Closter free of charge for the remainder of the 2021-2022 school year. The Board filed a counterclaim for tuition for the period of J.C.'s ineligible attendance, February 10, 2022 to April 27, 2022. Petitioner failed to attend two scheduled hearings in this matter without explanation.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(b)(2), if a school district finds that a non-resident child is attending one of its schools, the district may act to remove the child; here, the petitioner admitted at a Board hearing that the family had relocated to Norwood and no longer lived in Closter; it is undisputed that for the period in question, February 10, 2022 to April 27, 2022, petitioner and her family were domiciled in Norwood; and petitioner failed to appear at two scheduled hearings in this matter and provided no explanation for her failure to appear. Accordingly, the ALJ dismissed the within residency appeal with prejudice and ordered petitioner to pay the Board tuition in the amount of $3,847.50 for the period of J.C.'s ineligible attendance.

Upon review, the Commissioner concurred with the ALJ's finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Closter during the period from February 10, 2022 through April 27, 2022, and further concurred with the ALJ's conclusion that J.C. was, therefore, not entitled to a free public education in the District's schools during that time. However, the Commissioner noted that the Initial Decision does not include the detail necessary for the calculation of tuition pursuant to *N.J.S.A.* 18A:38-1b. Accordingly, this matter was remanded to the Office of Administrative Law for further proceedings to calculate the number of days of J.C.'s ineligible attendance in Closter's schools, as required by *N.J.S.A.* 18A:38-1b.

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

173-22
OAL Dkt. No. EDU 02441-22
Agency Dkt. No. 46-3/22

New Jersey Commissioner of Education

Final Decision

J.C., on behalf of minor child, J.C.,

Petitioner,

v.

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

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Closter during the period from February 10, 2022 through April 27, 2022. The Commissioner further concurs with the ALJ's conclusion that J.C. was, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in the district. The statute specifically provides that the Commissioner may order tuition "computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance." *N.J.S.A.* 18A:38-1b. The Initial Decision notes that the cost of

tuition in the district is $1,539.00 per month, but this information does not permit the Commissioner to make the required calculation of 1/180 of the total *annual* per pupil cost.[1] Furthermore, there is no evidence in the record of how many days of ineligible attendance there were between February 10, 2022 and April 27, 2022. The amount of tuition awarded by the ALJ appears to be two and a half times the monthly tuition cost, perhaps because there are approximately two and a half months between February 10, 2022 and April 27, 2022. If so, in addition to being incorrectly based on the monthly cost rather than the annual cost, the calculation is also incorrectly based on calendar days, rather than school days.

Accordingly, this matter is remanded to the Office of Administrative Law for further proceedings to calculate the number of days of ineligible attendance, as required by *N.J.S.A.* 18A:38-1b.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 13, 2022
Date of Mailing: July 13, 2022

[1] The Commissioner declines to assume that the annual cost is ten times the monthly cost.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02441-22
AGENCY DKT. NO. 46-3/22

J.C. ON BEHALF OF MINOR CHILD J.C.,
Petitioner,
vs.
BOARD OF EDUCATION OF THE
BOROUGH OF CLOSTER, BERGEN COUNTY,
Respondent.

J.C., Petitioner, pro se

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

Record Closed: June 3, 2022 Decided: June 13, 2022

BEFORE: **THOMAS R. BETANCOURT,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the Final Notice of Determination of Ineligibility by Respondent school district, dated February 18, 2022, wherein Respondent determined that the minor child was ineligible to attend school in Respondent school district.

Petitioner filed a pro se petition of appeal with the Office of Controversies and Disputes in the New Jersey Department of Education on March 14, 2022.

Respondent filed its Answer, Separate Defenses and Counterclaim thereto on March 29, 2022.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on March 30, 2022 as a contested case.

A Prehearing Order was entered on April 5, 2022.

The matter was listed for a hearing on May 17, 2022 via Zoom. Petitioner failed to appear, or otherwise contact the OAL regarding the non-appearance. The undersigned adjourned the matter to June 3, 2022, so as to notify Petitioner that the matter would proceed to a proof hearing should Petitioner not log in to the Zoom hearing. Notices were provided. Petitioner failed to appear. Respondent requested a proof hearing on their counterclaim.

The hearing proceeded on June 3, 2022, without Petitioner pursuant to N.J.S.A. 1:1-14.4(d)

ISSUE

Is the minor child eligible to attend school in the Closter school district; and, if not, is the District entitled to tuition reimbursement for the period the child attended the Closter school district after being found ineligible.

Respondent's Case

Floro Villanueva testified as follows:

He is the Business Administrator for the Closter School District. Part of his duties entail residency determinations. As a routine internal review he checks Zillow listings to see if any properties were sold and checks this against students' residencies. He noted that the house in which J.C. and her family resided was sold. J.C. had also informed staff that the family had moved.

Mr. Villanueva had a secretary, Cheryl Boehm, contact the parents, who ultimately admitted they had moved. Mr. Villanueva forwarded a notice of ineligibility to the parents dated February 10, 2022. He had spoken to them about the issue on February 8, 2022.

The parents attended the February 17, 2022 Closter Board of Education meeting, where an eligibility hearing was held. The parents presented their position about continuing J.C. in the Closter School District. At this meeting the Board voted that J.C. was not eligible to be enrolled in the Closter School District.

Mr. Villanueva sent a Final Notice of Ineligibility to the parents, dated February 18, 2022.

The parents withdrew J.C. on April 27, 2022 from the Closter School District and enrolled her in the Norwood School District.

The cost of tuition per month for grades One through Four in the Closter School District is $1,539.00. The total cost of tuition from February 10, 2022 through April 27, 2022 is $3,847.50. This is based on the per pupil costs set forth in the budget of the Closter School District.

I **FIND** the following FACTS:

J.C. was enrolled in the Closter School District on November 11, 2019. (R-1) J.C. continued to be enrolled in the Closter School District until she was enrolled in the Norwood School District April 27, 2022.

The house where J.C. resided in Closter was sold on January 7, 2022. (R-3) J.C. and her family moved to Norwood and reside therein. Petitioner was notified of a determination of ineligibility by the Closter Public Schools by letter dated February 10, 2022. (R-4). The parents of J.C. attended the meeting of the Closter Board of Education on February 17, 2022, and a eligibility hearing was held. The parents presented their position to the Board. The parents acknowledged that they no longer lived in Closter and confirmed they were living in Norwood.

A Final Notice of Ineligibility was made at its meeting of February 17, 2022, and was forwarded to Petitioner by letter dated February 18, 2022. (R-5)

Petitioner appealed this determination to the Commissioner of the Department of Education on March 11, 2022. J.C. continued to be educated in the Closter School District.

The cost of tuition per month for grades One through Four in the Closter School District is $1,539.00. The total cost of tuition from February 10, 2022 through April 27, 2022 is $3,847.50.

Petitioner is responsible for tuition costs for J.C. from the date of the Initial Notice of Eligibility, February 10, 2022, through the date J.C. was withdrawn, April 27, 2022. The total amount owed is $3,847.50.

LEGAL ANALYSIS AND CONCLUSION

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "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." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

If a school district discovers that a non-resident child is attending one of its schools, the district may act to remove the child. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.3. If so, the chief school administrator must first issue a notice of ineligibility.N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.2, -4.3. The notice shall inform the parent of the right to a hearing before the school district and the right to appeal the school district's decision to the Commissioner of Education. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-5.1. The notice shall also inform the parent whether the district's policy allows for continued attendance, with or without tuition, for students who move out of the district during the course of the school year. N.J.A.C. 6A:22-4.2(b)(7)(i). If, on appeal to the Commissioner, the parent fails to demonstrate his child's entitlement to attend the schools of the district, the parent may be liable for tuition for any period of ineligible attendance. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-4.2; N.J.A.C.6A:22-6.2, -6.3.

In the instant matter Respondent provided the requisite notice on February 10, 2022. A hearing was held before the school district on February 17, 2022. A final notice of ineligibility was provided on February 18, 2022. Further, the petitioner admitted to Ms. Boehm and at the hearing that the family was no longer living in Closter.

According to N.J.A.C. 6A:22-6.3(a), "[t]uition assessed pursuant to the provisions of this section shall be calculated on a per student basis for the period of a student's ineligible enrollment, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23-3.1. The individual student's record of daily attendance shall not impact on such calculation." However, "[n]othing in this chapter shall preclude an equitable determination, by the district board of education or the Commissioner, that, when the particular circumstances of a matter so warrant, tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district." N.J.A.C. 6A:22-6.3(b).

The Closter School District Business Administrator calculated the tuition costs based upon the school district budget for students in grades one through four. The total

equals $3,847.50 for the period J.C. was in attendance in Closter while residing in Norwood.

ORDER

It is hereby **ORDERED** that Petitioner's residency appeal is **DISMISSED**, with prejudice; and

It is further **ORDERED** that Respondent is entitled to tuition reimbursement in the amount of $3,847.50; and

It is further **ORDERED** that Petitioner shall pay said amount to Respondent.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 13, 2022
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: June 13, 2022

Date Mailed to Parties: 6-13-22

db

APPENDIX

List of Witnesses

For Petitioner:

Floro Villanueva, Business Administrator

For Respondent:

None

List of Exhibits

For Petitioner:

None

For Respondent:

R-1 November 10, 2019 student registration file

R-2 2019-2020 First Grade Report Card

R-3 Zillow Property Listing for 100 Knickerbocker Road, Closter, NJ

R-4 February 10, 2022 Initial Notice of Ineligibility

R-5 February 18, 2022 Final Notice of Ineligibility

R-6 March 11, 2022 Petition of Appeal with Envelope

R-7 Closter Board of Education Policy 5111, "Eligibility of Resident/Nonresident Students

R-8 2021-2022 Hillside Elementary School Trimester/Marking Period and Granting Schedule

NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF
TENURE CHARGES BY

NEPTUNE TOWNSHIP
BOARD OF EDUCATION,
Petitioner

and Agency Dkt #100-6/21

MICHAEL SMURRO,
Respondent

Appearances:

For Petitioner: Stephen Edelstein, Esq.
Weiner Law Group

For Respondent: Andrew Schwartz, Esq.
Schwartz Law Group

Before: Barbara C. Deinhardt
Arbitrator

Hearings: January 12, 14, 24, 25, February 3, 4, 2022

INTRODUCTION

In accordance with the TeachNJ statute, NJSA 18A:6-16, the tenure charges brought by the Neptune Township Board of Education ("the Petitioner," "the Employer," "the District" or "the Board") against

Michael Smurro ("Respondent'") were referred to me for review by the Commissioner of Education. A hearing was held on January 12, 14, 24, 25, February 3 and 4, 2022 via Zoom, during which the parties were accorded the right to examine and cross-examine witnesses, the right to present evidence, and the right to make arguments in support of their respective positions in this matter. The hearing was closed upon the receipt of post-hearing briefs on April 30, 2022 and reply briefs on May 14, 2022.

ISSUE

Has the Board proven by the preponderance of credible evidence that Respondent is guilty of conduct unbecoming a Vice Principal and/or other just cause warranting his dismissal? If not, what discipline, if any, is warranted?

BACKGROUND

The facts of the incident underlying the Tenure Charges are essentially undisputed. Respondent, Michael Smurro, is a tenured Vice Principal at Neptune Middle School who has been employed by the Neptune School District since 2006. He was appointed Vice Principal in July, 2014. His evaluations were effective to highly effective. He had no prior discipline.

On Saturday afternoon April 24, 2021, during off-duty hours, Respondent and his wife Lisa Smurro were sitting on an outside patio at a restaurant in Smithville, New Jersey (approximately one hour from Neptune Township) eating lunch and drinking beer after having attended the nearby Renaissance Fair. His wife became quite upset about the presence and conduct of a person whom she deduced to be a biological male wearing women's clothing who had been using a toilet in the women's bathroom (the record does not reflect the identity of the person or whether they/he/she was in fact a transgender woman) right before Mrs. Smurro entered the bathroom stall. According to Respondent's testimony, Mrs. Smurro recounted that the person had left urine on the seat and on the floor and this upset Mrs. Smurro who is, by her husband's description, somewhat of a neat freak and a germaphobe. When she returned to their table, Mrs. Smurro was extremely distraught. She was loudly complaining to her husband, making statements such as, "She's a man" and "It's not right. You're either a man or a woman" and "There's a man in the women's bathroom." Respondent testified that he tried to get her to stop and to calm down, but "[s]he wouldn't let it go."

Her protestations caught the attention of nearby patrons of the restaurant, who began to film the incident and make comments about and to her. Respondent testified that they were at the table for about 45 minutes; there is about 4½ minutes of videotape of the incident. According to Respondent, things would calm down and then the people or person filming would bait his wife to provoke her and her loud complaints would start up again.

On one of the videos in evidence it appeared that Respondent motioned to his wife that they should leave. (One of the narrators of the video noted that "her husband wants to leave.") As they left, his wife continued to engage with the server and with the patrons who were filming her and the patrons, in turn, continued to film her and to make comments such as, "Cut her off" and "Take your hate elsewhere."

At this point, Respondent, who had continued on toward the parking lot as his wife stopped to continue her complaints, came up from behind his wife, who was standing between the parking area and the dining area, separated from the diners by a yellow rope. He testified that the man who was filming had stood up and was starting to move toward his wife and he didn't know what would happen. Mr. Smurro is heard on one video saying to his wife as he approached, "Do you want me to fight this guy right here?"

In what he described as a misguided attempt to stop the entire incident and deflect attention away from his wife, Respondent threw the contents of his cup of beer toward the patron who was filming his wife (one clip shows the visual effect of the beer landing on the lens of the camera), saying, "Here you go, pal." There is no evidence that the beer actually landed on anyone other than the man who was filming. (There is some evidence that a child was at a neighboring table, but not that the beer landed on or near the child.) Respondent then backed up and gestured toward the camera, saying something like, "Now you can come out. I'm right here," seeming to challenge someone to a physical fight. He and his wife then left the area. There is no evidence that law

enforcement was called nor that the patron on whom the beer was thrown (or anyone else) suffered any injury.

Following the incident, the videos began to go viral on social media. The District received hundreds of emails and voicemail messages from senders who were angry about the actions of Respondent and his wife. Articles appeared in the press. Respondent was not aware of any of this before Monday morning.

On Monday morning April 26, Dr. Tami Crader, the District Superintendent, learned of the videos and watched them online. She called Respondent into her office. According to Respondent, she began by saying, "Please tell me you didn't throw a beer on a transgender woman." (Dr. Crader denies this.) Respondent said he had not, but he did throw a beer at someone. She asked what had happened. According to Dr. Crader,

> He shared with me that they had attended a social event over the weekend and had been at this restaurant Fred & Ethel's, and he and his wife were discussing her reaction to having been to the bathroom where he reported to me that she complained about a transgender individual in the bathroom. Mr. Smurro described that person as a transvestite.[1] On one occasion, he described that person as a man dressed in women's clothing.

According to Respondent, at the end of the meeting Dr. Crader told Respondent that he would be sent home on paid/administrative leave "to give this a chance to cool down and as long as this doesn't turn into anything, we'll bring you back in a couple days."

[1] Respondent testified that he told Dr. Crader that his wife had described the person as a transvestite.

Following the meeting on Monday, Dr. Crader sent Respondent an email with apology language and directed him to use the language if he were contacted by the media for a statement. The statement read, "I allowed my emotions to get in the way of my normally sound judgment and reacted in a way that was inappropriate. I do not condone violence or discrimination of any kind and should have simply walked away. I apologize to the person I threw my beer at and I wish I hadn't done so. I apologize to anyone I offended."

Over the course of the next few days, emails and voice mails continued to come into the school, many of them linking Mr. Smurro's actions to what was often described as his wife's "transphobic rant." According to Dr. Crader, the number of emails was such that the District had to temporarily modify the internal email system. In addition numerous press accounts continued to appear. The many headlines highlighted Respondent's tossing of his beer toward those filming his wife's transphobic rant.

At the Board meeting on April 28, Dr. Crader recommended that tenure charges be filed against Mr. Smurro.

Dr. Crader met with Mr. Smurro again on approximately May 5 and informed him "that [she] had come to the conclusion that he could no longer be effective in his duties as vice principal of the Neptune Middle School and [she] intended to ask for his resignation or file tenure charges."

On May 24, 2021, the District filed Sworn Tenure Charges of

Unbecoming Conduct and Other Just Cause, seeking Mr. Smurro's removal. The Board of Education voted unanimously to certify the Charges. The Charges are, in substance:

Charge One: Conduct Unbecoming. This Charge alleges that Mr. Smurro's actions of April 24, 2021 were "antithetical to his duties as a school administrator," that "[i]nstead of diffusing the situation, [he] further exacerbated the gravity of the situation and fostered a message of intolerance," that his conduct of throwing a beer on a restaurant patron and challenging him to a fight "clearly violated the implicit standard of good behavior required of a vice principal," that he exercised exceedingly poor judgment "that is repugnant to his moral and ethical duties as an educator and Middle School Vice Principal," that he is unfit to continue to care for and lead young and impressionable children and lacks the ability to effectively maintain discipline and proper administration of the school system and act as a role model for students and staff alike," and that "his misconduct damaged the reputation" of the" District. Therefore, his conduct of April 24, 2021 "constitutes conduct unbecoming a public employee warranting Smurro's termination from his tenured employment."

Charge Two: Conduct Unbecoming. This Charge alleges that "Smurro's conduct on April 24, 2021 has rendered it impossible for Smurro to continue to effectively serve as an administrative staff member." The Charge focuses on the perception of others that Mr. Smurro "was reasonably perceived by countless members of the school-community—students and staff alike, as joining with and adopting the

transphobic sentiments expressed by his wife" and that they are "outraged" and "no longer have confidence in Smurro's ability to effectively discharge his duties to protect the care the custody of students of a tender age" or to "foster [sic] an educational environment that fosters acceptance, tolerance and diversity."

Charge Three: Conduct Unbecoming. In this Charge the Superintendent states that the public outcry "does not formulate [her] basis as the Chief School Administrator for recommending that Smurro's employment be terminated." Rather, the Charge asserts that his conduct in "response to his wife's bigotry (throwing a beer at a Restaurant patron and challenging him to a fight)" sent a message "that he will stand in defense of intolerance," which is "antithetical to the efficient and effective operation of the District" and warrants his termination.

Charge Four: Conduct Unbecoming. This Charge alleges that Mr. Smurro violated Board Policy No. 1550 and the Board's Equal Employment/Anti-Discrimination Practices by "express[ing] views that discriminate towards persons on the basis of affectional or sexual orientation, gender, gender identity or expression," "condoning his wife's misconduct and assaulting (throwing a beer) at Restaurant patron in defense of his wife," thereby joining in and adopting and promoting the transphobic and non-inclusive behavior expressed by his wife.

Charge Five: Conduct Unbecoming. This Charge alleges that Mr. Smurro's conduct violated Board Policy No. 3281 and Regulation R3281

because his actions constituted inappropriate conduct by a staff member.

POSITION OF THE DISTRICT

The District contends that Respondent's conduct on April 24 was so egregious, particularly when combined with the completely foreseeable public reaction, to warrant a conclusion that he is no longer fit to discharge the duties and functions of his position. This is particularly so in light of Mr. Smurro's inability or refusal to understand that what he did on April 24 was linked to what his wife said.

The 1500 emails and 100 phones messages received by the school and many of the press articles published after the incident drew a connection between Mrs. Smurro's rant and Mr. Smurro's assault, the District notes. Dr. Crader testified that this public perception would be toxic to the Middle School environment. In addition, she was concerned that there could be serious consequences for the District in that parents could choose not to enroll their children in the school.

The District argues that Mr. Smurro has not only not admitted that his actions could be reasonably seen as adopting his wife's comments and beliefs, but also has not taken responsibility for his actions. He filed a Disorderly Persons Summons against one of the patrons at the restaurant for provoking, taunting and harassing him and his wife (referred to in the Summons as victims) by videotaping them after being asked to stop. According to the District, this shows that he has failed to

accept responsibility and instead blames others.

The District urges that Respondent's tale of man who appeared to be threatening his wife be rejected as not credible. Respondent never told Dr. Crader about such a threat to his wife, although he was given ample opportunity to tell what had happened on April 24.

The District asserts that progressive discipline was not warranted in this case because the behavior was so egregious and led Dr. Crader to no longer have confidence in Mr. Smurro's ability to be a leader at the school. Returning him to the school could lead to a renewed public outcry and possibly parents leaving the District.

The District cites the definition of "unbecoming conduct" set forth in the case of *In re Young*, 202 N.J. 50, 66 (2010) as any conduct "which adversely affects the morale or efficiency of the [department]" or "has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." (alterations in original) "As quoted in *Young*, the touchstone of the determination lies in the certificate holder's 'fitness to discharge the duties and functions of one's office or position.' *In re Grossman*, 127 N.J. Super. 13, 29; 316 A.2d 39 (App Div. 1974)."

The District argues that the multitude of emails, voice mails and social media posts makes it clear that Mr. Smurro's actions on April 24, 2021 destroyed the public respect for him and any confidence in his ability to function as an educational leader. The overriding message delivered by those who left voicemails or emails is clear that Mr. Smurro

cannot effectively perform the duties of a vice principal (or teaching staff member) or be in a position of authority over children because he is reasonable perceived as being transphobic, he defends transphobic rhetoric, he committed an unprovoked act of violence, he demonstrated an inability to appropriately handle a tense situation, and he has lost the respect and support of the community, as well as the District's children and stakeholders, the District argues.

Termination is warranted for Mr. Smurro's conduct, the District contends. "No theory of progressive discipline can save [him], despite his prior clean record." The case law makes clear that even on incident of improper conduct can support a termination, if the incident is sufficiently flagrant. Here the conduct is egregious and yet even now, Mr. Smurro does not recognize that his conduct was inappropriate. Finally, the Arbitrator should give great deference to Dr. Crader's judgment and experience and support her conclusion that Mr. Smurro is no longer fit to continue in the Neptune School District, the District argues.

POSITION OF RESPONDENT

Respondent acknowledges that Respondent's conduct was not appropriate, but asserts that it did not constitute conduct unbecoming such as to warrant dismissal. Further, Respondent contends that the conduct to be considered in analyzing whether he is fit to perform his duties is limited to his acts of throwing the beer and taunting the

restaurant patrons, not his wife's actions nor the subsequent public reaction. Respondent notes that the Superintendent was the sole witness for the District. While the Charges assert that District students and staff question his ability, no one other that Dr. Crader testified in support of this view and she did not ask any staff or students whether they had lost confidence in Mr. Smurro. On the other hand, 16 staff members who have worked with Respondent over the years testified that there was no disruption to their ability to perform their jobs in the days and weeks following April 24, that they never witnessed Respondent do anything that could be viewed as intolerant or bigoted to the LBGTQ or other minority community, that they believed the April 24 conduct was an aberrational lapse in judgment that should not negate his whole career, and that they did not believe this actions were in support of his wife's comments.

In support of the Charge that the Neptune school community had lost confidence in Mr. Smurro, the District relied on the emails and voice mail messages received by the school. Respondent observes, however, that Dr. Crader testified that she did not know if the emails and voicemails were in fact from members of the Neptune community or from elsewhere. Similarly Dr. Crader testified that the protests that occurred after April 24 reflected "community outrage," but admitted she did not know if the protesters were from the Neptune community.

Respondent notes that the Common Facts set forth in the Charges are almost all about his wife's conduct, not Respondent's, or about the viral nature of the public reaction. Respondent argues that the

connection of Respondent to his wife's comments is "[w]ithout evidence and based on pure conjecture."

Respondent argues that the Tenure Hearing Law sets up a presumption against dismissal. Here, the District has failed to demonstrate the Respondent lacks the fitness to discharge his duties while Respondent presented evidence from many witnesses about his positive contributions to the school and the students. The District has failed to demonstrate that Respondent's conduct has adversely affected the morale and efficiency of the District, while Respondent presented evidence from many witnesses that the morale in the school is actually down because Respondent is *not* there.

The District argues that Respondent's conduct caused harm to the "maintenance of discipline and the proper administration of the school," a factor mentioned in *In re Fulcomer*, 93 N.J. Super. 404, 422 (App. Div. 1967). Respondent argues, however, that the District has failed to demonstrate that Respondent's conduct resulted in any disciplinary problems, while Respondent presented evidence from many witnesses that there was no increase in student disciplinary incidents or bullying following Respondent's conduct. The District claimed that there were daily protests, which disrupted the day-to-day operations of the school. The evidence shows that there was one protest with about 15-20 people soon after the incident but after that, there was one person who showed up across the street on a number of occasions. There was no evidence of ongoing disruption to the school operations because of these protests and no evidence that student activities were adversely impacted. The

District presented evidence that because of the influx of emails in the several days following the April 24 incident, modifications had to be made to the school website to prevent hacking. While the Charges and District's Answers to Interrogatories state that all District staff were inconvenienced, educational services disrupted, and email system suspended, the record evidence does not support these allegations, Respondent asserts.

This was a single instance of poor judgment—an emotional outburst--that did not directly involve any student or other member of the Neptune community and that caused no injury to anyone. Thus it does not justify termination, Respondent argues.

OPINION AND AWARD

N.J.S.A. 18A:6-10 establishes the statutory basis for dismissal of tenured personnel employed in New jersey's public schools. Generally the District must prove "inefficiency, incapacity, unbecoming conduct, or other just cause…" The Charges in the instant case focus on unbecoming conduct.

The Common Facts section of the Charges, after reciting Respondent's employment history, sets out what happened on April 24, mostly focused on the conduct of Respondent's wife. There are two paragraphs that describe Respondent's actions of throwing the beer at a patron, yelling "here you go, pal," and seeming to challenge them/him to a physical fight by saying "I'm right here." Another paragraph

characterizes that conduct as Respondent being "complicit and supportive of [his wife's] rant by virtue of his throwing a beer on patrons that were questioning his wife's clearly transphobic view and then taunting them as he departed the scene."

The remaining 22 factual paragraphs were about the public response to the conduct of Respondent and his wife—the broadcast of the videos on various social media platforms, the number of views those postings got, the news articles that were written, a rally that was held, and the 92 voicemails and 507+ emails (some duplicates) that Petitioner received. A majority of those communications were to the same general effect, i.e. that Respondent should be terminated because he cannot effectively perform the duties of a vice principal or teacher or be in a position of authority over children because he is transphobic, he committed an unprovoked act of violence, he demonstrated an inability to appropriately handle a tense situation, and he has lost the respect and support of the community. One subset of the communications came from transgender people or their allies, stating their belief, *inter alia*, that he should not be in leadership role because transgender youth would not feel safe in the school environment.

Charge One asserts that Respondent's conduct on April 24 was inapposite and antithetical to his duties as a school administrator. He exacerbated the situation rather than diffusing it and fostered a message of intolerance. He used poor judgment. He failed to comply with the high standards expected of a certified staff member and his misconduct damaged the reputation of the school. He is therefore unfit

to continue to care for children and maintain discipline. His conduct constitutes conduct unbecoming a public employee and warrants his termination. The essential difference between Charge One and Charge Two seems to be that Charge One focuses on the conduct itself, rather than the reaction from the public.

I think there can be no question, and in fact Respondent concedes, and I find that the District is correct that Respondent's conduct on April 24 was inappropriate and unprofessional and wrong and was conduct unbecoming a teacher or vice-principal. There can be no question that he used poor judgment. He of course should not have thrown the contents of his cup of beer at the restaurant patron, regardless of what that patron was doing or saying to his wife. He should not have invited him to come out into the parking lot, apparently to fight. He exacerbated the situation rather than deescalating it. If he was concerned about his wife, he should have tried harder to persuade her to cease her tirade and to move away from the situation. There was no excuse for throwing his beer at the person filming them and inviting him to fight. No one, but especially not an educator and most especially not a school leader, should engage in such behavior, even on a Saturday afternoon far from his district.

The question is whether that conduct, in itself, without regard to the public reaction, constituted unbecoming conduct that is evidence that he is unfit to continue to perform his duties and that therefore warrants his termination. I find that it does not.

The caselaw involving charges of unbecoming conduct under

N.J.S.A. 18A:6-10 et seq serious enough to warrant removal generally establishes that the conduct must be so egregious that it requires immediate dismissal, i.e. it is conduct that cannot be corrected with warnings or progressive discipline. *In re Young* 202 N.J. 50, 66 (2010) "In making the determination that one is guilty of unbecoming conduct, the employee must be shown to lack the 'fitness to discharge the duties and functions of one's office or position.' In other words, it is "conduct 'which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services.'" Id.

In *In the Matter of Michael S. Wolff, County of Salem*, 2010 WL256020 (not a teacher case), the Court describes "unbecoming conduct" as "any conduct that adversely affects the moral or efficiency of the governmental unit or that has a tendency to destroy public respect and confidence in the delivery of government services" and "may include behavior that is not in accord with propriety, modesty, good taste or good manners, or behavior that is otherwise unsuitable, indecorous or improper under the circumstances." It must be recognized that not all instances of bad manners or immodest behavior or poor taste or indecorous behavior or other unbecoming conduct are grounds for termination of a teacher or other public employee. The court in *Wolff* recognized the critical importance of progressive discipline unless the infraction is egregious and found termination not warranted in that case.

Respondent cites cases that stand for the proposition that "an isolated incident will generally not support unbecoming conduct

charges unless it is 'sufficiently flagrant.'" *In re Fulcomer*, 93 N.J. Super. 404, 421 (App. Div. 1967) In that case, which involved a teacher using physical force against a student, clearly grave misconduct, the court wrote,

> We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See *Redcay v. State Board of Education*, 130 N.J.L. 369 (*Sup. Ct.* 1943), affirmed o.b. 131 N.J.L. 326 (*E. A.* 1944).
>
> Here, however, there is no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.
>
> Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances.

Ibid. 93 NJ Super 404, 421 (App Div 1967)

The conduct in the instant case was one isolated unpremeditated incident. There is no evidence of any prior violent behavior or inability to appropriately deal with tense or difficult situations. There is no evidence of any prior discriminatory or intolerant behavior. The entire case rests on about 20 seconds on a Saturday afternoon far from school, after a beer or two, after Mr. Smurro had in fact uged his wife to calm down and guided her out of the restaurant and thought she was right behind him. When he discovered she was not, he turned back to get her, saw that a patron was continuing to film and taunt her and, according to

him, had stood up. Then, in a moment of frustration, he threw his beer to deflect attention from his wife onto him. It was wrong and deserving of punishment, but it was not an action so egregious that Respondent should lose his tenure.

Contrary to the District's contentions, Mr. Smurro did acknowledge that what he did was wrong and testified that it was something for which he felt remorse and regret "every minute of every day." He testified that he knows he should have left the premises and not turned back to engage with the patron who was videotaping his wife. He issued a public apology at the time, using the words supplied by Dr. Crader, but words with which he agreed.

The District claims that Respondent did not take full responsibility because he filed a Complaint against those who were videotaping him and his wife. I disagree with the District's contention that the two are mutually exclusive. I conclude that he could have charged them with taunting and harassment, but also understood that it was not appropriate to respond to their improper conduct by throwing a beer and inviting them to fight.

The District also argues that Mr. Smurro was not telling the truth when he testified that he reacted in response to the patron who was videotaping standing up and approaching his wife. According to the District, the hearing was the first time Mr. Smurro told the story of this man. He did not mention him during the meetings with Dr. Crader. The only time Mr. Smurro gave an account of April 24 was during the 10-15 minute conversation with Dr. Crader on Monday April 26. Two days

later she recommended his removal and at the beginning of their next meeting, she informed him of the decision. At the very brief April 26 meeting, he gave an account of what happened, not really appreciating the scope of the public reaction or the severity of the potential consequences. He may not have understood the difference between throwing the beer because the patron was videotaping him and throwing the beer because the patron had stood up and was starting to move towards his wife as he was videotaping.

Contrary to the District's brief, Mr. Smurro did not describe the man as a "potential attacker" nor did he say that he was justified in throwing the beer to protect his wife from the danger of this on-coming man. He said that the man was starting to approach his wife, pointing his phone. "So I wanted to end the situation. I wanted it to be finished. I wanted the people to stop abusing my wife. I wanted my wife to stop her rhetoric. And in a fit of frustration, and a momentary lapse of sound judgment and what I should have done, I tossed the contents of my cup in this gentleman's direction, and it stopped everything. It stopped him. It stopped the crowd. It stopped the situation." I find, however, that I do not need to make a determination as to whether the man who was videotaping his wife did in fact stand up and start moving towards his wife or whether he remained seated while he was videotaping. In reading the whole of the testimony and the media accounts and in viewing the videos, there is no dispute about the critical facts that there was in fact a male restaurant patron who was videotaping Mrs. Smurro and that Mr. Smurro threw his beer at this man.

Dr. Crader testified that Mr. Smurro's conduct and action, even without the public reaction, would have warranted removal because it showed that he is not able to diffuse negative situations before they escalated, because the beer throwing and the invitation to fight would have created an insurmountable challenge for a vice principal to be effective, because Dr. Crader believes that the public will not respect any decision that he makes or action that he takes, and because she believes the conduct itself reveal him to be homophobic. I do not agree that one incident of not diffusing a negative situation means he would be unable to do so in the future. The conclusions that his conduct created a challenge to his effectiveness that would be "insurmountable" or that the public will not respect any decision he makes are based solely on speculation.

The essence of the District's case is that Mr. Smurro is not fit to discharge his duties because he himself is transphobic. Reading through the various iterations of Dr. Crader's explanation for her determination, I conclude that Dr. Crader agrees with the public reaction to Mr. Smurro's conduct, i.e. that it reflected his own personal transphobia. In responding to a question as to whether she formed her own impression as to the relationship between Mr. Smurro's actions and Mrs. Smurro's words, Dr. Crader responded, "I did. I felt that his—after watching the video many, many times I felt that his body language, his throwing of the beer, his not--his lack of success at leaving the area without making comments actually aligned himself with his wife's words. He did not denounce the words. He did not apologize. He did not walk away. He instead escalated the situation. And the perception that I had after I

watched the video several times was that he then subscribed to that same homophobic philosophy."[2] (T. 85) In other testimony she stated that his conduct of failing to disengage and instead becoming violent, gesturing and calling the patron out to fight "made him complicit in his wife's transphobic rant and that rendered him homophobic himself." (T.285)

I cannot accept Dr. Crader's analytical leap from Mr. Smurro defending his wife to a conclusion that he was defending her comments. There is no dispute that all of the comments were made by Mrs. Smurro. Mr. Smurro testified that he tried to get her to calm down and stop her tirade. He persuaded her to leave. He was the one who walked out of the restaurant and went on toward the parking lot, only coming back when he realized that she was not with him and then throwing his beer when he saw that the patron was continuing to film and, in his words, "verbally abuse" his wife. He is heard asking her if she wanted him to fight the guy who was filming her. While this conduct may well constitute an immature, misguided and certainly unprofessional attempt at chivalry, I do not find anything in this conduct that reflected any transphobic beliefs held by Mr. Smurro rather than his wife.

There is absolutely no evidence of any prior actions by Mr. Smurro during the course of his long teaching and administrative career that reflected any difficulty in controlling his temper or in diffusing difficult situations or any prejudice towards transgender people or any

[2] It is not clear why Dr. Crader finds that Mr. Smurro is "homophobic" rather than transphobic since there is no evidence of any comments concerning homosexuality.

other group. There is no evidence in the record--other than the inferences drawn by the Superintendent and many of the writers who sent emails to the school solely from Respondent's 20-second conduct on April 24--that Respondent is in fact prejudiced against trans people or other LGBTQ people or that LGBTQ students would not feel safe in his school. There is no evidence that he is unfit to perform his duties.

The record evidence in fact suggests the opposite. While the District did not present any direct testimony or even any hearsay testimony from any teacher or administrator other than Dr. Crader to support Dr. Crader's assumptions that Mr. Smurro is unfit to perform his duties, Respondent presented testimony from 16 witnesses in addition to Mr. Smurro, all members of the Neptune school community. While the District discounts this testimony as being merely the opinions of Mr. Smurro's friends, I note that these witnesses are colleagues of Mr. Smurro, including, significantly, the current principal of the school, the other vice-principal of the school, and the former principal of the school, as well as other teachers and guidance counselors. None of the witnesses believed that Respondent was adopting his wife's comments during the incident on April 24. In addition to testifying that they believe Mr. Smurro was an excellent vice principal who had great relationships with students and parents, the witnesses gave consistent testimony disagreeing with Dr. Crader's assessment of Mr. Smurro and the impact of his conduct, as set forth in the Charges:

Dr. Mark Alfone, who had been the principal at the Neptune Middle School from 2007 to 2016 and supervised Respondent when he

served as vice principal, testified that Mr. Smurro always treated students with respect, that he never lost his composure, that he always acted professionally, and that he was able to proactively work with students to deescalate situations. He never heard Mr. Smurro say or do anything that could be construed as anti-LGBTQ, bigoted or hostile to minority groups. He believes that Mr. Smurro would still be able to perform his job and command the respect of parents in the community. He heard from members of the Neptune LGBTQ community that they still have confidence in Mr. Smurro. He does not believe that the incident of April 24 had a negative effect on the morale or efficiency of the District or that it rendered Mr. Smurro unfit for duty.

Dr. Arlene Rogo has served as Respondent's principal for the last six years. She testified that she never saw Respondent lose his composure or act unprofessionally in his dealings with students or parents. He was effective at deescalating volatile situations. She never observed him saying or doing anything or received any complaints about him being insensitive or negative towards minority groups or anti-LGBTQ or bigoted or hostile to difference.

Significantly, Principal Rogo testified that no staff or student reached out to her to express any loss of faith in Respondent as a school leader. As principal of the school in which Mr. Smurro serves, she still has confidence in his ability to perform his duties and does not believe that this one incident involving a lapse in judgment should define him.

Thomas Decker is a co-vice principal at the Middle School with Respondent. He worked very closely with Respondent for seven years

and testified that he never saw him be unprofessional with any student or inappropriate with any staff or insensitive or intolerant to any student or staff concerns. He has not received any sort of negative responses from community members that would lead him to believe that there's a negative perception within the Neptune community. He had confidence in Mr. Smurro's ability as a school leader prior to the April 24 incident and his view has not changed. He believes Respondent could still be an effective school administrator, despite the widespread attention.

Andrea McGovern, the guidance counselor at the Middle School for the last five years, testified that she worked closely with Respondent. His interactions with students were always positive, even when he was administering discipline. He sought to deescalate situations with students and never dealt with them confrontationally. She noted that she has students within her charge who are members of the LGBTQ community, including those identifying as transgender, and none of those students ever confided in her that they have lost faith or confidence in Mr. Smurro. She never saw Mr. Smurro be unprofessional and never heard any complaint about him from any student. She stated that she believes that Respondent can still be effective and she believes her colleagues still have confidence in him, as well. Some have asked how he is doing and when he is coming back. Ms. McGovern testified that Mr. Smurro was involved in the administrative decision to switch the Middle School bathrooms to genderless ones.

Another guidance counselor, William Douma, echoed Ms.

McGovern's comments. Mr. Douma is the harassment, intimidation, and bullying (HIB) coordinator at the school. He worked with Respondent on HIB investigations and never saw him act unprofessionally or insensitively. He also worked with him to develop the "anti-bullying bill of rights." He testified that he has absolute faith and confidence in Respondent as a school leader and believes that if he had the opportunity to return, he would have the respect of students, staff, and parents.

In addition to the above witnesses, Respondent presented testimony from another eight teachers at the school, including a deaf teacher and a special education teacher, as well as an interpreter for the deaf. Their testimony was consistent with the testimony above, including emphasizing that the students loved him, the staff missed him, there was no increase in student disciplinary incidents after April 24, they continue to have confidence in him and they believe their colleagues have faith in him, and his absence has negatively affected morale.

All of the witnesses expressed their belief that if given the opportunity to return to his position, Mr. Smurro would use what had happened as a teachable moment, showing students that you can make a mistake, accept the consequences, learn from it, and move forward.

This may well have been a different case, more similar to the *In re Jennifer O'Brien, State-Operated School District of the City of Paterson*, 2011 WL 5429055 (N.J. Admin. 2011), aff'd by Comm'r, Agency Dkt. No. 108-5/11, aff'd 2013 WL 132508 (App.Div. 2013) and *In re Donna*

Coleman and Roselle Borough School Dist., Agency Dkt. No. 18-1/2 cases cited by the District, had it been Mr. Smurro who engaged in the transphobic rant. It was not. It was Mrs. Smurro. Her husband should not be punished for her beliefs and conduct.

Charge Two focuses on whether Mr. Smurro can continue to effectively serve as an administrator. In support of her contention that he cannot, the Superintendent, in Charge Two, relies on what she contends are the reasonable perceptions of members of the school community that he joined with and adopted the transphobic sentiments expressed by his wife. She cites "the social media postings, news articles, email and voicemails," "[t]he magnitude of the public outrage" and "the number of venomous complaints received by the District" as evidence that Respondent can no longer effectively serve as a vice principal. Yet, in Charge Three, the Superintendent clearly states that the public outcry "does not formulate [her] basis as the Chief School Administrator for recommending that Smurro's employment be terminated." This statement begs the question of whether Charge Two is therefore relevant to the decision to terminate his tenure.

I do not need to resolve this conundrum, however, as I find that the "abundant social media postings, news articles, emails, and voicemails" do not warrant his termination. The Superintendent is correct that the public outcry was loud and large. It is instructive, however, to carefully analyze the communications.

While Dr. Crader testified that there were 1500 emails sent to the District hostile to Mr. Smurro, there were 300-400 email messages

included in the Sworn Statement of Evidence in support of the Charges. (There are only a total of about 560 pages in the four exhibits referred to by Dr. Crader in her testimony as containing all the emails received. There is not more than one email message on any one page and some email communications took two or three pages. Many were duplicates or even triplicates of the same message. Many were form messages.) A handful (20-25, including some duplicates) of these were from senders who identified themselves as residents of the District. Most either did not state their location or were from other states and even other countries.

Contrary to the allegations in the Charge Two, I did not find ***any*** communications from District students or staff that provide evidence that students and staff "reasonably perceived him as joining with and adopting the transphobic sentiments expressed by his wife," are "outraged," or "no longer have confidence in Smurro's ability to effectively discharge his duties," or "question Smurro's foster [sic] an educational environment that fosters acceptance, tolerance, and diversity."

There are, however, many many emails from "stakeholders and other members of the public," expressing such beliefs. Some of the email messages reflected a misunderstanding of what had occurred on April 24. One writer was incensed at the "pure hate that the poor child in the video experienced." Two said Mr. Smurro threw a drink at workers. Several others stated that he threw a beer at a transgender person. One decried Smurro assaulting someone "simply because that person is

trans." One was angry that he had committed "a hate crime against a transgender child." One described Smurro as a "racist, homophobic bigot." One stated that "one of your employees is spewing transphobic rhetoric in the video" and another said, "your vice principal publicly berated a trans woman." One transgender writer stated, "Mrs. Smurro's proud, self-righteous display of hate was awful, but witnessing Mr. Smurro assaulting a young trans woman for the crime of existing in the same public space as he and his wife was absolutely brutal." These statements are clearly and demonstrably false. There is no evidence that a beer was thrown on a transgender person, let alone a transgender child, or that there was any racial content to any of the exchanges. These misunderstandings demonstrate the power of social media to distort and exaggerate events, similar to a vicious game of telephone.

(Interestingly, in one email exchange between Dr. Crader and Sara Palumbo, a District teacher, Dr. Crader refers to a certain set of emails as "all group think." (NEP0570))

There are similar factual misunderstandings in the 90 or so[3] voice mail messages left at the school in the days following the incident. Quite a few asserted that he threw beer at a transgender woman. One insisted that he had attacked a transgender student at the Middle School. Another confusingly stated that he had thrown something at a peaceful protester at a demonstration about trans rights after a principal had said derogatory things about trans rights. A few just ridiculed his shoes and his hat and his t-shirt.

[3] Some are duplicates. Some are from people who say they also sent email messages. A few don't refer to Mr. Smurro at all.

Similarly, one newspaper article referred to "the couple's transphobic tirade." Another stated that the video shows Mr. Smurro and his wife arguing with a waitress about a transgender woman using the woman's bathroom and that "the two" loudly made insensitive and transphobic remarks. The headline of a third article said that Smurro threw beer at a child after rant about a trans woman using women's bathroom." These statements, too, are false or at least misleading, as there is no question that it was Mrs. Smurro, not Mr. Smurro, who made disparaging comments about transgender people.

Many of the emails question the sincerity of his apology, assuming that he only apologized for not stopping once he realized he was being filmed. I note, however, that Respondent testified, and the Superintendent concedes, that the language of the statement was given to him by the Superintendent.

Most significantly, a majority of the media and social media articles and communications assumed that Mr. Smurro's actions of throwing the contents of his cup of beer and inviting the patron to join him out in the parking lot was in defense of his wife's statements when in fact, there is nothing to contradict his testimony that his conduct, while inappropriate, unprofessional, unjustified, and just wrong, was in defense of his wife, not her statements. She was being videotaped and taunted and in his words verbally abused, perhaps justifiably, and he came to her defense.

Many of the emails assume, based on the several minutes of video, that Mr. Smurro stayed silent in the face of his wife's comments and that

such silence constituted acquiescence. In fact, we don't know whether he stayed silent or not. There is testimony that the event lasted far longer than the brief snips of video that went viral and form the basis for this Charge. We see Respondent gesturing to his wife that it was time to leave. He testified that he repeatedly told his wife to stop and to calm down, but that she "just wouldn't let go." It is true that he did not publicly denounce her statements, and arguably he should have, but that does not mean that he acquiesced in her statements. The fact that many people assumed that he shared her beliefs does not make it so.

I find that the public reaction to the viral video—much of which is genuine and heartfelt and understandable, but much of which was apparently orchestrated from outside the Neptune community, some based on misinformation, and some constituting, as Dr. Crader described it, "group think"--does not establish that Respondent has discriminated or would discriminate against LGBTQ students or that he is otherwise unable to perform his duties. The answer to this question must be found elsewhere. As discussed above, I find that the evidence does not support a finding that he is transphobic or that he has or would discriminate against LGBTQ students or that he is otherwise unable to perform his duties.

I do not share Dr. Crader's belief that a public narrative based in whole or in part on an untruth should guide a personnel decision. (T.148) I recognize that such a public narrative may create a challenge for Mr. Smurro and for the rest of the administration, including Dr. Crader, to overcome in reestablishing trust, if indeed it is discovered

upon his return that trust has been jeopardized. It will be up to Mr. Smurro and the administration to rise to that challenge and find ways of making this incident an opportunity for growth and education and of assuaging any fears.

Charge Three asserts that the message sent by Respondent's conduct was "that he will stand in defense of intolerance" and as such is "antithetical to the efficient and effective operation of the District" and "cannot be tolerated." While the Charge states that Respondent's conduct sent a message "that he will stand in defense of intolerance," as discussed above, the conduct can also be seen as sending a message that he will stand in defense of his wife who was being filmed and taunted (although, again, perhaps with good reason). The substance of this Charge is similar to that of Charges One and Two and is discussed above and the Charge is therefore dismissed.

Charge Four charges Respondent with violation of Policy 1550, Equal Employment/Anti-Discrimination Practices. This Policy bars the Board from discriminating against staff on the basis of, *inter alia*, race, religion, gender or gender expression and, the section on which the District relies, contracting with a person who discriminates on such bases "either in employment practices or in the provision of benefits or services to students or employees." There is no evidence in the record that Respondent discriminates on any basis against anyone, but certainly not "in employment practices or in the provision of benefits or services to students or employees." The theory that because he defended his wife who arguably expressed intolerance for transgender

persons, he thereby discriminated in the provision of benefits or services to students is far-fetched. As discussed above, his defense of his wife who was being filmed and criticized by others does not equate to defending her comments or beliefs. Further, even assuming *arguendo* that it did so equate, the fact that he arguably could hold such beliefs does not mean that he did or would discriminate against students. Charge Four is dismissed.

Charge Five alleges a violation of Policy 3281: Inappropriate Staff Conduct. While the definition of inappropriate conduct set forth in the implementing regulation is broad ("includes but is not limited to"…"any conduct deemed by the Commissioner to be inappropriate conduct"), read as a whole, the Policy focuses on inappropriate sexual behavior by a staff member towards students. Broadly, the prohibition covers sexual harassment, inappropriate touching or comments, profanity, dating a student, and other similar conduct. There can be no question, as discussed above, that Respondent's conduct of throwing a beer at a member of the public, even if on non-school time and non-school property, was not "appropriate." I find, however, that it did not constitute inappropriate conduct within the meaning of Policy 3281. Charge Five is dismissed.

DECISION AND ORDER

As discussed above, I find Respondent Guilty of Charge One and Not Guilty of Charges Two, Three, Four and Five. However, for the

reasons discussed above, I do not find that his conduct warrants removal. Here the conduct was one isolated unpremeditated incident that did not directly involve staff or students. There is no evidence of any prior violent or even unprofessional behavior or inability to appropriately deal with tense or difficult situations. There is no evidence of any prior or currently held discriminatory or intolerant beliefs or behavior. There is no evidence that he is transphobic. While Dr. Crader's professional opinion is entitled to deference, the District still must prove by a preponderance of the evidence that Respondent's conduct in fact renders him unfit to be in a position of authority in the school and adversely affected the moral and efficiency of the District. I find that it has not met that burden.

In addition, as held by the court in *Fulcomer*, "Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances." Taking into account the above factors and the impact his removal would have on his career, I find that a six-month unpaid suspension, essentially equivalent to one semester, would sufficiently impress on him the importance of acting as a role model for students, even on a Saturday afternoon following a Renaissance Fair. I order that he be reinstated and made whole for all loss, with the exception of a six-month disciplinary suspension.

SO ORDERED.



Barbara C. Deinhardt
Neutral Arbitrator

Dated: July 11, 2022

STATE OF NEW YORK)

: ss

COUNTY OF KINGS)

On this the 11th day of July, 2022, I, Barbara C. Deinhardt, affirm, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the forgoing as my Opinion and Award in the above matter.



Barbara C. Deinhardt

175-22

OAL Dkt. Nos. EDU 16096-18, EDU 04273-19 (on remand)
Agency Dkt. No. 238-9/18

New Jersey Commissioner of Education

Final Decision

A.A. on behalf of minor child, A.A.,

Petitioner,

v.

Board of Education of the Township of Montgomery, Somerset County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

Petitioner challenges a harassment, intimidation, and bullying (HIB) decision made by the Board. The Administrative Law Judge (ALJ) scheduled a telephone conference regarding petitioner's appeal for April 27, 2022. Petitioner failed to appear; therefore, the ALJ dismissed the matter based on petitioner's failure to pursue the appeal.

In his exceptions, petitioner argues that he was unaware of the April 27, 2022 telephone call, which was scheduled only via email and not by regular mail.

Upon review, the Commissioner finds that petitioner offered a reason why he failed to appear for the telephone conference, namely that the email was not received.[2]

[1] The Board did not file a reply to petitioner's exceptions.

Accordingly, this matter is remanded to the OAL for further proceedings necessary to reach a determination on the merits.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 14, 2022
Date of Mailing: July 14, 2022

[2] The ALJ also indicated that petitioner failed to advise the court that his interlocutory appeal of the ALJ's August 25, 2022 Order had been denied. As petitioner's exceptions indicate that he did not understand that the document he received from the Appellate Division was the official decision on his appeal, the Commissioner finds his failure to notify the ALJ of the decision to be an insufficient basis to dismiss his petition.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - DISMISSAL
OAL DKT. NO. EDU 04273-19
AGENCY DKT. NO. 238-9/18
(ON REMAND OAL DKT. NO. EDU 16096-18)

A.A. ON BEHALF OF MINOR CHILD, A.A.,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,
Respondent.

A.A., petitioner on behalf of A.A., pro se

Rita F. Barone, Esq., for respondent (Purcell, Mulcahy & Flanagan, LLC, attorneys)

BEFORE **JEFFREY N. RABIN**, ALJ:

Record Closed: April 27, 2022 Decided: April 28, 2022

On April 26, 2018, petitioner was advised that an HIB investigation by respondent had concluded that student, A.A., committed two acts of HIB against another student at Orchard Hill Elementary School on March 19, 2018. Petitioner appealed this decision to the respondent Board and, on June 12, 2018, respondent heard the appeal and affirmed the finding of HIB against student A.A. Petitioner filed an appeal of the June 12, 2018, decision to the Commissioner of Education on September 19, 2018. On November 5,

2018, this matter was transmitted to the Office of Administrative Law (OAL), where it was filed on November 7, 2018, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. This matter was docketed as OAL Dkt. No. EDU 16096-18.

On November 5, 2018, respondent filed a motion to dismiss, and a hearing was held on December 19, 2018. On February 11, 2019, respondent's motion was granted, this court finding that petitioner failed to file his appeal in a timely manner and failed to state a claim upon which relief could be granted. On March 26, 2019, the Commissioner of Education remanded this matter to OAL, resulting in the within case, OAL Dkt. No. EDU 04273-19.

After attempts at reaching a settlement failed when petitioner could not agree to the form of settlement agreement to be used, a telephone conference was held with the parties on November 20, 2019, at which time a hearing was scheduled for March 30, 2020. Petitioner subsequently requested an adjournment of the March 30, 2020, hearing date.

On March 13, 2020, petitioner filed a motion to compel depositions of unnamed, potential witnesses. I denied this motion and closed discovery effective June 9, 2020. The parties agreed to a telephone status conference on August 25, 2020, and to a due process hearing date of September 11, 2020. On or about June 17, 2020, petitioner filed an interlocutory appeal of the discovery motion denial to The Honorable Ellen Bass, Acting Director and Chief Administrative Law Judge. That appeal consisted of accusations by petitioner that opposing counsel, Ms. Barone, had failed to conduct her case in an honest, ethical manner, and that I had displayed prejudice to petitioner's case by not ruling on procedural motions in his favor. By letter dated June 26, 2020, Judge Bass informed petitioner that this matter was not appealable to OAL, but rather should be appealed to the Commissioner of Education. Petitioner filed an interlocutory appeal of the motion denial with the Commissioner of Education on July 6, 2020. The Commissioner of Education subsequently denied petitioner's request for interlocutory review.

On July 21, 2020, petitioner filed a request, in the approximate form of a motion, asking me to review his documentation and disqualify Ms. Barone from this case or issue corrective and/or disciplinary action against Ms. Barone. Additionally, on or about August 11, 2020, petitioner filed a motion with OAL in which he asked me to disqualify myself as Administrative Law Judge in this matter.

During the telephone hearing of August 25, 2020, on the record, I denied petitioner's motion to disqualify opposing counsel, concluding that petitioner's filings failed to show good cause why Ms. Barone should be disqualified from representing respondent in this case. During the call of August 25, 2020, I further denied petitioner's motion for me to disqualify myself from continuing to hear this case, concluding that petitioner's filings failed to show good cause why I should disqualify myself. A Letter Order dated August 28, 2020, was issued to confirm the rulings from the telephone conference of August 25, 2020. Petitioner indicated he would file an interlocutory appeal of my findings. As a result, I then adjourned the hearing scheduled for September 11, 2020, and stated that a new hearing date would be scheduled once petitioner A.A.'s interlocutory appeal was completed. Petitioner subsequently failed to provide any docket number, documentation, or other proof that he was pursuing an interlocutory appeal.

A telephone status conference was scheduled for November 12, 2020. Petitioner requested an adjournment. No information regarding an interlocutory appeal was provided by petitioner throughout 2021. On December 6, 2021, however, respondent-counsel provided proof that petitioner had filed an appeal with the Superior Court of New Jersey, Appellate Division, which had denied petitioner's motion for leave to appeal on February 12, 2021. As a result, a telephone conference was scheduled for February 16, 2022; petitioner later requested that it be adjourned. A telephone conference was then scheduled for April 27, 2022, but petitioner failed to appear.

As petitioner failed to take any action to pursue this appeal between August 25, 2020, and April 27, 2022, failed to advise the court or respondent that his interlocutory appeal had been denied on February 12, 2021, and requested the adjournment of a telephone conference scheduled for February 16, 2022, and failed to appear for a telephone conference scheduled for April 27, 2022, without any notifice to this court or

explanation of good cause for having missed said telephone conference, I therefore **CONCLUDE** that petitioner has abandoned his appeal.

ORDER

It is hereby **ORDERED** that this 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.

April 28, 2022
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: April 28, 2022

Date Mailed to Parties: April 28, 2022

JNR/dw

177-22

OAL Dkt. No. EDU 07400-21
Agency Dkt. No. 120-8/21

New Jersey Commissioner of Education

Final Decision

Christina DiCosmo,

Petitioner,

v.

Board of Education of the Town of Hackettstown, Warren County,

Respondent.

The record of this matter, the proposed Stipulation of Settlement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that the Agreement references actions that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, 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: July 14, 2022
Date of Mailing: July 14, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07400-21

AGENCY DKT. NO. 120-8/21

CHRISTINA DICOSMO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN, WARREN COUNTY,

Respondents.

Gail Oxfeld Kanef, Esq. for Petitioner (Oxfeld Cohen, attorneys)

Jeffrey Merlino, Esq. for Respondent (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: June 16, 2022 Decided: June 16, 2022

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

The New Jersey Department of Education transmitted to the Office of Administrative Law for determination as a contested case on September 1, 2021, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Stipulation of Settlement and Resolution setting forth the terms of their settlement.

Having reviewed the Stipulation of Settlement and Resolution, 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 the stipulation of settlement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the stipulation of 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.

Kelly J Kirk

June 16, 2022
DATE

KELLY J. KIRK, ALJ

Date Received at Agency:

June 16, 2022

Date Mailed to Parties:
June 16, 2022
db

EXTRACT FROM THE MINUTES OF A MEETING OF
THE BOARD OF EDUCATION OF THE TOWN OF HACKETTSTOWN
WARREN COUNTY, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Town of Hackettstown, County of Warren, New Jersey convened in public session on Wednesday June 15, 2022 at 7:04 p.m. in the High School Media Center, in Hackettstown, New Jersey.

The following members of the Board of Education were present:
Ms. Jami Cavanagh; Ms. Amy Cochran; Dr. Gaddy; Mr. Michael Herbst;
Ms. Malainie Hibler; Ms. Mary Beth Maciag; Mr. Robert Moore;
Ms. Christine Strelec; Ms.Courtney Wenthen

The following members of the Board of Education were absent:
Mr. Shawn Burke; Dr. Bo Soobryan

The following resolution was offered by Mr. Moore, seconded by Ms. Wenthen and then adopted by the Board of Education by the following roll call vote:

TITLE : **APPROVAL OF SETTLEMENT AGREEMENT**

RESOLVED: That the Board of Education approve the Settlement Agreement in Docket No. :EDU-07400-2021N

ROLL CALL VOTE: YES– Ms. Cavanagh; Ms. Cochran; Dr. Gaddy; Mr. Herbst; Ms. Hibler; Ms. Maciag; Mr. Moore; Ms. Strelec; Ms. Wenthen;

NO -

ABSTAIN –

State of New Jersey)
County of Warren)

I, Timothy Havlusch, Business Administrator/Board Secretary of the Board of Education of the Town of Hackettstown, County of Warren, New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Hackettstown Board of Education, duly called and held on June 15, 2022 has been compared by me with the original minutes as officially recorded in the minute book of said Town of Hackettstown, Board of Education, and is a true, complete copy thereof; and of the whole of said original minutes so far as the same relates to the subject matter referred to in said extract, in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this the 16th day of June 2022.

(Affix Seal)

Timothy Havlusch, Business Administrator/Board Secretary

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

OAL DKT NO: EDU-07400-2021N

Respondent.

STIPULATION OF SETTLEMENT

2. Petitioner agrees that this Settlement Agreement fully resolves all administrative, civil or other claims that were or could have been asserted against the District, its Board of Education, its Board of Education members, employees, agents and representatives, based on any facts or events preceding execution of this Settlement Agreement, including but not limited to any claims for money damages, counsel fees, or other relief, and releases the District, its Board of Education, its Board of Education members, employees, agents and representatives with respect thereto.

3. Petitioner represent that she has been represented by Gail Oxfeld Kanef, Esq., her legal counsel, throughout the negotiation of this Settlement Agreement, that she has had a full opportunity to consult with her legal counsel concerning the meaning and consequences of entering into this Settlement Agreement, that she fully understands its terms, and that she has full legal authority to resolve this dispute.

4. Petitioner represents that she has entered into this Settlement Agreement voluntarily, and without duress or coercion.

5. This Settlement Agreement is subject to approval by the Hackettstown Board of Education and Administrative Law Judge Kelly Kirk.

6. This Settlement Agreement may be signed in counterparts, and PDF signature pages shall be acceptable in lieu of original signature copies.

Christina DiCosmo

Christina DiCosmo

Michael Herbst, Hackettstown Board of Education

Witness

Timothy Havlicek, Board Secretary

Dated: Thursday May 26, 2022

Dated:

176-22
OAL Dkt. No. EDU 02461-21
Agency Dkt. No. 16-1/21

New Jersey Commissioner of Education

Final Decision

Brick Township Education Association, on behalf of its Member, Hannah Jovanovic,

Petitioner,

v.

Board of Education of the City of Summit, Union 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 have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 14, 2022
Date of Mailing: July 14, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 02461-21
AGENCY DKT. NO. 16-1/21

BRICK TOWNSHIP EDUCATION ASSOCIATION ON BEHALF OF ITS MEMBER HANNAH JOVANOVIC,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,
Respondent.

Richard A. Friedman, Esquire, for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Wade L. Dickey, Esquire, co-counsel for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Caitlin Pletcher, Esquire, for respondent (Florio, Perrucci, Steinhardt, Capelli, Tipton & Taylor, LLC, attorneys)

Record Closed: May 19, 2022 Decided: June 8, 2022

BEFORE **DEAN J. BUONO**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 26, 2021, 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. This Settlement Agreement resolves all disputes.

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 and the attached Board resolution.

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 8, 2022
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 6/9/2022

Date Mailed to Parties: 6/10/2022

mph

APPENDIX

EXHIBITS

For the Court

C-1 Settlement Agreement

Rec'd 5/19/22

Caitlin Pletcher, Esq.
FLORIO PERRUCCI STEINHARDT & CAPPELLI TIPTON & TAYLOR, L.L.C.
1010 Kings Highway South, Building 1
Cherry Hill, New Jersey 08034
(856) 853-5530
cpletcher@floriolaw.com

Attorneys for Respondent, Brick Township BOE

BRICK TOWNSHIP EDUCATION ASSOCIATION, on behalf of itself, and its Bargaining member, HANNAH JOVANOVIC, Petitioners, v. BRICK TOWNSHIP BOARD OF EDUCATION, Respondent.	OAL DOCKET #: EDU 02461-2021 AGENCY REF.#: 16 – 1/21 SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into by and between the Brick Township Board of Education, which has offices located at 101 Hendrickson Avenue, New Jersey 08724 (hereinafter referred to as the "Board") and the Brick Township Education Association, which has offices located at 270 Chambers Bridge Road, Unit 12, Brick, New Jersey 08724, on behalf of itself, and its Bargaining member, Hannah Jovanovic (hereinafter referred to as the "BTEA") (hereinafter collectively referred to as the "Parties").

WHEREAS, the Board and BTEA are parties to a collective bargaining agreement ("CBA"), under which the Board recognizes the BTEA as the majority representative, pursuant to N.J.S.A. 34:13A-1, et seq., representing Classroom Teachers, Special Education Teachers, Nurses, Special Services Personnel, Librarians, Student Services Personnel, Athletic Trainers, Attendance Officers, Instructional Coaches, and Teacher Aides; and,

WHEREAS, the Parties' CBA (effective dates of July 1, 2018 through June 30, 2021) set forth terms for employees' contributions for health benefits and the medical plans offered by the Board; and,

WHEREAS, the New Jersey Legislature enacted P.L. 2020, c. 44 ("Chapter 44"), effective July 1, 2020, which, among other things, created a new State health care plan, New Jersey Educators Health Plan ("NJEHP"); and,

WHEREAS, Chapter 44 applies to both school districts that do and do not participate in the School Employees Health Benefits Program ("SEHBP"); and,

WHEREAS, the Board does not participate in the SEHBP; and,

WHEREAS, pursuant to Chapter 44, the Board provided an "affirmative selection process" to employees hired prior to July 1, 2020, during which employees were required to indicate whether they wanted to maintain their current health plan or whether they would prefer the NJEHP, or its equivalent; and,

WHEREAS, a member of the BTEA requested to enroll her spouse in her current health plan during the "affirmative selection process;" and,

WHEREAS, the Board maintains that Chapter 44 only required an "affirmative selection process," not an "open enrollment period;" and,

WHEREAS, the BTEA maintains that Chapter 44 required an "open enrollment period," and, thereby, the enrollment of spouses/dependents if requested by members; and,

WHEREAS, the BTEA filed a Petition of Appeal ("Petition") seeking, among other things, to compel the Board to permit the enrollment of the BTEA member's spouse and for any damages incurred for the failure to do so; and

WHEREAS, the Board filed an Answer to the Petition, seeking an Order denying the relief sought by the BTEA and the dismissal of the Petition; and

WHEREAS, the Parties are desirous of resolving the issues raised by the BTEA and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the Parties agree as follows:

1. In consideration of the documentation provided by the BTEA in support of the alleged damages incurred by Hannah Jovanovic in connection with this matter, the Board will pay Ms. Jovanovic seven-hundred and fifty dollars ($750.00) within thirty (30) days of the Board's approval of this Agreement at a public meeting.

2. The terms of this Agreement represent the compromise of disputed claims between the Parties.

3. This Agreement shall not constitute, be interpreted, construed, or used as evidence of any admission of fact, law, responsibility, or liability on the part of any party.

4. The Parties agree to submit this Agreement to an Administrative Law Judge for approval in full settlement of all issues pertaining to this matter. If approved, this Agreement shall be incorporated into a Final Decision by an Administrative Law Judge. Nothing contained herein shall be interpreted as preventing the Parties from filing a lawsuit to enforce the terms of this Agreement.

5. The BTEA, individually, and on behalf of all of its members, hereby forever and fully waives and releases the Board from any and all claims and demands raised in its underlying Petition of Appeal (OAL Docket No. EDU 062461-2021), and from any and all claims that may have accrued with respect to the subject matter encompassed by this Agreement. Nothing in the

release set forth in this paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

6. Each party shall bear their own attorneys' fees, costs, expert witness fees, and/or costs of evaluations and expert reports for the entirety of any matter or matters related to the subject matter of this Agreement.

7. This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey.

8. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective party.

9. The Parties may execute this Agreement in counterparts, each of which is deemed an original and all of which only constitute one original.

10. This Agreement is subject to ratification by the Board and is without prejudice to any party if the terms are not agreed upon. The representatives of the District shall recommend the terms of this Agreement to the Board for approval at its next regularly scheduled BOE meeting.

11. This Agreement constitutes the entire understanding of the Parties hereto and shall supersede any prior agreements between the Parties with respect to its subject matter. Further, there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. Each party acknowledges and agrees that they are not relying upon any oral statements, representations, promises or expectations which are not expressly and explicitly set forth in this Agreement, which alone fully and completely expresses all agreements between the Parties.

12. A modification or waiver of any of the provisions of this Agreement shall be effective and enforceable, only if made in writing, signed and duly authorized by all Parties and executed with the same formality as the Agreement.

13. The terms and conditions set forth herein shall be deemed severable. If any clause or provision contained herein shall be held unenforceable by a court of competent jurisdiction, it shall not affect the validity of any other clause or provision, all of which shall continue in full force and effect.

14. The Parties acknowledge that they are entering into this Agreement of their own accord and without any undue influence, coercion or pressure of any kind; that all the provisions of this Agreement, as well as all questions pertinent thereto, have been fully and satisfactorily explained to them; that they have given due consideration to such provisions and questions and understand them clearly; that the provisions of this Agreement are in all respects acceptable to them and that they, therefore, accept these provisions in full and final satisfaction of all claims and demands which have been raised or which could have been raised in any litigation related to the within Agreement.

15. The Parties recognize that each had the opportunity to be represented by legal counsel and that they sign this within Agreement as their own voluntary act and deed, and that they understand the duties and obligations enumerated herein.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date hereinafter set forth:

Witness:

BRICK TOWNSHIP SCHOOL DISTRICT

By: _____
Stephanie Wohlrab, Board President

Dated:

Dated:

Witness:

By: _____
James Edwards, Business Administrator

Dated:

Dated: 5/12/22

Witness:

BRICK TOWNSHIP EDUCATION ASSOCIATION

5/11/2022

By: Wayne Puglisi
Wayne Puglisi, BTEA President

Dated:

Dated:

BRICK TOWNSHIP PUBLIC SCHOOLS
101 HENDRICKSON AVENUE
BRICK, NJ 08724

CERTIFICATION

I hereby certify that I, the undersigned, am the Brick Township Board of Education Secretary and am duly authorized to certify resolutions adopted by the Board of Education at the Regular Meeting held on the 12th day of May, 2022.

To approve a Settlement and Release Agreement, OAL Docket EDU 02461-2021.

James W. Edwards, Jr., CPA
Business Administrator/Board Secretary

178-22

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION.

IN THE MATTER OF TENURE CHARGES BY:

N.J. DEPARTMENT OF CORRECTIONS
Petitioner

- against -

CELESTE THATCHER
Respondent

Agency Docket No. 74-4/22

Pursuant to N.J.S.A. §§ 18A:28-5 and 18A:6-10

APPEARANCES:

FOR THE PETITIONER
N.J. OFFICE OF ATTORNEY GENERAL
By: Kevin K.O. Sangster, Esq.

FOR THE RESPONDENT
WEISSMAN & MINTZ, LLC
By: Jason L. Jones, Esq.

BEFORE:

Perry A. Zirkel, Arbitrator

ARBITRATOR APPROVAL

The Department of Corrections, Office of Education Services (Petitioner) filed Sworn Tenure Charges against tenured teacher Celeste Thatcher (Respondent) in accordance with N.J.S.A. §§ 18A:28-5 and 18A:6-10, and served them on Respondent with notice of opportunity to submit evidence and argument inopposition. Thereafter, the Commissioner of Education, following review of the Charges and Respondent's answer, found the Charges were sufficient for referral to an arbitrator. On June 13, 2022, the Office of Controversies and Disputes appointed me as the arbitrator to hear and decide this tenure dispute. Pursuant to a June 16 status conference with the parties, we agreed on hearing dates of July 20 and, if needed, July 22. On July 1, the parties notified me of their settlement of the case pending final signing. On July 13, the parties submitted the finally executed settlement agreement, which included recitation of compliance with the Cardonick standards.

After a careful review of the Agreement, I hereby conclude that it satisfies the statutory requirements for withdrawal and settlement of tenure charges, as set forth in N.J.A.C. 6A:3-5.6 based on the following findings:

1. The Petitioner specified the charges and provided them to the Respondent with the requisite accompanying documentation. The initial section of the Agreement confirmed the charges.

2. The Agreement's provision to set the suspension at 10 working days and to vacate the demotion aligns within the respective party positions during the prehearing process as inferable reasonable justification for the settlement.

3. The remaining provisions of the Agreement amply show the full consent of both parties.

4. These same remaining provisions also show that the charged party signed with informed consent.

5. The Agreement is in the public interest by saving the notable transaction costs of the detailed statutory proceedings and contributing to the effective service of the Respondent, while providing discipline for the Respondent and moving her from the site of the charged conduct.

6. Because neither the charges nor the Agreement involved loss of position, the final Cardonick criterion is not applicable in this case.

Thus, I approve the attached Agreement in full resolution of Agency Docket No. 74-4/22.



Perry A. Zirkel, Arbitrator
July 15, 2022

IN THE MATTER OF TENURE HEARING OF: CELESTE THATCHER and NEW JERSEY DEPARTMENT OF CORRECTIONS, EDNA MAHAN CORRECTIONAL FACILITY	AGENCY DOCKET NO. 74-4/22 Arbitrator Perry Zirkel **SETTLEMENT AGREEMENT**

The parties hereto have voluntarily resolved all disputed matters and enter into the following Settlement Agreement, which fully disposes of all issues in controversy between them:

A. The **Tenure charges** filed with the Commissioner of Education on April 7, 2022, against Celeste Thatcher ("Respondent" or "Thatcher"), contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee	20-working day suspension and demotion to position of Asst. Supervisor of Education	N/A
2. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause	Same as above	N/A
3. H.R.B. 84-17, as amended: C-4: Verbal abuse of an inmate, patient, client, resident, or employee	Same as above	N/A
4. H.R.B. 84-17, as amended: C-8: Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report,	Same as above	N/A

investigation or other proceeding		
5. H.R.B. 84-17, as amended: C-11: Conduct unbecoming a public employee	Same as above	N/A
6. H.R.B. 84-17, as amended: E-1: Violation of a rule, regulation, policy, procedure, order or administrative decision.	Same as above	N/A

B. Respondent withdraws her appeal and request for a hearing and the Petitioner Appointing Authority, the New Jersey Department of Corrections ("Petitioner" or the "Appointing Authority"), agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee	10-working day suspension and rescinding of demotion
2. N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause	Same as above
3. H.R.B. 84-17, as amended: C-4: Verbal abuse of an inmate, patient, client, resident, or employee	Same as above
4. H.R.B. 84-17, as amended: C-8: Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding	Same as above
5. H.R.B. 84-17, as amended: C-11: Conduct unbecoming a public employee	Same as above

6. H.R.B. 84-17, as amended: E-1: Violation of a rule, regulation, policy, procedure, order or administrative decision.	Same

C. The parties have agreed to the following:

1) Petitioner will rescind Respondent's demotion and Respondent will serve a total of **10** working days of suspension without pay.

2) Respondent will retain her current title and be reassigned to another correctional facility based on the operational needs of the Appointing Authority.

3) Respondent will be subject to retraining as appropriate.

4) Respondent agrees not to seek or accept future work assignment to the Edna Mahan Correctional Facility.

5) As of this date, Respondent is no longer under consideration for any disciplinary action.

6) The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension, seniority or benefit time will be credited for periods for which the employee is not paid by the employer.

7) Respondent has been advised that, as a teaching staff member, the Commissioner of the New Jersey Department of Education has the duty to refer all tenure determinations resulting in loss of position to the State Board of Examiners.

8) The parties acknowledge and agree that settlement is justified in this matter and is in the public interest, and that

such settlement will provide the benefit of avoiding the costs and expenses of litigation.

D. The Appointing Authority shall amend Respondent's personnel records to reflect the terms of this Agreement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Respondent or as consistent with state or federal law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Respondent waives all other claims against the Department of Corrections with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein. This Agreement resolves any and all disciplinary actions pending against Respondent.

F. Nothing in this Agreement shall constitute an admission or stipulation of facts regarding the charges listed in Paragraph A. By entering into this Agreement, neither party admits or denies a violation of any state or federal law, any agency or departmental policy, or the parties' collective negotiations agreement. This Agreement shall not constitute precedent in matters involving other employees.

G. Respondent 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 or 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 Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the ●lder Workers Benefits Protection Act, the ●ccupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensati●n laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This Settlement Agreement is binding on the parties and may not be supplemented, amended, changed or modified in any manner, orally or otherwise, except in writing signed by a duly authorized representative of each party.

J. By signing this Settlement Agreement, the signatories represent that they have read this Agreement and fully understand its terms.

AGENCY DOCKET NO. 74-4122

APPROVAL OF THE SETTLEMENT AGREEMENT

In witness of this Agreement, having read and understood the terms and having agreed to be bound by each of the terms of this Agreement, the parties affix their signatures below.

7/13/2022
DATE

Respondent
Celeste Thatcher

7/13/22
DATE

On Behalf of Respondent
Jason Jones, Esq.

7/13/22
DATE

On Behalf of Dept. of Corrections
Kathleen Krieger, Esq.

CERTIFICATION

I, Celeste Thatcher, being the Respondent in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all of my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

It is also my understanding that this Settlement Agreement will terminate all claims and further appeal against the State of New Jersey and the New Jersey Department of Corrections.

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.

7/13/2022
Date

Celeste Thatcher

181-22
OAL Dkt. No. EDU 17358-19
Agency Dkt. No. 299-11/19

New Jersey Commissioner of Education

Final Decision

Tyeast Edmond,

Petitioner,

v.

Board of Education of the City of Plainfield, Union County,

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. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that the Agreement references actions that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 22, 2022
Date of Mailing: July 25, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 17358-19
AGENCY REF. NO. 299-11/19

TYEAST EDMOND,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,

Respondents.

Stephen B. Hunter, Esq., for Petitioner (Detzky, Hunter & DiFillippo, LLC, attorneys)

Philip Stern, Esq., for Respondents (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, P.C., attorneys)

Record Closed: April 19, 2022 Decided: June 13, 2022

BEFORE **JOHN P. SCOLLO,** ALJ:

NATURE OF PROCEEDINGS

Petitioner alleges violation of her tenure rights by respondent Board of Education of the City of Plainfield.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on December 12, 2019.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached Stipulation and Settlement Agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that Petitioner's petition is withdrawn 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.

John P. Scollo

June 13, 2022
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: 6-13-22

Date Mailed to Parties: 6-13-22
db

Detzky
Hunter
& DeFillippo, LLC

*Michael L. Detzky, Esq.
Stephen B. Hunter, Esq.
David J. DeFillippo, Esq.

*Also Member of NY Bar

Reply to: Somerville

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Somerville, New Jersey 08876
908-707-4560
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dhlaw@optonline.net

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Freehold, New Jersey 07728
732-780-3090
Fax: 732-308-3866
mldetzky@detzkylaw.com
davedefillippo@aol.com

April 19, 2022

VIA E-MAIL

Honorable John P. Scollo
Office of Administrative Law
33 Washington Street
Newark, N.J. 07102

RE: TYEAST EDMOND and CITY OF PLAINFIELD BOARD OF EDUCATION
OAL DOCKET NO. EDU 17358-2019N
AGENCY DOCKET NO. 299-11/19

Dear Judge Scollo:

I am happy to send Your Honor the fully executed Settlement Agreement between the parties, along with a copy of the check issued to Ms. Edmond.

In consideration of Paragraphs 2 and 3 of this Agreement, please consider this letter as a request that this appeal be withdrawn in consideration of the Settlement terms.

Thank you for your consistently positive intervention in helping to facilitate a resolution of this long standing matter.

Respectfully submitted,

Stephen B. Hunter

SBH/vjb
Enclosures
cc: Hope Blackburn, Esq. (via e-mail)
Tyeast Edmond (via e-mail)
Richard Dunne, Esq. (via e-mail)
Maryanne Rodriguez, NJEA (via e-mail)

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("Agreement") is made and entered into this _____ day of March, 2022, by and between the **BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,** with administrative offices located at 1200 Myrtle Avenue, Plainfield, NJ 07063 (hereinafter referred to as "the Board"), and **MS. TYEAST EDMOND** (hereinafter referred to as "Ms. Edmond").

WITNESSETH:

WHEREAS, 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 Plainfield; and

WHEREAS, Ms. Edmond is employed by the Board as a tenured, certificated staff member; and

WHEREAS, the Board and Ms. Edmond have been engaged in discussions regarding her resignation from the Board; and

WHEREAS, the Board and Ms. Edmond have a arrived at a mutually-agreeable settlement regarding Ms. Edmond's resignation from the Board's employ; and

WHEREAS, the parties, wishing to resolve all issues related to Ms. Edmond's employment amicably, hereby stipulate to settle same, subject to the terms and conditions set forth herein;

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. Lump Sum Payment

The sum of Sixteen Thousand Dollars and 00/100 ($16,000.00), from which no deductions or withholdings will be made, is being paid by the Board to Ms. Edmond as compensation for Ms. Edmond's claim for emotional distress and the physical manifestations therefrom that Ms. Edmond claimed she has suffered, and from which she claims she continues to suffer on account and as a direct result of the unlawful adverse employment actions she contended were taken against her by the Board and/or its agents.

2. Resignation

Upon receipt of the Lump Sum Payment, Ms. Edmond shall resign from all employment with the Board. A true copy of Ms. Edmond's Letter of Resignation is attached hereto as Exhibit "A."

3. Waiver

Upon receipt of the Lump Sum Payment, Ms. Edmond shall withdraw, with prejudice, subject to this Agreement, her Petition of Appeal, styled, Tyeasi Edmond v. City of Plainfield Board of Education, OAL Docket Number EDU 17358-2019N, Agency Docket Number 299-11/19 (hereinafter referred to as "Petition of Appeal"). Upon receipt of the Lump Sum Payment, Ms. Edmond shall also waive any asserted right to receive any health insurance benefits from the Board.

4. **Affidavit of Counsel**

The Board shall authorize Philip E. Stern to sign the Affidavit, attached hereto as Exhibit "B," regarding the pending Teachers Pension and Annuity Fund creditable compensation appeal (Teachers Pension and Annuity Fund Docket Number 5764-7).

5. **Material Breach**

By the Board: If the Board fails to comply with any of the aforementioned agreements, then this Agreement shall be deemed null and void, and Ms. Edmond shall be conferred with the absolute right to reinstate the Petition of Appeal.

By Ms. Edmond: If Ms. Edmond fails to comply with any of the aforementioned agreements, then this Agreement shall be deemed null and void, and Ms. Edmond shall return the Lump Sum Payment, however, the Board shall be under no obligation to rescind its acceptance of Ms. Edmond's resignation..

6. **Mutual Releases**

In exchange for the above consideration, Ms. Edmond, her heirs and assigns, and the Board, personally and officially, individually and collectively, its past and present members, all officers and administrators, its attorneys, agents and employees, personally and officially, as well as their successors and assigns, hereby irrevocably and unconditionally waive,

release and forever discharge any and all claims and rights of any kind that either party may have, whether now known or unknown, suspected or unsuspected, including, but not limited to, arising out of or in any way connected with Ms. Edmond's employment with the Board. These claims and rights released include, but are not limited to, claims under the Age Discrimination in Employment Act, the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, et seq., the Family and Medical Leave Act of 1993, 29 U.S.C. §2601 et seq., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., the Americans With Disabilities Act, 42 U.S.C. §12101, et seq., the Fair Labor Standards Act, 29 U.S.C. §201 et seq., the Rehabilitation Act of 1973, 29 U.S.C. §701 et seq., Executive Orders 11246 or 11141, the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101 et seq., the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, et seq., the New Jersey Equal Pay Act, N.J.S.A. 34:11-56.1, et seq., the New Jersey Worker Health & Safety Act, and New Jersey wage payment laws, all as amended; Title 18A of the Education Laws; Title 6A of the Education Regulations; and civil, criminal, or statutory laws, including any and all human rights laws and laws against discrimination, harassment, or retaliation, any other federal, state or local fair employment or whistle-blower statute, code or ordinance, common law (including New Jersey common law public policy claims, malicious prosecution and

malicious use of process claims), contract law, tort, and any and all claims for attorneys' fees. The parties represent that they know of no claim that has not been released by this paragraph. Ms. Edmond does not waive any rights she may have pursuant to N.J.S.A. 18A:16-6, or N.J.S.A. 18A:16-6.1, in the event of any claims brought by a third party against her, nor does the Board waive any defenses it may assert in the event Ms. Edmond exercises her rights pursuant to N.J.S.A. 18A:16-6 or N.J.S.A. 18A:16-6.1. Ms. Edmond does not waive any rights under the Workers' Compensation laws.

7. <u>ADEA Waiver</u>

Ms. Edmond acknowledges that the Board has advised her that she is knowingly and voluntarily waiving and releasing any rights she may have under the ADEA, and that the consideration given for the waiver and release in the preceding paragraphs hereof is in addition to anything of value to which Employee is already entitled. Ms. Edmond further acknowledges that she has been advised, as required by the ADEA, that: **(1) Ms. Edmond's waiver and release do not apply to any rights or claims that may arise after the Effective Date of this Agreement, as that term is defined below; (2) Ms. Edmond should consult with an attorney prior to signing this Agreement; (3) Ms. Edmond may take twenty-one (21)**

calendar days to consider and review this Agreement, including this release provision; (4) Employee may revoke the release provision of this Agreement at any time prior to 5 p.m. Eastern Time on the seventh calendar day after the date she executes this Agreement by giving the Board written notice of said revocation; and (5) on the eighth calendar day after Ms. Edmond executes this Agreement (the "Effective Date"), this release provision immediately will become irrevocable and fully binding on Ms. Edmond, her estate and anyone acting on behalf of Ms. Edmond or her estate.

8. **Non-Admission** This Agreement is not and shall not in any way be considered or construed as an admission of wrongdoing and/or liability by the Board of any kind, including, but not limited to discrimination, retaliation, tortious conduct, or of any violation of any laws, common laws, or federal, state, and local laws, statutes or regulations, or of any employment policies, Board policies, Board regulations, standard operating procedures, practices, contracts, or agreements, or of any alleged duties owed by Defendants, or of any unlawful or wrongful acts whatsoever by the Board. The Board wholly denies wrongdoing of any kind. The Parties merely seek to amicably resolve any and all disputes among them.

Accordingly, this Agreement shall not be used as an admission by any Party in any proceedings; however, this Agreement may be introduced in any proceedings to enforce the terms and conditions of the Agreement and/or used by any Party in connection with any proceeding and/or other enforcement or other action by or before any local, state, or federal agency and/or other like entity.

9. **Liens and Indemnification** It is further understood and agreed 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 solely by Ms. Edmond, 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 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. Ms. Edmond therefore agrees, upon prompt presentation of any such claims and/or liens, to defend the Board against any such claims and/or liens, and to indemnify and hold the Board and harmless against any judgment entered against the Board and/or its insurance carrier based on such claims and/or liens, including the payment of any sustained fines, charges, and reasonable and necessary attorneys' fees incurred as a result of any such lien.

10. **Assent to Terms**

Ms. Edmond hereby acknowledges that she entered into this Agreement with a full understanding of her rights and that she was fully informed of the implications of this Agreement by her attorney, Stephen B. Hunter, Esq., and she does so without duress of her own free will and volition.

11. **Entire Agreement**

This Agreement represents the entire understanding of the parties and may be modified only in a subsequent written instrument, duly executed by the parties. No other representations of any kind shall be binding upon the parties.

12. **Severability**

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

13. **Governing Law**

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Tyeast Edmond
TYEAST EDMOND

Date: 3-15-2022

WITNESS:

/s/

Date: 3-15-2022

FOR THE BOARD OF EDUCATION OF THE CITY OF PLAINFIELD:

~~ERIC ANDREWS~~, BOARD PRESIDENT
JOSELYN CASTRO

Date: 3/15/22'

ATTEST:

RASHON HASAN, BOARD SECRETARY

Date: 03/15/2022

182-22+
OAL Dkt. No. EDU 05582-21
Agency Dkt. No. 82-5/21

New Jersey Commissioner of Education

Decision

Board of Education of the City of Pleasantville,
Atlantic County,

Petitioner,

v.

Dr. Constance Bauer, State Monitor,

Respondent.

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

Upon review, the Commissioner agrees with the Administrative Law Judge's determination that this matter should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 22, 2022
Date of Mailing: July 25, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAIL DECISION
DISMISSAL (corrected caption)
OAL DKT. NO. EDU 05582-21
AGENCY DKT NO. 82-5/21

CITY OF PLEASANTVILLE BOARD
OF EDUCATION, ATLANTIC COUNTY
Petitioner,

v.

DR. CONSTANCE BAUER,
STATE MONITOR,
Respondents.

Benjamin B. Brenner, Esq., for petitioner, (The Carroll Law Firm, attorneys)

Joanne L. Butler, Esq., for respondent, Dr. Constance Bauer (Schenck, Price, Smith and King, L.L.P., attorneys)

Record Closed: June 20, 2022 Decided: June 23, 2022

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

The Board of Education of the City of Pleasantville, Atlantic County (Petitioner/Board) challenges the decision of Dr. Constance Bauer (Bauer) to override the Board's vote terminating in-house counsel.

PROCEDURAL HISTORY AND FACTUAL DISCUSSION

The petitioner filed the within appeal, and the matter was transmitted to the Office of Administrative Law (OAL) on July 1, 2021, for a hearing as a contested case. N.J.S.A.

52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. By order, dated May 25, 2022, this matter was dismissed against the New Jersey Department of Education (NJDOE).

The aforementioned order included the following:

> This matter shall be scheduled for a telephone conference on **June 20, 2022, at 3:00 pm.** Only the petitioner and respondent Bauer shall participate in this conference. Notices will be sent to the parties under separate cover. (emphasis included.)

Furthermore, on May 25, 2022, notice of the June 20, 2022, telephone conference was emailed to the remaining parties. The notice included the following language:

> **If you do not participate in the telephone conference, the file will be returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party.** (emphasis include.)

The petitioners did not participate in the June 20, 2022, telephone conference and did not contact the OAL to explain why they were unable to do so.

CONCLUSION

To date, the petitioners have not provided a request for an adjournment of the June 20, 2022, telephone conference or an explanation for their nonappearance for the same.

Therefore, I **CONCLUDE** that petitioners have failed to appear and abandoned their appeal.

ORDER

It is hereby **ORDERED** that this matter is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 08625-500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 23, 2022
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: June 23, 2022 (via email)

Date Mailed to Parties: June 23, 2022 (via email)

JRW/tat

187-22

OAL Dkt. No. EDU 08266-15
Agency Dkt. No. 93-4/15

New Jersey Commissioner of Education

Final Decision

Mount Carmel Guild Schools Corporation,

Petitioner,

v.

New Jersey Department of Education, Division of Field Services, Office of School Finance,

Respondents.

The record of this matter and the Consent Order transmitted by the Office of Administrative Law have been reviewed. The agency is a party to this matter; therefore, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the Consent Order is deemed to be the final decision in this matter.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 5, 2022
Date of Mailing: August 5, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 08266-15
AGENCY DKT. NO. 93-4/15

MOUNT CARMEL GUILD SCHOOLS CORPORATION,

Petitioners,

v.

NEW JSERSEY STATE DEPRTMENT OF EDUCATION, DIVISION OF FIELD SERVICES, OFFICE OF SCHOOL FINANCE,

Respondent.

Catherine M. Elston, Esq., (C. Elston and Associates, attorneys) for petitioners

Laurie Fichera, Deputy Attorney General (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney) for respondent

Record Closed: July 6, 2022 Decided: July 7, 2022

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

On June 4, 2015, 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 fully executed Settlement Agreement, and the attached Stipulation of Dismissal.

Having reviewed the record and the Dismissal terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the terms of the Settlement Agreement and Dismissal 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.

July 7, 2022

Ernest M. Bongiovanni

DATE

ERNEST M. BONGIOVANNI., ALJ

Date Received at Agency: 7-8-22

Date Mailed to Parties: 7-8-22

id

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
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
TRENTON, NJ 08625-0

MATTHEW J. PLATKIN
Acting Attorney General

MICHAEL T.G. LONG
Director

July 6, 2022

Via Email (Ila.Dhabliwala@oal.nj.gov)
Honorable Ernest Bongiovanni, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: Mount Carmel Guild Schools Corp. v. N.J. Dep't. of Educ., Office of School Finance
OAL Dkt. No. EDU 08266-2015N
Agency Reference No. 93-4/15

Dear Judge Bongiovanni:

As you may recall, this office represents the Respondent, New Jersey Department of Education, Division of Finance, Office of School Finance, in the above referenced matter. Attached please find a Stipulation of Dismissal executed by this office and counsel for the Petitioner, Catherine M. Elston, Esq.

Thank you for your attention to this matter.

Sincerely yours,

MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Laurie Fichera
Laurie Fichera
Deputy Attorney General

cc: Catherine Elston, Esq., via Email (cmelston@elstonlaw.com)

MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112
Attorney for the New Jersey Department of Education,
Division of Finance, Office of School Finance

By: Laurie Fichera
Deputy Attorney General
(609) 376-3100

MOUNT CARMEL GUILD SCHOOLS CORP.,	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner, v.	OAL DKT. NO.: EDU 08266-2015 N Agency Dkt. No.: 93-4/15
New Jersey Department of Education, Division of Field Services, Office of School Finance[1],	**STIPULATION OF DISMISSAL**
Respondent.	

PLEASE TAKE NOTICE that pursuant to N.J.A.C. 1:1-19.1(c), the parties hereby stipulate to the dismissal of the above-captioned matter with prejudice.

[1] The name of this office has changed and is currently the Office of School Finance within the New Jersey Department of Education Division of Finance.

Catherine Elston, Esq.
Attorney for Petitioner

By: _____
Catherine Elston, Esq.

Dated: 7/6/2022

MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent

By: /s/ Laurie Fichera
Laurie Fichera
Deputy Attorney General

Dated: 7-6-22

Dhabliwala, Ila [OAL]

From: Laurie Fichera <Laurie.Fichera@law.njoag.gov>
Sent: Wednesday, July 6, 2022 3:56 PM
To: Dhabliwala, Ila [OAL]; Catherine M. Elston
Subject: RE: Mt. Carmel Guild Schools Corp. v. NJ Dep't of Educ., Office of School Finance, OAL DKt. # EDU 08266-2015 N
Attachments: 7.6.22 Ltr to Judge Bongiovanni.pdf; Stipulation of Dismissal fully executed.pdf

Please see attached correspondence forwarding a Stipulation of Dismissal to Judge Bongiovanni. Thank you.

Laurie Fichera
Deputy Attorney General
Division of Law – Education & Higher Education
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08625-0112
Phone: 609-376-3100
Fax: 609-943-5853
Laurie.fichera@law.njoag.gov

From: Dhabliwala, Ila [OAL] <Ila.Dhabliwala@oal.nj.gov>
Sent: Wednesday, July 6, 2022 10:46 AM
To: Catherine M. Elston <cmelston@elstonlaw.com>; Laurie Fichera <Laurie.Fichera@law.njoag.gov>
Subject: RE: Mt. Carmel Guild Schools Corp. v. NJ Dep't of Educ., Office of School Finance, OAL DKt. # EDU 08266-2015 N

Both parties please let me know about the Board's Resolution.
Thanks.

Bcc: Judge Bongiovanni

Ila Dhabliwala, Judicial Assistant to:
Gail M.Cookson, ALJ 973-648-6018
Jude-Anthony Tiscornia, ALJ 973-648-6033
Ernest M. Bongiovanni, ALJ 973-648-6036

Fax: 973-648-6124 / 973-648-2358

CONFIDENTIALITY NOTICE: This email message and all attachments transmitted with it may contain State of New Jersey legally privileged and confidential information intended solely for the use of the addressee only. If the reader of this message is not the intended recipient, you are hereby notified that any reading, dissemination, distribution, copying, or other use of this message or its attachment is prohibited. If you have received this message in error, please notify the sender immediately and delete this message.

From: Dhabliwala, Ila [OAL]
Sent: Tuesday, July 5, 2022 10:18 AM
To: Catherine M. Elston <cmelston@elstonlaw.com>

Dhabliwala, Ila [OAL]

From: Catherine M. Elston <cmelston@elstonlaw.com>
Sent: Thursday, June 30, 2022 11:30 AM
To: Dhabliwala, Ila [OAL]
Cc: Fichera, Laurie (LPS)
Subject: [EXTERNAL] Mt. Carmel Guild Schools Corp. v. NJ Dep't of Educ., Office of School Finance, OAL DKt. # EDU 08266-2015 N
Attachments: 2022-06-27 Fully Executed Settlement.pdf

Importance: High

Ms. Dhabliwala,

Attached please find a fully executed settlement agreement in the above matter for the Court's approval.

MOUNT CARMEL GUILD SCHOOLS CORP., Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FIELD SERVICES, OFFICE OF SCHOOL FINANCE[1], Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Agency Docket No.: 93-4/15 OAL Docket No.: EDU 08266-2015N SETTLEMENT AGREEMENT

IT IS HEREBY STIPULATED AND AGREED by and between Petitioner, Mount Carmel Guild Schools Corporation ("Mount Carmel") and Respondent, the New Jersey Department of Education, Division of Finance, Office of School Finance ("OSF") (collectively "The Parties"), that this action is hereby settled upon the following terms:

RECITALS

WHEREAS, N.J.A.C. 6A:23A-18.10 requires Approved Private Schools for Students with Disabilities ("APSSD") to annually submit audited financial statements based on the July 1 to June 30 school year; and

WHEREAS, Mount Carmel submitted the required audited financial statements for the 2007-2008 school year; and

WHEREAS, the OSF reviewed Mount Carmel's 2007-2008 audited

[1] The name of this office has changed and is currently the Office of School Finance within the New Jersey Department of Education Division of Finance.

financial statements and identified non-allowable costs of $97,566; and

WHEREAS the OSF notified all school districts that paid tuition to Mount Carmel in the 2007-2008 school year of a potential settlement in this matter and allowed them a period of 30 days to submit any comments to the OSF:

NOW THEREFORE, it is hereby agreed by way of this Settlement Agreement ("Agreement") as follows:

1. The Parties acknowledge that the above Recitals are true and correct and are incorporated herein as material to this Agreement.

2. Mount Carmel agrees to accept $50,002 as non-allowable costs attributable to the 2007-2008 school year.

a. The OSF has identified the districts that are impacted by this Agreement by reason of having paid tuition to Mount Carmel during the 2007-2008 school year. The amount of the settlement shall be calculated by the OSF and distributed to Mount Carmel within 45 days from the execution of this Agreement. The amount of the settlement shall be allocated to each district based on the ratio of each sending district board of education's total Average Daily Enrollment ("ADE") in Mount Carmel for the 2007-2008 school year to Mount Carmel's total ADE for the same period.

b. Each district shall receive its allocation of the $50,002 due in each year of this agreement until its total allocation is repaid. In particular, Mount Carmel agrees to notify each sending district of this settlement within 90 days and to remit each district's share of $16,667.34 (50,002 divided by 3 years). One year and two years from the date of the initial remittance, Mount Carmel will disburse payments equivalent to each district's share of $16,667.33 and $16,667.33 respectively to the sending districts.

   i. It is understood that the purpose of this allocation is to refund to each sending district a portion of the funds previously paid by those districts in respect of the charges disallowed pursuant to this Agreement, not to bestow a windfall on districts who have not yet paid Mount Carmel the tuition charges for the years related to the refund and at issue in this matter. The OSF will determine the amount of refund owed to each school district and notify Mount Carmel and each school district of same upon the execution of this Agreement.

c. Subject to the obligations set forth in paragraph (b) above, nothing herein shall affect whatever entitlement

Mount Carmel otherwise would have to collect from sending districts any outstanding tuition charges unrelated to the partial disallowances agreed to herein.

d. Nothing in this agreement shall prohibit Mount Carmel from prepayment, and a shorter repayment term may be negotiated between Mount Carmel and any school district.

e. Mount Carmel's payment of the settlement amounts in each year shall be memorialized in a Note Disclosure in that year's audited financial statements.

f. Under no circumstances shall the amount of settlement be included in allowable costs.

g. Nothing in this settlement shall exempt other offices within the New Jersey Department of Education from identifying costs that are deemed contrary to regulations and seeking resolution of same.

h. Mount Carmel will copy the OSF on all correspondence relating to payments made by the terms of this Agreement so that the OSF can ensure that this Agreement is being followed.

3. The Parties stipulate and agree that this Agreement sets forth the complete and full resolution of all issues between them with regard to OSF's desk audit of Mount Carmel's financial statements for the 2007-2008 school year. This Agreement may not be modified or amended except by a written instrument signed by

all parties hereto.

4. Mount Carmel agrees to continue to follow the Corrective Action Plan implemented in 2007.

5. The Parties hereby agree that this Agreement shall fully dispose of any and all causes of action and claims that the Parties may have against one another relating to OSF's desk audit of Mount Carmel's financial statements for the 2007-2008 school year. In exchange for, and in consideration of, the payments, benefits, and other commitments described above, each party hereby fully releases, acquits, and forever discharges each other party of and from any and all claims, liabilities, causes of action, damages, costs, attorneys' fees, expenses, and compensation whatsoever, of whatever kind of nature, in law, equity or otherwise, whether known or unknown, vested or contingent, suspected or unsuspected, that the party may now have to the date of this Agreement against each other party related to OSF's desk audit of the audited financial statements through the 2007-2008 school year. The Parties agree that attorneys' fees and costs will not be passed along to any of the involved school districts as an allowable cost.

6. Petitioners shall file a Stipulation of Dismissal with Prejudice of OAL Docket No. EDU 08266-15 with the New Jersey Office of Administrative Law within 30 days of the execution of this Agreement. A copy of the executed Agreement will be filed with the New Jersey Office of Administrative Law simultaneously.

7. This Agreement shall not constitute, be interpreted, be construed, or be used as evidence of any admission of fact, law, responsibility, wrongdoing, or liability on the part of the OSF or Mount Carmel and shall not be referred to in any other proceeding by any party other than to enforce the express terms of this Agreement.

8. Nothing in this Agreement shall preclude an action to enforce the terms of this Agreement.

9. This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey, including but not limited to the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1 et seq. The Parties agree that any action to enforce or interpret this Agreement shall only be brought in the Superior Court of New Jersey.

10. In addition to the other remedies set forth within this Agreement, in the event that the terms of this Agreement are violated, the OSF reserves the right to reinstate its non-allowable cost determination toward Mount Carmel for the 2007-2008 school year, and reserves all rights to pursue actions to enforce that determination. Mount Carmel reserves all rights and defenses in the event the terms of this Agreement are violated.

11. The Parties understand and agree to the terms of this Agreement. It is acknowledge that this Agreement has been entered into freely, willingly, and voluntarily, without duress or

coercion, and with the opportunity for the Parties to consult with representation of their choosing and at their option.

Catherine Elston, Esq.
Attorney for Petitioner

By: _____
Catherine Elston, Esq.

Dated: 6/27/2022

MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondent

By: _____
Laurie Fichera
Deputy Attorney General

Dated: 5/23/22

New Jersey Commissioner of Education

Final Decision

M.I., on behalf of minor children, A.D. and P.P.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

Synopsis

Petitioner filed a pro se petition challenging the determination of the respondent Board of Education of the City of Elizabeth (Board) that her minor children, A.D. and P.P., were ineligible to receive a free public education in respondent's schools. Petitioner asserted that she and her children do, in fact, live at the Elizabeth address provided when the children were enrolled and that she had provided proof of her residence as required by the Board. The Board has subsequently determined that the children are eligible to attend Elizabeth schools, and withdrew its claim for tuition. Petitioner has not, however, withdrawn her appeal in this matter.

The ALJ found, *inter alia*, that: the children are attending Elizabeth Public Schools free of charge; the District has formally withdrawn its counterclaim for tuition; and there is no further matter in controversy. The petitioner has already achieved the relief she sought in her appeal. The ALJ determined that the matter is moot and, accordingly, granted the Board's motion to dismiss the petition, with prejudice.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions. Acordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed with prejudice.

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

188-22

OAL Dkt. No. EDU 05322-21
Agency Dkt. No. 71-5/21

New Jersey Commissioner of Education

Final Decision

M.I., on behalf of minor children,
A.D. and P.P.,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

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

Upon the review of the record, the Commissioner is in accord with the ALJ's conclusion - for the reasons set forth in the Initial Decision – that the issues raised by the petitioner are moot. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed as moot, with prejudice.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 5, 2022
Date of Mailing: August 5, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 05322-21
AGENCY DKT. NO. # 71-5/21

M.I. O/B/O MINOR CHILDREN A.D. AND P.P.,
Petitioners,
v.
CITY OF ELIZABETH BOARD OF EDUCATION,
Respondent.

M.I., Petitioner, pro se (no appearance)

Brian J. Kane, Esq., (La Corte, Bundy, Varady & Kinsella) for Respondent

Record Closed: June 22, 2022 Decided: June 28, 2022

BEFORE **DANIELLE PASQUALE**, ALJ:

STATEMENT OF THE CASE

M.I., Petitioner, filed a petition challenging the determination of Respondent Elizabeth Board of Education that Petitioner and her family do not reside in the Elizabeth New Jersey School District (District). M.I. maintained throughout that she did, in fact, live in Elizabeth, New Jersey at the listed address. M.I. wrote in her Pro Se Residency Appeal that she had provided proof of same. In response, on June 18, 2021, the Respondent

filed an Answer and Counterclaim and while the attorney of record initially had difficulties communicating with Petitioner, Ms. DiPalo did, in fact, write to me to state that M.I. provided sufficient proof of her Elizabeth Residency and the District determined that it would permit her children to re-enroll as students. The students are currently enrolled and the District has withdrawn its counterclaim for any reimbursement. I take Judicial Notice that M.I. has been on multiple phone calls both in English and in Spanish and was thinking of withdrawing her case but never did. We sought a response as did the District for months but never received one. I finally listed the case for a hearing on June 22, 2022 where she was properly noticed and failed to appear. The argument to dismiss the case due to mootness was heard in M.I.'s absence.

LEGAL ANALYSIS

As the District properly argues, mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threated with harm. Jackson v. Dep't of Corr., 335 N.J. Super. 227, 231 (App. Div. 2000). "A case is technically moot when the original issue presented has been resolved at least concerning the parties who initiated the litigation." DeVesa v. Dorsey, 134 N.J. 420, 428 (1993). Courts normally will not decide issues when a controversy no longer exists, and the disputed issues have become moot. Id.

An action is 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. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, 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), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.

When a decision being sought in a particular matter will have no practical effect on the existing controversy, it is considered moot. A matter becomes moot when an issue becomes hypothetical in nature, 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).

"Therefore, when there has been a change in circumstances that raises doubt concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the state to which litigation has progressed." Id. at 437.

In the instant matter, I **FIND** as it is undisputed that M.I. lives in Elizabeth and that both her children do as well and that she provided proof of same. I also **FIND** that they are currently enrolled in the Elizabeth School District. I **FURTHER FIND** that The District has withdrawn its counterclaim as a result of our hearing/motion on June 22. 2022.

Again, it is undisputed and I am taking judicial notice of the District's description of M.I. being unresponsive an uncooperative even when the District was explaining that her residency was no longer in dispute as I was present on some of those calls and my assistant copied on some of that correspondence. It bears mentioning that my assistant speaks both English and Spanish and has communicated many times with M.I. in both languages, and thus I so **FIND**. As the District has formally withdrawn their counterclaim and the children are attending Elizabeth Public Schools and there are no legal fees at issue, I **FIND** that there is no matter in controversy that this court can decide or relief that the court can grant and thus the issues are moot. In short, I **FIND** that the Petitioner has already achieved the relief she sought in her appeal.

Therefore, I **CONCLUDE** that the petition is moot because M.I.'s showed the proof of residency, it is undisputed that she and her children live and are currently enrolled in the District and the District has withdrawn its counterclaim. As such there is nothing for this court to decide has the Petitioner has already received the relief she sought in her appeal.

ORDER

Based on the foregoing, I hereby **ORDER** that Respondent's Motion to Dismiss on behalf of mootness is **GRANTED**. **I ORDER** that the **DISMISSAL IS WITH PREJUDICE** based on mootness and later Petitioner's failure to appear and/or pursue an action.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 28, 2022
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: June 28, 2022

Date E-Mailed to Parties: June 28, 2022

lr

189-22
OAL Dkt. No. EDU 02898-22
Agency Dkt. No. 22-2/22

New Jersey Commissioner of Education

Decision

Gabriel Baltimore,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

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

Upon review, the Commissioner agrees with the Administrative Law Judge's determination that the petition should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 5, 2022
Date of Mailing: August 5, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02898-22
AGENCY DKT. NO. 22-2/22

GABRIEL BALTIMORE,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION BOARD OF EXAMINERS,

Respondent.

Gabriel Baltimore, pro se, failed to appear

Sydney Finkelstein, Deputy Attorney General, appearing on behalf of respondent

Record Closed: June 27, 2022 Decided: June 28, 2022

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 12, 2022, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on April 29, 2022, wherein the parties engaged in extensive settlement discussions. During the pendency of the prehearing petitioner advised that he would be submitting a letter withdrawing his request for a hearing. With no letter being received, on May 5, 2022, my assistant inquired

about the status of the withdrawal from petitioner, via email. Petitioner failed to respond. Under my direction, my assistant reached out to the parties again on May 12, 2022, inquiring about the withdrawal and whether or not petitioner wished to pursue a hearing. Petitioner failed to respond. On May 19, 2022, notice was sent to the parties, via electronic and regular mail, scheduling another telephone prehearing for June 21, 2022. The bottom of the notice reads in bold, "If you do not participate in the prehearing conference, the file will be returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party." Petitioner did not appear for the June 21, 2022 prehearing and on June 22, 2022, my assistant sent an email to the parties stating:

> "As you know this matter was scheduled for a telephone prehearing for yesterday, June 21, 2022. Neither party called in for the conference. Judge Moss is requesting that Mr. Baltimore advise if he intends to go forward with a hearing or if he will be producing a letter withdrawing his request for a hearing, as per his agreement during the April 29th conference call. Kindly advise no later than June 27, 2022. Otherwise this matter will be returned to the agency as a dismissal."

Respondent's counsel replied shortly thereafter advising that he was present for the prehearing. To date, petitioner has not responded.

I **CONCLUDE** that this matter is no longer a contested case before the OAL. Petitioner abandoned his claim by failing to submit a letter of withdrawal or advise if he wanted to move forward with a hearing.

ORDER

Accordingly, It is **ORDERED** that this matter be and is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 28, 2022

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: June 28, 2022

Date Mailed to Parties: June 28, 2022

ljb

190-22

New Jersey Commissioner of Education

Final Decision

Melody Travisano,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent New Jersey State Board of Examiners (SBE) that she had not met the requirements for issuance of a Teacher of English standard certificate because she had not successfully completed the required number of semester hour credits in English. Petitioner requested credit for journalism courses, as well as her experience working as a journalist, to satisfy the semester hour requirements for English certification; however, the SBE did not accept petitioner's alternative college courses or experience, finding that petitioner failed to establish a compelling one-to-one correspondence between the Teacher of English certification requirements and her journalism education and experience. Petitioner thereafter filed the within appeal.

The ALJ found, *inter alia,* that: the issue in this case is whether petitioner satisfied her burden of demonstrating, by a preponderance of the evidence, that the SBE acted in a manner that was arbitrary, capricious, or contrary to law when it determined not to accept petitioner's alternative education to satisfy the remaining requirements that petitioner needed to receive a Teacher of English certificate; *N.J.A.C.* 6A:9B-9.1 sets forth the requirements for issuance of a standard instructional certificate; the SBE determined that petitioner did not satisfy the requirements for certification because she lacks eighteen semester-hour credits in English, of which twelve must be advanced courses; petitioner's alternative education and experience was not deemed equivalent to satisfy that deficiency; and petitioner failed to establish that the SBE's decision to deny her application for a Teacher of English certificate was arbitrary, capricious or unreasonable. Accordingly, the ALJ affirmed the SBE's decision and dismissed the petition.

Upon comprehensive review, the Commissioner found, *inter alia,* that: the ALJ mistakenly applied the wrong standard of review in the Initial Decision, stating that the SBE's decision will not be overturned unless the petitioner proves that the SBE acted in a manner that was arbitrary, capricious or contrary to law; the appropriate standard of review here is whether the SBE's decision was consistent with the applicable statutory and regulatory provisions of *N.J.A.C.* 6A:3; nonetheless, the record of this matter demonstrates that the petitioner did not complete the required course work and that the SBE's decision to deny her application was consistent with the applicable regulatory provisions. Accordingly, the Initial Decision of the OAL was modified with respect to the appropriate standard of review and the petition was dismissed.

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

190-22
OAL Dkt. No. EDU 03126-22
Agency Dkt. No. 58-3/22

New Jersey Commissioner of Education
Final Decision

Melody Travisano,

Petitioner,

v.

Department of Education, State Board of Examiners,

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.

In this case, petitioner Melody Travisano filed a petition of appeal under *N.J.A.C.* 6A:3.1 *et seq*. challenging the State Board of Examiners' (Board) decision denying her application for a Teacher of English certificate. The Administrative Law Judge (ALJ) determined that the petitioner did not satisfy the requirements necessary to obtain the certificate because she lacked the required semester hour credits in English courses, and that her journalism classes and newspaper experience are not one-to-one equivalents to the required courses in the subject area.

As a threshold matter, a discussion of the applicable standard of review for petitions of appeal that are filed under *N.J.A.C.* 6A:3 is necessary. When there is a challenge to a determination made by an office within the Department of Education, the Commissioner is not

mandated to give deference to her staff, but instead determines if the finding was legally appropriate. *See*, *Jarosław Nimczyk v. New Jersey State Board of Examiners*, Commissioner Decision No. 98-22, dated May 16, 2022 (comprehensively detailing the appropriate standard of review to be applied in matters filed against the Board of Examiners pursuant to *N.J.A.C.* 6A:3); and *Board of Trustees of the Passaic County Elks Cerebral Palsy Center v. New Jersey Dept. of Educ., Office of Fiscal Accountability and Compliance*, Commissioner's Decision No. 334-14, dated August 14, 2014 (finding that a decision of the Office of Fiscal Accountability and Compliance is not given deference by the Commissioner). Moreover, where the Department of Education has limited the scope of review of a subordinate office or division, it has done so by regulation, *i.e.* appeals filed under *N.J.A.C.* 6A:4 challenging a decision of the State Board of Examiners revoking/suspending a certificate, or a decision of the School Ethics Commission.

Despite several decisions in which the Commissioner has clearly articulated the appropriate standard of review for matters filed under *N.J.A.C.* 6A:3, here the ALJ mistakenly referenced *N.J.A.C.* 6A:4-4.1(a) in the Initial Decision and stated that the Board's decision will not be overturned unless the petitioner proves that the Board acted in a manner that was arbitrary, capricious or contrary to law.[1] It is important to recognize that a decision by the Board denying an application for a certificate is not entitled to the arbitrary, capricious or unreasonable standard of review that is afforded to appeals filed under *N.J.A.C.* 6A:4, challenging a decision of the Board revoking or suspending a certificate. *See*, *Jessica Walder v. New Jersey Department of Education, State Board of Examiners*, Commissioner's Decision No. 503-14, decided December 29, 2014 (finding that the Commissioner does not give deference to

[1] The Motion to Dismiss filed by the Board of Examiners also referenced *N.J.A.C.* 6A:4-4.1(a) and the incorrect standard of review that applies in this matter.

a decision of the State Board of Examiners denying a request for issuance of a certificate). The petition of appeal in this matter was filed in accordance with *N.J.A.C.* 6A:3, which contains completely different regulatory provisions than *N.J.A.C.* 6A:4; these two Administrative Code Sections should never be conflated. *Nimczyk, supra at* 2. As such, the standard of review that governs appeals filed under *N.J.A.C.* 6A:4 does not apply to this case. Therefore, the appropriate standard of review of the Board's decision is whether the decision is consistent with the applicable statutory and regulatory provisions.

Upon a comprehensive review of the record and applying the appropriate standard of review, the Commissioner is in accord with the Board's determination that the petitioner did not satisfy the requirements necessary to qualify for a Teacher of English certificate under *N.J.A.C.* 6A:9B-8.7 and 9.1. Although the ALJ applied an inaccurate standard of review, the record of the matter demonstrates that the petitioner did not complete the required course work and that the Board's decision to deny her application was consistent with the applicable regulatory provisions.

Accordingly, the Initial Decision is modified with respect to the appropriate standard of review and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

Angelina Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 8, 2022
Date of Mailing: August 8, 2022

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03126-22
AGENCY DKT. NO. 58-3/22

MELODY TRAVISANO,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,
Respondent.

Melody Travisano, petitioner pro se

Colin Klika, Deputy Attorney General, for respondent, (Matthew J. Platkin, Acting Attorney General, attorneys)

Record Closed: June 10, 2022 Decided: June 22, 2022

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE

The New Jersey Department of Education, State Board of Examiners (Board) denied petitioner's request for the issuance of a Teacher of English standard certification, because she lacked the required semester hour credits in English courses.

Petitioner appeals the Board's decision and requests credit for other educational courses, specifically, journalism, and experience as a journalist to satisfy the required semester hour credits to be issued the certification.

PROCEDURAL HISTORY

The Board rendered its written decision on March 4, 2022, denying petitioner's request. The petitioner filed a petition with the Bureau of Controversies and Disputes on March 23, 2022. The Deputy Attorney General for the Board filed a motion to dismiss in lieu of an Answer on April 18, 2022. The matter was transmitted to the Office of Administrative Law (OAL) and filed on April 20, 2022, to be heard 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 convened a case management conference on May 9, 2022, at which time a briefing schedule was agreed upon regarding the respondent's pending motion to dismiss, to be considered as a motion for summary decision. Petitioner filed a letter response on May 13, 2022. Respondent's final reply was served on June 10, 2022. Oral argument was not requested, and the matter is now ripe for determination.

FACTUAL DISCUSSION

Petitioner seeks the issuance of a K-12 Teacher of English certificate. She presently teaches Bilingual Language Arts at the middle school level. Petitioner was found by the Board to have satisfied the certification requirements except for eighteen (18) semester-hour credits in English, of which twelve (12) must be advanced courses. Petitioner applied for recognition of her college journalism credits and her journalism career experience. Travisano obtained her Bachelor of Arts in Journalism from Penn State in 1995. She also worked in journalism for twenty (20) years before switching careers in 2015 to teaching. After petitioner went into education, she obtained a Masters of Arts in Bilingual Education from Fairleigh Dickinson University in 2019.

The Board did not accept those alternative college courses or experience, finding they were not adequate substitutes. Specifically, the Board ruled:

> After full consideration of Travisano's submission, the Board finds that she did not establish a compelling one-to-one correspondence between the Teacher of English certification requirements and her education and experience.... Travisano's degree in Journalism is not equivalent to 18 semester-hour credits in English as a subject area specifically. And, while Travisano's journalism background is a valuable tool in teaching certain writing techniques, this experience demonstrates neither the breadth of knowledge and skills associated with a variety of rhetorical techniques nor the critical theory and analysis of literature.

LEGAL ANALYSIS AND CONCLUSION

In an administrative law action, 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). The non-moving party will prevail if they are able to "set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Id.

This standard is also set forth in New Jersey Court Rule 4:46-2, regarding a motion for summary judgment, which is the equivalent to an administrative law summary decision motion. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court stated:

> [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.
>
> [Brill at 540.]

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." Brill at 540, citing Anderson v Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Summary judgment, like

alternative education if the petitioner demonstrates, by a preponderance of the credible evidence, that the alternative education is the one-to-one equivalent with the statutory requirements.

> (c) The Board of Examiners shall not:
>
> 1. Waive any test, GPA, degree completion, or approved educator preparation program completion requirements;
>
> 2. Permit a candidate to substitute education and/or experience for any test, GPA, degree, or approved educator preparation program completion requirements; or
>
> 3. Issue a certificate that is expired and/or is not a type of certificate endorsement pursuant to N.J.A.C. 6A:9B-9 through 11.
>
> [N.J.A.C. 6A:9B-4.12.]

See also Hutchinson v. New Jersey State Board of Examiners, EDU16373-12, Initial Decision (April 5, 2013), aff'd, Commissioner (May 15, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

When a decision by the Board has been appealed, the Commissioner "shall ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated the State Board of Examiners . . . acted in a manner that was arbitrary, capricious, or contrary to law." N.J.A.C. 6A:4-4.1(a). "Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewerage Co. v Dep't of Environmental Protection, 122 N.J. Super. 184, 199 (App. Div. 1973), citations omitted.

The issue presented here is whether there is a genuine issue of material fact in dispute that the Board's decision was arbitrary and capricious, when it chose not to accept the petitioner's proposed alternative education courses to satisfy the semester

credits in English courses that she needs to receive a Teacher of English certificate. N.J.A.C. 6A:9B-9.1(a). The facts are viewed most favorably to the non-moving party. Nevertheless, the burden is on petitioner to prove that she has met the certification requirements by "clear and convincing evidence" of a one-to-one correspondence of experience or alternate education to the licensing deficiencies. N.J.A.C. 6A:9B-4.12(d)(1); McQuilken v. State Bd. Of Examiners, OAL No. EDU 8375-11, Initial Decision (Dec. 12, 2013) (https://njlaw.rutgers.edu/collections/oal.)

Here, and on the basis of the undisputed facts and records, petitioner cannot be found to have the required credits in English to be issued the certificate. The Board exercised its discretion pursuant to N.J.A.C. 6A:9B-4.12(b) and found that the journalism courses, for which no detailed syllabi or reading lists were even provided, and newspaper experience offered as alternative or equivalent education were not the one-to-one equivalent of courses on critical literature analysis and other advanced and "coherent sequence of courses appropriate to the subject area." N.J.A.C. 6A:9B-9.1(a)(1)(iii). The Board exercised its discretion honestly and upon due consideration. It thoughtfully and reasonably chose to give credit to petitioner for some of her college-hour credits. Likewise, the Board thoughtfully and reasonably chose not to give her credit for her alternative journalism coursework and job experience, finding that journalism is a "valuable tool in teaching certain writing techniques" but does not encompass the variety of theories and analysis of literature central to the teaching of English at the high school level.

I **CONCLUDE** that the motion for summary decision shall be granted. Upon a review of the papers submitted, looked upon most favorably to the petitioner, there is no genuine issue of material fact in dispute that the Board's decision was arbitrary and capricious, unreasonable, or otherwise contrary to the law.

ORDER

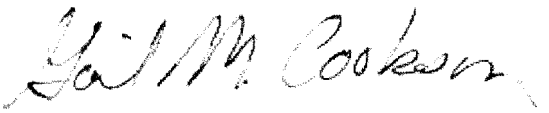
Based upon the foregoing, I hereby **ORDER** that respondent State Board of Examiners' motion for summary decision is hereby **GRANTED**. It is further **ORDERED** that

the application of petitioner Melody Travisano for an appeal from the denial of her application for a standard teacher of English certificate 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.



June 22, 2022
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 6/22/2022

Date Mailed to Parties: 6/22/2022

id

191-22

New Jersey Commissioner of Education

Final Decision

N.U. on behalf of minor child, M.U.,

Petitioner,

v.

Board of Education of the Town of Mansfield, Burlington County,

Respondent.

Synopsis

In this matter on remand, the petitioner challenged the respondent Board's determination that M.U. committed an act of harassment, intimidation and bullying (HIB) in violation of New Jersey's Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.*, when he told a fellow sixth grader who had recently dyed his hair and gotten a haircut that he looked like Donald Trump. The classmate took offense to the comment, and an HIB investigation ensued, resulting in a finding that M.U.'s conduct constituted HIB. In an April 2020 decision, the Commissioner remanded this matter to the OAL for further proceedings to develop the record in order to determine if the Board's HIB determination was arbitrary, capricious or unreasonable.

On remand, the ALJ found, *inter alia*, that: the Commissioner will not overturn a decision of a local board of education unless it is determined that the action was arbitrary, capricious or reasonable; the HIB investigation herein revealed a single incident in which M.U. stated to another student that his new hair color and style made him look like Donald Trump; the incident occurred on school property; the distinguishing characteristic in this case was the student's recent change to his hair color and style; and the incident interfered with the student's right to be free from negative, verbal attacks. The ALJ concluded that all elements required to establish an act of HIB under the Act were satisfied, and petitioner did not meet her burden of proof that the Board acted in an arbitrary, capricious or unreasonable manner in concluding that M.U.'s actions constituted harassment, intimidation or bullying under the Act. Accordingly, the ALJ issued an Initial Decision dismissing the petition.

Upon review, the Commissioner found that the Board's decision was arbitrary, capricious, and unreasonable because it failed to address one of the criteria necessary to prove an act of HIB. Specifically, there is no documentation of any kind to show that M.U.'s conduct substantially disrupted or interfered with the rights of other students or the orderly operation of the school. Accordingly, the Commissioner concluded that the Board's decision was arbitrary, capricious, and unreasonable because there is no evidence that the Board considered all of the factors required to prove an element of HIB. The Initial Decision of the OAL was reversed, and any reference to HIB shall be removed from M.U.'s student record.

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

OAL Dkt. Nos. EDU 16045-18, EDU 04896-20 (on remand), EDU 09701-20 (on remand)
Agency Dkt. No. 253-9/18

New Jersey Commissioner of Education

Decision

N.U., on behalf of minor child, M.U.,

Petitioner,

v.

Board of Education of the Town of Mansfield, Burlington County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

This matter concerns an alleged act of harassment, intimidation, and bullying (HIB) by M.U. The HIB complaint alleged that M.U. had referred to another student as "Donald Trump." The Board found that M.U. had committed an act of HIB and imposed an in-school suspension. Following a hearing, the Administrative Law Judge (ALJ) concluded that the Board's decision was not arbitrary, capricious, or unreasonable and dismissed the petition.

In her exceptions, petitioner argues that the Board failed to prove all the elements of HIB. According to petitioner, there is no evidence that the comment M.U. made was related to the alleged victim's hair – only speculation by the principal that the recent haircut and color were the reason for M.U.'s comment – and therefore it cannot have been reasonably perceived as being motivated by a distinguishing characteristic. Petitioner also contends that there is a lack of evidence that M.U.'s comment substantially disrupted or interfered with the orderly operation of the school or the right of

[1] The Board did not file a reply to petitioner's exceptions.

other students. Additionally, petitioner argues that the alleged victim first made a comment to M.U., such that their exchange was a dispute not within the definition of HIB.

Upon review, the Commissioner concludes that the Board's decision was arbitrary, capricious, and unreasonable because it failed to address one of the criteria necessary to prove an act of HIB. The Anti-Bullying Bill of Rights Act (the Act) defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, 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 disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB requires three elements.[2] First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020).

[2] The statute also requires that the conduct take place on school property, at a school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3. This element appears to have been satisfied in this matter.

The Commissioner previously issued a decision in this matter, finding that the record at that time did not adequately address all of the factors necessary to determine whether the Board's HIB decision was arbitrary, capricious, or unreasonable. The Commissioner noted that the letter from the principal to petitioner, which was affirmed by the Board, only contained specific information regarding the first factor – that M.U.'s comment was reasonably perceived as being motivated by an actual or perceived distinguishing characteristic.[3] Accordingly, the Commissioner ordered further development of the record.

On remand, the record now includes a copy of the HIB incident report that was completed during the investigation. The report goes a step further than the principal's letter and includes a statement that the effect of M.U.'s comment was that it insulted or demeaned a student. Accordingly, it appears that the Board did make a finding regarding the third HIB criteria listed above. However, there is no documentation of any kind addressing the second criteria – that M.U.'s conduct substantially disrupted or interfered with the rights of other students or the orderly operation of the school. While two of the Board's witnesses testified that the alleged victim shaved his head and felt reluctant to return to school, there is no documentary support for that information or indication that that information was presented to the Board. The victim statement included in the HIB report does not reference either the head shaving or any reluctance to return to school, or any other information that demonstrates that M.U.'s comments substantially disrupted or interfered with the rights of other students or the orderly operation of the school.[4] The Commissioner therefore concludes that the Board's decision was

[3] The Commissioner did not reach any conclusions regarding the merits of the Board's decision on this factor, but only noted that the record demonstrated that the Board had specifically made a finding regarding this factor.

[4] In another matter, *LK. and T.K., on behalf of minor child, A.K. v. Bd. of Educ. of the Twp. of Mansfield, Burlington Cty.*, Commissioner Decision No. 318-21, decided December 9, 2021, the petitioners argued that the HIB report and witness testimony included information that was not contained in the interview notes. The Commissioner indicated that individuals completing an HIB investigation are not required to take verbatim notes of their interviews and found that witness testimony was credible even when the information presented in that testimony was not included in interview notes. The distinction between *L.K.* and this matter is that in *L.K.*, the HIB report presented to the board of education included information related to all three criteria necessary to prove an act of HIB, even though some of that information was not included in the underlying interview notes that formed the

arbitrary, capricious, and unreasonable because there is no evidence that the Board considered all of the factors required to prove an element of HIB.[5]

Accordingly, the Initial Decision is reversed, and the decision of the Board finding that M.U. committed an act of HIB is overturned. Any reference to the HIB decision shall be removed from M.U.'s student files.

IT IS SO ORDERED.[6]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 10, 2022
Date of Mailing: August 10, 2022

basis for the reports. Here, the HIB report – which is the only documentation available in the record – fails to include any information related to one of the criteria, and the Commissioner is therefore unable to conclude that that information was presented to the Board, rendering its decision arbitrary, capricious, and unreasonable. This conclusion is reached as a matter of law and is unrelated to the ALJ's credibility finding regarding the testimony of the Board's witnesses.

[5] The Commissioner does not reach the question of whether the Board's findings on the other two criteria were arbitrary, capricious, or unreasonable, as its failure to make findings on all necessary factors is sufficient to overturn its decision.

[6] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09701-20
AGENCY DKT. NO. 253-9/18
(ON REMAND FROM EDU 04896-20
COMMISSION DECSION 231-20R)
(ON REMAND FROM EDU 16045-18
COMMISSIONER DECISION 106-20)

N.U. ON BEHALF OF M.U.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF MANSFIELD, BURLINGTON COUNTY,
Respondent.

N.U., on behalf of minor child M.U., petitioner, pro se

Marc G. Mucciolo, Esq. appearing for respondent, (Methfessel & Werbel, P.C. attorneys)

Record Closed: June 1, 2022 Decided: June 27, 2022

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

Petitioner, N.U. on behalf of her minor child, M.U., challenges respondent's, Board of Education of the Town of Mansfield, Burlington County's (Board), Harassment Intimidation and Bullying (HIB) determination relative to M.U.

PROCEDURAL HISTORY

The petitioner initially filed a challenge of the Board's HIB determination and requested a hearing before the Office of Administrative Law (OAL). The matter was transmitted to the OAL on November 2, 2018, where it was filed under Docket No. EDU 16045-18, on November 5, 2018, as a contested case. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. The petitioner filed an amended petition with the OAL on February 21, 2019. The Board filed its answer to the amended petition on March 11, 2019. The fair hearing was conducted on March 3, 2020. At the close of the petitioner's case, counsel for the respondent made an oral motion to dismiss the petition. The respondent's motion to dismiss was granted and the order of dismissal was entered on March 10, 2020.

By its Decision No. 106-20, entered April 24, 2020, The New Jersey Commissioner of Education (Commissioner) remanded this matter to the OAL for further proceedings to determine if the Board's HIB determination was arbitrary, capricious, or unreasonable. Decision No. 106-20 reads in pertinent part:

> The letter to N.U. from the school's principal[1], which the Board affirmed in its decision, indicates that the investigation found evidence of the first element (of the HIB Act) that M.U.'s conduct was reasonably perceived as being motivated by another student's distinguishing characteristic. However, the letter does not provide any information regarding the remaining elements required to prove an act of HIB. Nor does the Initial Decision address these elements of the statute.
>
> The Commissioner is mindful that when a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "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). However, in the instant case, the Commissioner cannot determine whether the decision was arbitrary, capricious, or unreasonable based upon the current record.

[1] Entered into evidence as R-1.

> Accordingly, this matter is remanded to the OAL for further proceedings consistent with this decision.

The remand was transmitted to the OAL, under Docket No. EDU 04896-20, where it was filed on April 28, 2020. The parties were advised that a prehearing telephone conference was scheduled for August 26, 2020. Petitioner did not participate in the scheduled prehearing telephone conference and did not contact the OAL to explain why she was unable to do so. Accordingly, the matter was dismissed for the petitioner's failure to appear. The order of dismissal was entered on August 31, 2020.

By its Decision No. 231-20R, entered October 9, 2020, The New Jersey Commissioner remanded this matter to the OAL for further proceedings necessary to reach a determination on the merits.

The remand was transmitted to the OAL, under Docket No. EDU 04896-20, where it was filed on October 15, 2020. The matter was heard virtually on July 19, 2021, and the record remained open for the receipt of transcripts and written summations from the parties until the record was closed on June 1, 2022.

FACTUAL DISCUSSION AND FINDINGS

The following facts of this case are not in dispute; therefore, I **FIND** as **FACT** that in December 2017, M.U. was eleven years old and in the sixth grade. At that time, he approached a fellow classmate, while at school, who had gotten a haircut and bleached a portion of his hair. M.U. told his classmate that he looked like Donald Trump. The classmate took offense to the comment and the incident was reported. A HIB investigation was conducted, and it was determined that M.U.'s conduct towards his classmate constituted HIB.

Testimony

Julie Katz has been employed by the Mansfield Township Board of Education for five years as a school counselor and was appointed to serve as the school anti-bullying

specialist. She is primarily responsible for investigating all allegations of HIB arising in the school and to promote a positive school environment. She also provides individual and group counseling services and chairs the Section 504 Committee.

As part of a HIB investigation, her role is to interview the alleged victim of HIB, interview the alleged perpetrator as well as any witnesses, and collaborate with the principal to make a determination as to whether or not an act of HIB occurred. She first became familiar with M.U. with regard to this incident, in December of 2017, when the victim's parents alerted the District to issues between the student and M.U.

Ms. Katz testified she was aware of the Board policy on bullying, and that she was responsible for investigating the incident and generating a report. Based upon meeting with the victim and his parents, she learned the victim had dyed his hair blonde, and as a result, M.U. referred to him as "Donald Trump."

The first step she took was to interview the victim and find out exactly what happened from his perspective. She then interviewed M.U. and four witnesses who overheard the comment. Once the interviews were complete, she collaborated with the principal, Glenn Kershner. regarding the findings of her investigation and as to whether or not the allegation of HIB was substantiated.

Ms. Katz testified that the determination from her investigation was that M.U. committed HIB against the other student. Specifically, she testified that the comment was related to an actual characteristic of the victim, his hair, and that the comment had an impact on the student as the student stated that he shaved off his blond hair and did not feel safe coming to school. Under the circumstances, Ms. Katz believed a reasonable person should have known that the comments were insulting or would have the effect of being insulting, and that the victim felt insulted and demeaned by the comment.

Ms. Katz testified that her investigation was thorough, and she believed the investigation and its result were proper and that the Board acted appropriately in upholding the recommendation of HIB against M.U. Under the circumstances, Ms. Katz believed the intent of the alleged bully was immaterial to the ultimate determination of

whether or not HIB was founded. Ms. Katz also testified that M.U.'s statements that the victim had made a comment to him, leading up to the "Donald Trump" comment, could not be corroborated by any of the witnesses. Ms. Katz testified that she did not divert in any way from regular policies and procedures (P-1) in investigating this particular HIB incident.

Glenn Kershner has been employed by the Mansfield Township Board of Education for thirteen years as the building principal for the grade three through grade six building. He holds a principal certificate, teaching certificate, and school safety specialist certification.

Mr. Kershner stated he first became familiar with M.U. in the fifth grade when M.U. first enrolled in the District. He identified the letter he sent to N.U. regarding the bullying investigation that took place. (R-1.) Mr. Kershner testified he received a phone call from the victim's parents stating the student was being bullied in school and they wanted to meet with him and Julie Katz, the school anti-bullying specialist, to discuss the situation.

Mr. Kershner and Ms. Katz met with the parents of the victim during the 2017-2018 school year. At the meeting, the student's parents and the student identified M.U. as specifically targeting the student in a myriad of ways, including referring to the student as "Donald Trump" as a result of his hair color and style. Mr. Kershner was told the student went home the night that M.U. called him Donald Trump and shaved the blond hair off his head because he was so insulted by the remark.

Mr. Kershner testified there was a list of nine things that M.U was alleged to have done to the other student, one of which was calling the student "Donald Trump" as a result of his hair color. He spoke to M.U with regard to each allegation, but only investigated the "Donald Trump" incident as HIB.

Mr. Kershner generally reviews the investigation and notes from Ms. Katz, discusses the findings with her, and then makes a recommendation to the superintendent. In this instance, he did all of those things. He and Ms. Katz agreed M.U.'s conduct was reasonably perceived and motivated by a specific characteristic of the victim, in this case

his hair color and style. He and Ms. Katz agreed that M.U.'s conduct substantially interfered with the victim's rights, specifically that the student shaved off his blond hair and was reluctant to return to school.

Under the circumstances, Mr. Kershner believed a reasonable person would have known that these comments would emotionally harm another student, and that this conduct actually had the effect of insulting and demeaning the other student. As principal, he is responsible for handing out discipline, and that in this case, the discipline for M.U. was a lunch and recess detention.

Mr. Kershner attended the Board meeting in February 2018, where the Board upheld the determination of HIB. Mr. Kershner testified the two students were not friends, and that under the circumstances, the District acted appropriately in timely investigating and fulfilling its responsibilities in addressing the incident.

Tiffany Moutis has been employed by the Mansfield Township Board of Education for six years as the school superintendent. Her role relative to allegations of HIB involve presenting the administrative recommendations to the Board of Education for approval or rejection.

She testified that Mr. Kershner and Ms. Katz met with her and reviewed the within investigation. She took the report and recommendations and met with the Board in executive session to discuss the recommendations. The Board determined to uphold the administrative recommendation of HIB against M.U.

N.U. was afforded the opportunity to appear before the Board to state her position regarding the incident, and the Board heard her out. Ms. Moutis identified the letter she sent after the Board meeting, upholding the HIB determination. (R-2.) She also stated that she agreed with the determination, and with the investigation findings as completed by Mr. Kershner and Ms. Katz. Under the circumstances, she believed all steps required were followed correctly.

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In-re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
> [5 N.J. at 522.]

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, 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.)

When assessing 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.) Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963.)

Having considered the testimonial and documentary evidence presented and observing the demeanor of Julie Katz, Glenn Kershner and Tiffany Moutis, I accept their testimony to be highly credible. Julie Katz, Glenn Kershner and Tiffany Moutis merely stated that facts as they recalled them, without histrionics or magnification. Their testimony was consistent and corroborated by the documentary evidence. None of these witnesses had an ulterior motive or anything to gain by testifying.

LEGAL ANALYSIS AND CONCLUSION

New Jersey enacted the Anti-Bullying Bill of Rights Act (Act) to "strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying" occurring both on and off of school grounds. N.J.S.A. 18A:37-13.1(f). Definitions relative to adoption of harassment and bullying prevention policies are found in N.J.S.A. 18A:37-14, which states in part:

> Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, 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 disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > (a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> >
> > (b) has the effect of insulting or demeaning any student or group of students; or
> >
> > (c) creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

Here, the investigation revealed that the single incident of M.U. stating to another student that the student's new hair color and style made him look like Donald Trump, occurred on school property. The distinguishing characteristic in this case was the student's recent change to his hair color and style. This incident interfered with the

student's right to be free from negative, verbal attacks. A reasonable should know, under these circumstances, that such a verbal attack would have the effect of emotionally harming the student. Clearly this incident had the effect of insulting or demeaning any student as is evidenced by him cutting his hair and wanting to avoid returning to school.

The petitioner alleges that the HIB investigation was conducted improperly and was incomplete. Petitioner urges this tribunal to conclude that there was no HIB, and that the HIB investigation was conducted improperly and was incomplete therefore the determination should be reversed.

The Board urges this tribunal to conclude that the Board was not arbitrary, capricious or unreasonable in its determination that the HIB investigation was conducted properly and that M.U.'s conduct did constitute HIB.

The Commissioner of Education 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) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, 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). New Jersey 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). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it.

Here, based on the whole of the credible evidence presented, I **CONCLUDE** that all elements required to establish an act of HIB under the HIB Act have been satisfied. I

CONCLUDE that petitioner has not met her burden of proof that the Board acted in an arbitrary, capricious or unreasonable manner in concluding that M.U.'s actions constituted harassment, intimidation or bullying under the Act. Furthermore, I **CONCLUDE** that the petitioner failed to demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it.

ORDER

Based on the foregoing, I **ORDER** that the petition be **DISMISSED**.

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

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

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

June 27, 2022
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JRW/tat

APPENDIX

WITNESSES

For Petitioner:

Kenneth Nwobu

For Respondent:

Glenn Kershner
Julie Katz
Tiffany J. Moutis

EXHIBITS

For Petitioner:

P-1 Mansfield Township Board of Education Policy – Harassment, Intimidation and Bullying
P-2 Email – N.U. to Glenn Kershner, dated February 9, 2018

For Respondent:

R-1 Glenn Kershner letter to N.U, dated January 22, 2018; email from N.U. to Glenn Kershner, dated December 11, 2017; email from Glenn Kirshner to N.U., dated December 11, 2017; Glenn Kershner letter to unknown parents, dated, January 22, 2018; HIBster Report, submitted to BOE on January 16, 2018
R-2 Not Admitted into Evidence
R-3 Tiffany J. Moutis letter to N.U., dated February 13, 2018
R-4 Not Admitted into Evidence
R-5 Not Admitted into Evidence

R-6 Not Admitted into Evidence

R-7 Not Admitted into Evidence

New Jersey Commissioner of Education

Final Decision

N.M., on behalf of minor children, N.M. and K.M.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

Synopsis

Petitioner filed a pro se petition challenging the determination of the respondent Board of Education of the City of Elizabeth (Board) that her minor children, N.M. and K.M., were ineligible to receive a free public education in respondent's school district from December 8, 2021 through the end of the 2021-2022 school year. Petitioner asserted that she and her children lived with her mother at an address in Elizabeth. The Board contended that a residency investigation concluded that petitioner and her children actually reside at an address in East Orange. The Board filed a counterclaim for tuition for the period of ineligible attendance. Petitioner failed to appear at the scheduled hearing and offered no explanation for her failure to attend.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a) and *N.J.A.C.* 6A:22-3.1(a), public schools are free to any person over five and under twenty five years of age who is domiciled within the school district; pursuant to *N.J.A.C.* 6A:22-6.2., if a student does not have a right to attend the school district, the Commissioner may assess tuition; in this case, a preponderance of evidence demonstrates that the petitioner and her children were not domiciled in Elizabeth during the relevant time period; and petitioner supplied no compelling proof of domicile in Elizabeth despite requests to produce required documentation of residency. The ALJ concluded that N.M. and K.M. were not eligible to attend school in Elizabeth from December 8, 2021 through the end of the 2021-2022 school year. Accordingly, the ALJ ordered petitioner to pay the Board tuition in the amount of $19,335.80 for the period of N.M. and K.M.'s ineligibility from December 8, 2021 through June 20, 2022, as well as $79.90 per child for each school day attended beyond that date for the remainder of the 2021-2022 school year.

Upon review, the Commissioner concurred with the ALJ that petitioner failed to sustain her burden of establishing that she was domiciled in Elizabeth from December 8, 2021 through the end of the 2021-2022 school year. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and petitioner was ordered to reimburse the Board for tuition costs as outlined herein. 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.

192-22

OAL Dkt. No. EDU 00653-22
Agency Dkt. No. 240-12/21

New Jersey Commissioner of Education

Final Decision

N.M., on behalf of minor children,
N.M. and K.M.,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she was a domiciliary of Elizabeth from December 8, 2021 through the end of the 2021-2022 school year. The Commissioner further concurs with the ALJ's conclusion that minor children N.M. and K.M. were, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in the District. Therefore, the Board is entitled to tuition reimbursement in the amount of $19,335.80 for the period from December 8, 2021 through June 20, 2022, plus $79.90 per child for each school day

attended from June 20, 2022 through the end of the school year, during which time petitioner's minor children were ineligible to attend school in Elizabeth.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $19,335.80 for the period from December 8, 2021 through June 20, 2022,[1] plus $79.90 per child for each school day attended from June 20, 2022 through the end of the school year, for tuition costs incurred during the time period in which the minor children were ineligible to attend school in Elizabeth. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 10, 2022
Date of Mailing: August 10, 2022

[1] This calculation is based on a daily tuition rate of $79.90 and 121 school days of ineligible attendance per child. The Commissioner notes that these figures were derived from testimony presented to the ALJ during the hearing. However, a transcript of the testimony was not provided to the Commissioner, nor did the record contain any certification verifying the tuition rate or number of days of ineligible attendance. Therefore, the Commissioner relies on the ALJ's findings of fact.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00653-22
AGENCY DKT. NO. 240-12/21

N.M. ON BEHALF OF MINOR CHILDREN N.M. & K.M
Petitioner,
v.

CITY OF ELIZABETH BOARD
OF EDUCATION, UNION COUNTY,
Respondent.

N.M. petitioner, pro se

Brian J. Kane, Esq. for respondent (La Corte, Bundy, Varady & Kinsella, attorneys)

Record Closed: June 21, 2022 Decided: June 28, 2022

BEFORE: **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Petitioner, N.M. is the mother of minor children N.M. and K.M. who are students in the Elizabeth Public School District (District). From December 8, 2021, until now, K.M. and N.M. were not domiciled in the District. Should public school be free to K.M. and N.M. in the District for this period? No. Public school shall be free only to a minor who is domiciled within the school district. N.J.S.A. 18A:38-1(a).

PROCEDURAL HISTORY

On November 11, 2021, the Elizabeth Board of Education (Board) initially determined that K.M. and N.M. were not domiciled within the District, offered to conduct a residency hearing before the Board, and directed petitioner to present residency proofs to its investigator. Petitioner did not seek a residency hearing.

On December 8, 2021, the Board rendered a final decision, advising N.M. that neither child could attend public schools in the District because their domicile was not in Elizabeth. The District deemed petitioner's proofs insufficient. If petitioner did not remove the children from the District's schools and appealed the determination, the children could remain, but the District would seek per diem reimbursement for their education.

On December 11, 2021, petitioner appealed that determination, and the Board filed a counterclaim for tuition reimbursement. On January 19, 2022, the Department of Education, Office of Controversies and Disputes, transmitted the case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, 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.

On February 11, 2022, I scheduled a pre-hearing conference, but neither party attended. On February 24, 2022, I held an initial pre-hearing conference during which the parties agreed to exchange discovery by March 21, 2022, and I would schedule

another pre-hearing conference on March 30, 2022. At petitioner's request, I rescheduled the March 30, 2022, conference for April 4, 2022. Yet, she did not appear.

I scheduled the hearing for June 20, 2022, and issued a pre-hearing Order dated April 5, 2022, sent via email and regular mail. The Order also extended discovery until June 1, 2022 and required the parties to submit exhibits by June 10, 2022. The District complied, but petitioner supplied no discovery or exhibits.

On June 20, 2022, I conducted the hearing. This tribunal waited thirty minutes, but petitioner did not sign onto the zoom hearing despite separate notice. Petitioner did not contact the OAL to explain her absence, and I closed the record on June 21, 2022.

FINDINGS OF FACT

Based on the evidence the Board submitted and having considered its sufficiency and the opportunity to assess the witness' credibility, I **FIND** the following as **FACT**:

Beginning in November 2021, the Board's residency investigator explored the domicile of K.M., attending the District's School Number Twenty-Nine, and N.M., attending the District's School Number One. The principal received emails from teachers noting that the children told teachers and friends that they lived in East Orange. On picture day, K.M. filled her address on the form as being in East Orange. However, petitioner enrolled the children using an address in Elizabeth. Petitioner does not explain this discrepancy.

The District's residency investigator for four and one-half years, Vito Tropeano, is a former police officer and was straightforward in his testimony. Tropeano credibly described the steps he took to investigate this case. In addition to the form completed by K.M., and emails reporting statements by the children, he also reviewed attendance records revealing excessive missed school days or tardy arrivals for both children. According to the attendance records, K.M. had thirty absences and twelve tardiness

notations during the 2021-22 school year. N.M. had twenty-seven absences and thirty-seven tardiness notations for the 2021-22 school year.

Tropeano also went to the property in Elizabeth multiple times, and no one ever answered. He also spoke to the property management office for the home. Notably, petitioner is not on the lease. Instead, the lease is in petitioner's mother's name. Tropeano notes that the Elizabeth address is walking distance from N.M.'s school, and when leaving school, Tropeano observed N.M. walking in the opposite direction away from that address.

The District supplied N.M. with a computer-type device for school work that allows the District to "ping" or track its location. The device records note its frequent use at the school at 250 Broadway in Elizabeth and the East Orange address written on the picture record completed by the student and used for mailings to petitioner. N.M. also used the device a few times at a non-specific location in Elizabeth, like a hot spot. However, the device's location and use history do not identify the Elizabeth address used to enroll petitioner's children during the three months tracked.

On March 21, 2022, Tropeano observed the Elizabeth residence starting at 7:45 a.m., before school hours, noting only one vehicle present belonging to petitioner's mother. N.M. was not at school by 8:10 a.m. While watching the home, Tropeano saw no one leave. Tropeano learned that petitioner's friend dropped N.M. off at school at 8:45 a.m., after the start of school. In other words, N.M. was not at the Elizabeth residence before being dropped off at school.

Tropeano sent eligibility correspondence to petitioner at both addresses on November 12, 2021, and December 8, 2021. The East Orange address is an apartment complex, and the security desk signs for mail deliveries to residents. The East Orange complex security desk signed for both letters addressed to petitioner. Petitioner signed for the November 12, 2021, correspondence to the Elizabeth address where her mother

resides. However, the December 8, 2021, correspondence to the same address was undeliverable.

Tropeano explains that the District requires at least five documents to establish residency in the District. The Districts expects to see indicia of residence like a lease or property utility bills, but petitioner supplied none connecting her to ownership or rental of the Elizabeth property.

Further, Tropeano reviewed materials received from petitioner, which he describes as insufficient. Petitioner has a driver's license with the Elizabeth address issued in June 2020 and supplied two bank statements from November 2021 with that same address. Still, petitioner's mother lives at the Elizabeth address, and petitioner could have used this as a mailing address. Although the petitioner emailed the District that her mother would send the District a certified letter explaining petitioner's living situation, the District received none.

Petitioner supplied no additional supporting materials in this case despite knowing that the District considered her proofs inadequate.

The District charges a per diem pupil general education rate of $79.90. To June 20, 2022, one hundred twenty-one school days expired, totaling $9,667.90 per student. Eight additional days remain in this school year. Thus, through the hearing date, the District is owed $19,335.80 for educating N.M. and K.M., who remain enrolled in general education in the Elizabeth Public School District.

To date, petitioner has made no payments to the District since its demand on December 8, 2021, to either remove N.M. and K.M from the District or pay the per diem amount.

CONCLUSIONS OF LAW

Public school shall be free to a minor who is domiciled within the school district. N.J.S.A. 18A:38-1(a). A student is domiciled in a school district if his parent or guardian has a permanent home in the district such that "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." N.J.A.C. 6A:22-3.1(a)(1); State v. Benny, 20 N.J 238, 250 (1955). New Jersey has consistently held that the domicile of the child follows the domicile of the parent. Shim v. Rutgers, 191 N.J. 374, 399 (2007). Establishment of a domicile is an act of volition. Matter of Unanue, 255 N.J. Super. 362, 375 (Law Div. 1991). "[A] choice of domicile by a person, irrespective of the motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." Id. at 376.

If a student does not have a right to attend the school district, the Commissioner may assess tuition. See N.J.A.C. 6A:22-6.2.

Where a local board of education seeks removal of a student, the parent may appeal to the Commissioner of Education. N.J.S.A. 18A:39-1(b)(2). In the proceeding before the Commissioner, the parent has the burden of proof by a preponderance of the evidence that the child meets eligibility requirements for a free education. Ibid. If the evidence does not support the parent's claim, the Commissioner shall assess the parent tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Ibid.

In this case, I **CONCLUDE** that a preponderance of the evidence demonstrates that neither K.M. nor N.M. are domiciled in Elizabeth or were domiciled in the District when Elizabeth commenced its investigation. Indeed, I **CONCLUDE** that petitioner supplied no compelling proof of her children's domicile in Elizabeth on balance to the District's investigatory findings. Thus, I **CONCLUDE** that the Board is entitled to prevail as a matter of law given my findings of fact and the tuition petitioner owes the District is clear. Therefore, I **CONCLUDE** that petitioner owes the Board $19,335.80 for the

period of N.M. and K.M.'s ineligibility from December 8, 2021, through the scheduled hearing date of June 20, 2022; and $79.50 for each child for school days attended beyond the hearing date, for the remainder of the 2021-22 school year.

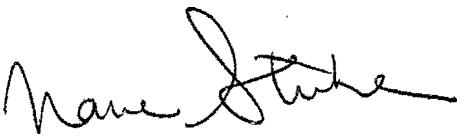
ORDER

Given my findings of fact and conclusions of law, I **ORDER** that petitioner owes the Board $19,335.80 for the period of N.M. and K.M.'s ineligibility from December 8, 2021, through the scheduled hearing date of June 20, 2022; and $79.50 for each child for school days attended beyond the hearing date, for the remainder of the 2021-22 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.



June 28, 2022
DATE

NANCI G. STOKES, ALJ

Date Received at Agency: June 28, 2022

Date Mailed to Parties: June 28, 2022

ljb

APPENDIX

WITNESSES

For Petitioner:

None.

For Respondent:

Vito Tropeano

EXHIBITS

For Petitioner:

None

For Respondent:

R-1. Emails to Legal Department

R-2. Student N.M.'s Photo Order Form

R-3. Residency Investigation Request Form

R-4. Notice of Initial Determination of Ineligibility for Student N.M.

R-5. Notice of Initial Determination of Ineligibility for Student K.M.

R-6. UPS packages to 144 South Harrison St., #404, East Orange, NJ and 172 Community Lane

R-7. Petitioner's Letter and Documents

R-8. Notice of Final Determination of Ineligibility for Student N.M.

R-9. Notice of Final Determination of Ineligibility for Student K.M.

R-10. Second Set of UPS packages to 144 South Harrison St., #404, East Orange, NJ and 172

Community Lane.

R-11. Pro Se Appeal

R-12. Student K.M.'s attendance records

R-13. Student N.M.'s attendance records

R-14. Student N.M.'s device records

R-15. Supplemental Report.

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

August 11, 2022

Steven R. Cohen, Esq. and Daniel R. Dowdy, Esq.
Selikoff & Cohen, P.A.
700 East Gate Drive, Suite 502
Mount Laurel, NJ 08054

James N. Barletti, Esq.
Gold, Albanese, Barletti & Locascio
48 South Street
Morristown, NJ 07960

Re: ***Ronald Donnerstag, et al. v. Heather Koenig, Central Regional Board of Education, Ocean County, SEC Dkt. No. C19-22, Agency Dkt. No. 200-8/22***

Dear Counsel:

I have considered the papers filed in connection with the requests for interlocutory review of the School Ethics Commission's July 26, 2022 decision filed by the Complainants and the Respondent in the above-captioned matter.

Upon full consideration 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, the requests for interlocutory review are hereby denied.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JS
c: Director, School Ethics Commission

193-22L

194-22

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

August 12, 2022

VIA EMAIL ONLY

Michael I. Inzelbuch, Esq.
1340 West County Line Road
Lakewood, NJ 08701

Michael Czarnecki, DAG
Division of Law
25 Market Street
P.O. Box 112
Trenton, NJ 08625

Re: ***Board of Education of the Township of Lakewood, Ocean County v. New Jersey Department of Education, and Kathleen Ehling*, Agency Dkt. No. 152-7/20, Commissioner Decision No. 254-21.**

Dear Parties:

I have reviewed the materials filed in connection with appellant Lakewood Board of Education's (Board) Motion to Stay certain actions of the New Jersey Department of Education (NJDOE) pending the Board's appeal of the October 18, 2021 decision requiring the Board to set aside 15% of the district's total Individuals with Disabilities Education Act (IDEA) funding for comprehensive, coordinated early intervention services (CCEIS) in order to address disproportionality in special education across the district.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that appellant has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that the Board has failed to meet the standard required for a stay of the October 18, 2021 decision. Most notably, the Board has failed to establish a likelihood of success on the merits. In the October 18, 2021 decision, the Commissioner determined that it was not arbitrary, capricious, or unreasonable for the NJDOE to exclude nonpublic school students from its disproportionality calculations. On this issue, the Board's motion papers reiterate arguments that were fully considered – and rejected – by the Commissioner in the October 18, 2021 decision.

The Board also makes arguments related to the NJDOE's calculations in the category of discipline, based on documents which supplemented the record before the Appellate Division following the Commissioner's October 18, 2021 decision. However, those arguments pertain to only one of the five categories of disproportionality found by the NJDOE and upheld by the Commissioner. Even accepting for purposes of this motion that the revised calculations are correct and support the Board's contention, they do not provide any basis to overturn the disproportionality findings in the other categories. As a result, appellant has failed to demonstrate a likelihood of success on the merits.

In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, appellant's request for a stay of the October 18, 2021 decision is hereby DENIED.[1]

Sincerely,

Angelica Allen-McMillan
Acting Commissioner

AAM/JKH
c: State Law Library

194-22L

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the TENURE Charges Against

REGINA GAUSS,

Agency Dkt. No.
176-9/21

By: DEPARTMENT OF CORRECTIONS, GARDEN STATE YOUTH CORRECTIONAL FACILITY

Before **MELISSA H. BIREN, Esq.**, Impartial Arbitrator

ORDER APPROVING SETTLEMENT OF TENURE CHARGES

The New Jersey Department of Corrections ("DOC") certified tenure charges against Regina Gauss ("Respondent" or "Gauss"), a tenured teacher working for the DOC at the Garden State Youth Correctional Facility as a certified Learning Disabilities Specialist. The tenure charges, alleging various claims related to the creation and/or maintenance of Individualized Education Plans for students in the DOC's charge who were entitled to special education services under applicable law, were filed on September 14, 2021.[1] Deputy Attorney General, Ryan Silver, Esq., entered a notice of appearance on behalf of DOC following the certification of the charges. Respondent, by her counsel, Jason Jones, Esq. (Weissman & Mintz, LLC) filed response to the tenure charges in the form of a Motion to Dismiss the Tenure Charges on September 30, 2021. The Commissioner of Education, having reviewed the tenure charges and the Respondent's Motion to Dismiss, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation. Therefore, on October 7, 2021, the Commissioner referred the matter to arbitration by the undersigned arbitrator pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L.* 2012, c. 26, to consider and decide the merits of the case, including the pending Motion to Dismiss. A timely request for an extension of time was granted.

[1] This matter has a long procedural history that is set forth in the Order on Motion to Dismiss dated January 10, 2022.

Following briefing by both parties, the arbitrator denied Respondent's Motion to Dismiss and set the matter for a hearing. The parties reached a mutually acceptable settlement of the tenure charges at a hearing on April 19, 2022. The settlement terms were thereafter set forth in a written Stipulation of Settlement ("Stipulation"). On July 28, 2022, the Stipulation signed by the parties was forwarded to the arbitrator for review and approval. In accordance with *N.J.A.C.* 6A:3-5.6, the settlement of the tenure charges pursuant to the terms of the Stipulation is hereby approved; the standards for settlement have been satisfied as set forth below.

1. A copy of the Stipulation is annexed to this Order.
2. The settlement of the tenure charges is warranted as it resolves the charges without any disruption to the DOC and its programs from calling personnel as witnesses or the additional costs of proceeding with the hearing. The settlement also removes the uncertainty of litigation for both the DOC and the Respondent.
3. Both the charged and charging parties have consented to the settlement terms. Both parties were represented by counsel in the negotiation of the settlement terms and the preparation of the Stipulation. Gauss signed the Stipulation on July 14, 2022 indicating her voluntary agreement to its terms; her counsel signed the Stipulation on July 15, 2022. An authorized representative of the DOC signed the Stipulation indicating the DOC's voluntary agreement to its terms on July 19, 2022.
4. Respondent expressly confirmed to the arbitrator at the hearing on April 19, 2022 that she fully understood the basic terms of the settlement reached at the hearing and that she was voluntarily entering into the settlement with a full understanding of her rights. Competent counsel provided advice and counsel to the Respondent throughout the settlement process.
5. The settlement is in the public interest. By the settlement, the DOC avoids the uncertainty of the outcome of the arbitration, the time and expense

associated with litigation and any disruption resulting from DOC personnel's participation in the hearing.

6. Under the Stipulation's terms, Respondent has voluntarily resigned in good standing from her position with the DOC. In accordance with N.J.A.C. 6A:3-5.6(a)6, and as confirmed in the Stipulation, Respondent has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners.

By reason of the foregoing, the settlement of the tenure charges against the Respondent, Regina Gauss, pursuant to the terms set forth in the Stipulation, is approved.

Dated: August 9, 2022

Melissa H. Biren, Esq., Arbitrator

State of New Jersey)

County of Morris)

On this 9th day of August 2022, before me personally came and appeared MELISSA H BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Notary Public

Robert D Agree
Notary Public
New Jersey
My Commission Expires February 8, 2023
No. 2429835

195-22

IN THE MATTER OF TENURE HEARING OF: REGINA GAUSS, Respondent, v. NEW JERSEY DEPARTMENT OF CORRECTIONS, GARDEN STATE YOUTH CORRECTIONAL FACILITY, Petitioner.	AGENCY DOCKET NO. 176-9/21 Arbitrator Melissa H. Biren, Esq. **SETTLEMENT AGREEMENT AND RELEASE**

This settlement agreement and release ("Agreement") is by and between the New Jersey Department of Corrections (the "Department" or "DOC"), and Regina Gauss ("Gauss") (collectively the "Parties").

WHEREAS the Department filed tenure charges with the Commissioner of the New Jersey Department of Education on September 15, 2021 against Gauss, seeking her removal for: N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming a Public employee; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; H.R.B. 84-17, as amended, B-1 Neglect of Duty, Loafing, Idleness or Willful Failure to Devote Attention to Tasks Which Would Not Result in Danger to Persons or Property; H.R.B. 84-17, as amended, B-9 Incompetency or Inefficiency; H.R.B. 84-17, as amended, C-8 Falsification: Intentional Misstatement of Material Fact in Connection with Work, Employment Application, Attendance, or in any Record, Report, Investigation or Other Proceeding; H.R.B. 84-17, as amended, C-11 Conduct Unbecoming an

Employee; and H.R.B. 84-17, as amended, E-1 Violation of a Rule, Regulation, Policy, Procedure, Order or Administrative Decision (the "Tenure Charges"); and

WHEREAS the New Jersey Department of Education, Office of Controversies and Disputes acknowledged receipt of the Tenure Charges filed with the Commissioner on September 15, 2021 and required Gauss to file a written response to the Tenure Charges within fifteen (15) days of the notice of acknowledgment; and

WHEREAS Gauss, through counsel, filed a written response to the Tenure Charges in the form of a motion to dismiss the Tenure Charges on September 30, 2021; and

WHEREAS the New Jersey Department of Education, Office of Controversies and Disputes advised on October 7, 2021 that the Tenure Charges had been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to the motion to dismiss, and transmitted the matter to Arbitrator Melissa H. Biren for determination of Gauss' motion to dismiss and the Tenure Charges; and

WHEREAS Arbitrator Biren denied Gauss' motion to dismiss the Tenure Charges on January 10, 2022 and ordered the matter to proceed to a hearing on the merits; and

WHEREAS the Parties have entered into this Agreement to fully and finally resolve any and all claims and disputes arising out of the Tenure Charges and any and all allegations which were asserted or could have been asserted against Gauss in the Tenure Charges.

NOW THEREFORE in consideration of the mutual promises and

covenants herein, the sufficiency of which are hereby acknowledged, and intending to be legally bound, the Parties agree as follows:

1. The above "WHEREAS" clauses are incorporated herein and made a part of this Agreement.

2. **Release**. Gauss waives and releases 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 Department, its 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 or disputes giving rise to this action up to the date of this Agreement, including, but not limited to, the Constitution or statutes of the United States, the Constitution, statutes, regulations or compacts of the State of New Jersey, or under common law, including, but not limited to, all claims under: Title VII of the Civil Rights Act of 1964; Sections 1981, 1983 and 1985 of the Civil Rights Act of 1991; the New Jersey Law Against Discrimination; the New Jersey Civil Rights Act; the Conscientious Employee Protection Act; the Age Discrimination in Employment Act; the Americans with Disabilities Act; Title 11A - the Civil Service Act; the Older Workers Benefits Protection Act; the New Jersey Equal Pay Act; the Handicapped, Blind, or Deaf Persons Civil Rights Law; the Developmentally Disabled Rights Act; the Family Medical Leave Act; the Whistleblower Protection Act; the Alcoholism Treatment and Rehabilitation Act; the Education Code; the New Jersey Wage Payment Law; the New Jersey Wage and Hour Law; all wages and hours laws; all prevailing wage laws; public works statutes;

the Public Transportation Act; the Right to Know Law; the Occupational Safety and Health Act; the Worker Health and Safety Act; the Earn Labor Law; the Public School Safety Law; the Minimum Wage Law; the New Jersey Smoking Act; the Unemployment Compensation Law; the Federal Unemployment Tax Act; the Social Security Act; the Wagner-Peyser Act; the Housing and Community Development Act of 1974; workers' compensation laws; disability benefits laws; all claims of wrongful termination and/or constructive discharge; tort laws; the Tort Claims Act; contract law; or any contract, express or implied.

a. This Release includes all claims made or which could have been brought as grievances under any collective bargaining agreement, and/or all claims made or which could have been brought in any other administrative or judicial proceeding.

b. This Release includes all claims and/or liens, past, current and/or future, arising out of this matter or asserted against the proceeds of this settlement, including, but not limited to, any Medicare or Medicaid 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. Any such claims and/or liens are released by Gauss and are not the responsibility of the State of New Jersey or the Department to satisfy.

c. This Release includes all claims which might otherwise have been brought in the future by my Estate or my family members under Mauro v. Raymark Industries, 116 N.J. 126 (1989) and Alfone v. Sarno, 87 N.J. 99 (1981), for past, present, or future losses, damages, or injuries. This includes all future claims for wrongful death.

d. This Release includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

e. Gauss understands that under the Age Discrimination in Employment Act of 1967, as amended, she is entitled to a period of twenty-one (21) days within which to consider this Settlement Agreement and general release, and that she may revoke this Settlement Agreement and general release up to seven (7) days after signing it. To be effective, Gauss' rescission must be in writing and delivered to counsel for the Department, either by hand or by mail, within the seven (7) day period. If sent by mail, the rescission must be: (1) postmarked within the seven (7) day period; (2) properly addressed; and (3) sent by certified mail, return receipt requested.

f. The Parties agree that this Settlement Agreement and general release shall not be enforceable or effective until after the seven (7) day revocation period, as described in paragraph 1(e) above, has expired. This Agreement is null and void if Gauss fails to sign and accept it.

3. **Terms.** The Parties have agreed to the following:

a. Gauss agrees to accept a Resignation in Good Standing, which shall be effective June 18, 2020, as a full and final resolution to the Tenure Charges, as set forth in the above "WHEREAS" clauses. The Department agrees that as of this date, Gauss is no longer under consideration for any disciplinary action.

b. The Department agrees to pay Gauss the sum of $5,000.00 (FIVE THOUSAND DOLLARS AND 00/100 CENTS) (the "Settlement

Amount") in full and final satisfaction of any and all claims, including, but not limited to, the Tenure Charges. The Department agrees to remit payment to Gauss as one check, for which form 1099 will be used, payable to Gauss within sixty (60) days of the receipt by the Department of the fully executed Settlement Agreement and Release, a State of New Jersey Payment Voucher (Vendor Invoice) ("Payment Voucher"), W-9 Tax Form, New Jersey Superior Court Judgment/Lien Record Search results, and Child Support Judgment Search Certification ("Child Support Certification"). The Parties agree that this Settlement Amount is provided in consideration for the general release of any and all claims that were made or could have been made, by either party, and that this Settlement Amount does not constitute back pay. No performance of any further act or obligation shall be required of Gauss. Gauss agrees not to seek anything further from the Department.

c. The Payment Amount shall not be made unless the Department has received this Settlement Agreement and Release signed by Gauss, a Payment Voucher, a Child Support Certification, and W-9 Tax Form.

d. The Parties acknowledge that under N.J.A.C. 17:1-2.18, no pension, seniority or benefit time will be credited for a period for which the employee is not paid by the employer.

e. Gauss waives any and all rights or claims which she may have to reinstatement, employment, or re-employment with the Department. Gauss agrees that she will not knowingly apply for or accept employment, re-employment or reinstatement with the Department at any time in the future.

f. Gauss acknowledges that she has been advised that, as a teaching staff member, the Commissioner of the New Jersey

Department of Education has the duty to refer all tenure determinations resulting in loss of position to the State Board of Examiners.

g. The Parties hereby acknowledge and agree that settlement is justified in this matter and is in the public interest as Gauss wishes to seek employment outside of the Department and that such settlement will provide the benefit of avoiding the costs and expenses of litigation.

4. **Taxes.** A form 1099 will be issued with respect to the payment of the Settlement Amount. The Settlement Amount shall not constitute income replacement, compensation for back pay, employee wages, and/or services. Gauss shall be solely responsible for the payment of any and all taxes on the Settlement Amount. Gauss agrees and understands that the Department and/or counsel for the Department have not made any representations regarding the tax treatment of the Settlement Amount. Gauss agrees to make no claim against the Department for payment of any and all taxes, or the payment of any applicable interest or penalties. In the event a claim for such taxes, and/or penalties or interest, is assessed by any taxing authority, Gauss agrees to hold the Department, counsel for the Department, and the State of New Jersey harmless and indemnify the Department, counsel for the Department, and the State of New Jersey against any and all tax liability, interest and/or penalties as due thereon.

5. **Indemnification.** Gauss agrees to hold the Department, counsel for the Department, and the State of New Jersey harmless and indemnify the Department, counsel for the Department, and the State of New Jersey against any and all liens or claims of any third parties and any claims by anyone who contends the

Department had no authority or right to settle the dispute in this matter.

6. **Debt/Lien Owed to the State.** Gauss hereby acknowledges and understands that the Department or counsel for the Department shall cause to be conducted a New Jersey Superior Court Judgment Record Search performed for all liens attached by the State, counties, and/or municipalities of New Jersey. No part of the Settlement Amount shall be released until documentation of the search results is provided to the Department or counsel for the Department. Gauss also acknowledges that if, upon the results of any lien search conducted, a debt/lien is owed to the State, its agencies, or departments, such debt/lien shall be deducted from the Settlement Amount prior to its disbursement to Gauss.

7. **Child Support Certification.** Gauss hereby acknowledges and understands her obligation to comply with the legal requirements of N.J.S.A. 2A:17-56.23b, including, but not limited to, the requirement to perform a certified child support judgment lien search and to provide the Department and/or counsel for the Department with said documentation prior to disbursement of the Settlement Amount. Gauss agrees to direct her counsel to perform the judgment search required by N.J.S.A. 2A:17-56.23b and deliver a copy of the certification to counsel for the Department. Gauss further understands and acknowledges that no settlement funds due to her under this Settlement Agreement and Release shall be released prior to the receipt of the judgment search certification, and any fees incurred, and/or payments made, by the Department in connection with any obligation under N.J.S.A. 2A:17-56.23b shall be deducted from the Settlement Amount prior to its disbursement to Gauss.

8. **Personnel Record.** The Department shall amend Gauss' personnel record to reflect the terms of this Agreement. All internal records of the Department will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Gauss or as consistent with state or federal law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

9. **Non-Assignment.** None of the benefits being given herein have been assigned or are subject to alienation (i.e., personal bankruptcy).

10. **No Admission of Liability.** Nothing in this Agreement shall constitute an admission or stipulation of facts regarding the Tenure Charges. By entering into this Agreement, neither party admits or denies a violation of any state or federal law, any agency or departmental policy, or the Parties' collective negotiations agreement. This Agreement shall not constitute precedent in matters involving other employees.

11. **Governing Law.** This Agreement shall be governed by the laws of the State of New Jersey, without regard to any conflict of law principles. The provisions herein are severable so in the event that any provision(s) of this Agreement is held to be illegal or unenforceable by any court or agency of competent jurisdiction, or by operation of any applicable law, the remaining terms of this Agreement shall remain valid and in full force and effect. Further, the Parties shall adhere to any modification made by the court or agency to the offending

provision to conform to the most expansive permissible reading under the law.

12. **Entire Agreement.** The terms of this Agreement represent the entire agreement and understanding between the Parties as to the entire subject matter herein, and supersede all other previous agreements regarding the subject matter herein, written or oral, express or implied. This Agreement may not be supplemented, amended, changed or modified in any manner, orally or otherwise, except in writing signed by a duly authorized representative for each party.

13. **Severability.** The Parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

14. **Counterparts.** This Agreement may be signed in counterparts and shall have the same force and effect as if signed at the same time. Each signatory to this Agreement represents and warrants he/she is fully authorized by the party for whom he/she is signing to enter into this Agreement. A facsimile or photocopy of this Agreement and the signatures hereto shall have the same effect and may be accepted with the same authority as the original.

APPROVAL OF THE SETTLEMENT AGREEMENT

7/14/22 Regina Adams

7/15/22

7/19/2022 Kathleen Krug

CERTIFICATION

I, Regina Gamez, being duly sworn, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I hereby affix my signature hereto and certify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative Plaintiff's counsel has explained and verified my acceptance of the terms of this Settlement Agreement and answered all of my questions regarding this Settlement to my satisfaction. I am satisfied with my representation and I wish to enter into this Settlement Agreement voluntarily.

It is also my understanding that this Settlement Agreement will terminate all claims and lawsuits against Defendants in the New Jersey and the New Jersey Department of Corrections.

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.

7/14/22
Dated:

Regina Gamez
Regina Gamez

Mattye M. Gandel
LABOR ARBITRATOR

520 MELROSE PLACE
SOUTH ORANGE, NEW JERSEY 07079
(973) 763 - 3271
(973) 763 - 4292 (FAX)
email - wsour@aol.com

August 8, 2022

Ms. Jennifer Killough-Herrera
Director, Office of Controversies and Disputes
100 Riverview Plaza
NJ Department of Education
Trenton, NJ 08625

Dear Ms. Killough-Herrera;

Re: In the matter of the Tenure Hearing of Nicole Reid-Dookie and the Neptune Township School District Board of Education
Agency Docket No. 188-9/21

After seven days of hearing in the above matter, this Arbitrator received the briefs from both parties on July 1, 2022, as agreed, with the understanding that my decision would be issued by August 1, 2022. However, on July 14, 2022, after I had been working on the Award for two weeks, I received a letter from Ms. Reid-Dookie's attorney advising me that she was going to resign and that the Board was going to accept her resignation. I immediately stopped working on the Award and awaited the final outcome.

In fact, on July 27, 2022, the Board voted to accept Ms. Reid-Dookie's resignation. Therefore, in light of the resignation, the charges are now moot and shall be deemed withdrawn. Therefore, the Arbitrator approves the withdrawal and this matter is closed.

Sincerely,

Mattye M. Gandel

Mattye M. Gandel

196-22

197-22SEC
SEC Dkt. No. T24-21
Agency Dkt. No. 167-6/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Matthew Walker,
Board of Education of the Township of
Holland, Hunterdon County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Following the SEC's June 28, 2022 decision, respondent provided proof that he had completed the required training. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, as of the filing date of this decision, respondent is suspended from the board for 30 days for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 12, 2022
Date of Mailing: August 12, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T24-21
Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner[1]

I/M/O Matthew Walker,
Holland Township Board of Education, Hunterdon County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[2] The OTSC directed Matthew Walker (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Holland Township Board of Education (Board), located in Hunterdon County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by December 31, 2021.

---

[1] The School Ethics Commission adopted an Amended Decision on June 28, 2022, solely because the Resolution appended to its May 24, 2022, decision contained incorrect information.

[2] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent filed a response to the Commission's OTSC. More specifically, Respondent acknowledged that he did not complete his required training before the December 31, 2021, deadline, and represented that he would complete training on May 19, 2022; however, on May 24, 2022, NJSBA advised that Respondent did not complete training on May 19, 2022. Importantly, Respondent did not deny that he did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of the Commissioner of Education's decision. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon issuance of the Commissioner of Education's 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 ***et seq.*** within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: June 28, 2022

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T24-21

Whereas, Matthew Walker (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent represented that he would complete his training on May 19, 2022; however, on May 24, 2022, NJSBA advised that Respondent did not complete training on May 19, 2022, and Respondent also did not dispute that he did not complete training in a timely fashion; and

Whereas, at its meeting on June 28, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on June 28, 2022, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education; and

Whereas, at its meeting on June 28, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 28, 2022.

Kathryn A Whalen

Kathryn A. Whalen, Esq., Director

198-22SEC

SEC Dkt. No. T27-21
Agency Dkt. No. 168-6/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Danielle Brown,
Board of Education of the City of Perth Amboy,
Middlesex County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the April 26, 2022 Order to Show Cause but prior to the SEC's May 24, 2022 meeting; therefore, a penalty of censure is recommended. Respondent filed exceptions to the penalty but did not appeal the SEC's underlying finding of a violation to the Commissioner pursuant to *N.J.A.C.* 6A:4.

In her exceptions, respondent indicates that she had experienced technical difficulties completing her required training, but nonetheless believed that her training had been completed in a timely manner. She notes that she completed the training as soon as she became aware that her prior attempts had been unsuccessful, and that she has no history of failing to comply with the training requirements. Respondent further argues that numerous past decisions of the SEC imposed a penalty of a reprimand, rather than a censure, when a board member completed training following the issuance of an Order to Show Cause but prior to the SEC's meeting to vote on the matter. Accordingly, respondent requests that the penalty imposed against her be limited to a reprimand.

Upon review, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the SEC's meeting date – the penalty has been a reprimand. *See, In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 223-21SEC, decided October 13, 2021; *In the Matter of Marcos Garciga, Cliffside Park Board of Education, Bergen County*, Commissioner Decision No. 224-21SEC, decided October 13, 2021; *In the Matter of Gary Yedman, Seaside Park Board of Education, Ocean County*, Commissioner Decision No. 230-21SEC, decided October 13, 2021. As the instant case arises from the same circumstances, the Commissioner finds that a reprimand is the appropriate penalty for the respondent's failure to timely complete the requisite training.[1] Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 12, 2022
Date of Mailing: August 12, 2022

[1] The SEC has previously recommended a penalty of a censure when a board member completed the training after the issuance of the Order to Show Cause but prior to the SEC's next meeting; however, the Commissioner rejected the penalty recommendation in that case and advised that a reprimand is the appropriate penalty under those circumstances. *In the Matter of Robyn Schneider, The Ethical Community Charter School, Hudson County*, Commissioner Decision No. 140-16SEC, decided April 11, 2016.

[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).

Before the School Ethics Commission
Docket No.: T27-21
Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner[1]

I/M/O Danielle Brown,
Perth Amboy Board of Education, Middlesex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[2] The OTSC directed Danielle Brown (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Perth Amboy Board of Education (Board), located in Middlesex County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by December 31, 2021.

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[1] The School Ethics Commission adopted an Amended Decision on June 28, 2022, solely because the Resolution appended to its May 24, 2022, decision contained incorrect information.

[2] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete her required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. However, after having been served with the OTSC, Respondent completed her training requirement on May 13, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent stated that, prior to completing training on May 13, 2022, she "attempted to complete [it] on the NJSBA website in the last several months, but experienced technical issues"; prior to issuance of the OTSC, she was "under the impression that her mandatory training was completed"; and after "being made aware" that her training was not completed, she "went back to the NJSBA website and completed the training." Respondent maintains that she "fully intended to comply with all mandatory training requirements ... in a timely fashion," and any "inadvertent failure to do so was not intentional." Importantly, Respondent did not deny that she did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on June 28, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: June 28, 2022

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T27-21

Whereas, Danielle Brown (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after being served with the OTSC, Respondent completed training on May 13, 2022, and cited technological difficulties (among others) as the reason she previously failed to complete training by December 31, 2021; and

Whereas, at its meeting on June 28, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

Whereas, at its meeting on June 28, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its meeting on June 28, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 28, 2022.

Kathryn A. Whalen, Esq., Director

199-22SEC
SEC Dkt. No. T33-21
Agency Dkt. No. 170-6/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Stephen Bienko,
Board of Education of the Township of
Allamuchy, Warren County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent failed to complete the training. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law.

Accordingly, as of the filing date of this decision, respondent is removed from the board for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 12, 2022
Date of Mailing: August 12, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T33-21
Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Stephen Bienko,
Allamuchy Township Board of Education, Warren County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Stephen Bienko (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Allamuchy Township Board of Education (Board), located in Warren County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by December 31, 2021.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated

[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

At its meeting on May 24, 2022, and because the Commission did not have information from NJSBA or Respondent indicating that Respondent had completed mandated training prior thereto, the Commission adopted a decision recommending that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon issuance of the Commissioner of Education's decision. The Commission's decision further stated that if Respondent completed training before the Commissioner of Education adopted a final decision (which would have been forty-five (45) days after the mailing date of its May 24, 2022, decision), then the Commission recommended that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension.

On May 26, 2022, which was after the Commission adopted the aforementioned decision, the Commission received correspondence from the Superintendent of the Allamuchy Township School District indicating that Respondent resigned from the Board on May 19, 2022.

Notwithstanding Respondent's resignation on May 19, 2022, which was not communicated to the Commission until May 26, 2022, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on June 28, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **censure,** which is the highest penalty that the Commission can impose following Respondent's resignation.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a

violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: June 28, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner
Docket No.: T33-21

Whereas, Stephen Bienko (Respondent) was a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), at all times relevant to the within proceedings; and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent resigned from the Allamuchy Township Board of Education and did not dispute that he did not complete training in a timely fashion; and

Whereas, at its meeting on June 28, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on June 28, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its meeting on June 28, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 28, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq., Director

200-22E
OAL Dkt. No. EDU 06077-22
Agency Dkt. No. 192-7/22

New Jersey Commissioner of Education

Order on Emergent Relief

Yvonne McGovern,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner agrees with the ALJ for the reasons stated in the Order on Emergent Relief that the petitioner is entitled to emergent relief and she should be immediately reinstated to her tenured position as principal and resume her pay and health benefits retroactive to July 1, 2022. Accordingly, the recommended Order of the OAL, granting the petitioner's application for emergent relief, is adopted. Because the present proceeding has fully disposed of all issues in dispute between the parties, no further proceedings are necessary. 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.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 12, 2022
Date of Mailing: August 12, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
EMERGENT RELIEF
OAL DKT. NO. EDU 06077-22
AGENCY DKT. NO. 192-7/22

YVONNE MCGOVERN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Carol R. Smeltzer, Esq., for petitioner (New Jersey Principals and Supervisors Association)

Robert F. Varady, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: August 1, 2022 Decided: August 2, 2022

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

STATEMENT OF THE CASE

Petitioner, Yvonne McGovern, alleges that she was terminated by respondent, Board of Education of the City of Elizabeth (Board), in violation of her tenure rights.

PROCEDURAL HISTORY

On or about July 20, 2022, McGovern filed a Verified Petition of Appeal (Petition) and Motion for Emergent Relief with the Commissioner of Education. The Office of Controversies and Disputes of the Department of Education (Department) transmitted the contested case to the Office of Administrative Law, where it was filed on July 20, 2022.

Petitioner's Motion for Emergent Relief consisted of a letter brief and Affidavit of Yvonne McGovern. Oral argument was scheduled for July 27, 2022, and on July 22, 2022, respondent was advised that its brief should be filed no later than July 26, 2022, at noon. No brief was filed and on July 26, 2022, respondent requested a two-week adjournment, with consent. A telephone conference was held on July 26, 2022. Since the Board was scheduled to meet the following day, another telephone conference was held on July 28, 2022, during which respondent's attorney confirmed that there had been no tenure charges filed and advised that neither oral argument nor a hearing would be necessary. By letter dated August 1, 2022, respondent's attorney advised "At the direction of my client I will not be filing a response to the Verified Petition of Appeal and Notice of Motion for Emergent Relief."

FACTUAL DISCUSSION

The Petition reflects, in pertinent part, the following:

> 1. Petitioner has been employed by Respondent since September 1, 1993.
>
> 2. Since September 1, 1993, Petitioner has served in the following positions:
>
> a. Middle School Teacher 1993—1997;
> b. Bilingual Education Teacher 1997—2001;
> c. Whole School Reform Facilitator 2001—2002;
> d. Teacher Trainer 2002—2006;
> e. Vice Principal 2006—2014; and
> f. Principal 2014—2022.

3. Petitioner is tenured in the positions of teacher, vice principal and principal.

4. On or about February 15, 2022, Respondent placed petitioner on administrative leave with pay pending an investigation into an allegation that she made a racially insensitive remark to a student.

5. On or about May 14, 2022, at a public meeting, Respondent approved a list of employees for continued employment for the 2022-2023 school year.

6. Petitioner's name was either not on that list or removed from that list, prior to Respondent's vote on the rehire of the employees for the upcoming school year.

7. Respondent did not approve Petitioner for employment in the 2022-2023 school year, effectively terminating her employment as of the close of business on June 30, 2022.

8. Petitioner has been without pay, and without health benefits for herself, her husband and five of her children, since July 1, 2022.

9. N.J.S.A. 18A:6-10 expressly provides that no school district employee under tenure of service shall be dismissed or reduced salary ". . . except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle . . ."

10. Respondent has not filed tenure charges against Petitioner, nor has a tenure dismissal hearing been conducted in accordance with the "Tenure Employees Hearing Law."

11. The action taken by Respondent in summarily terminating Petitioner's employment violates her employment rights as protected by N.J.S.A. 18A:6-10.

. . .

13. Respondent unilaterally terminated Petitioner's employment without any recommendation to do so from the district's superintendent of schools.

14. N.J.S.A. 18A:27-4.1 expressly provides that a board of education cannot remove a school district employee in the absence of the recommendation of the chief school administrator.

> 15. The action taken by Respondent exceeded its powers in light of the requirement under the school laws that boards of education remove employees only with the recommendation of the chief school administrator.
>
> WHEREFORE, Petitioner respectfully requests the Commissioner to hear and determine this matter and order Respondent to immediately reinstate Petitioner to her tenured position as principal and resume her pay and health benefits retroactive to July 1, 2022.

Similarly, the motion seeks emergent relief to reinstate McGovern to her tenured position as building principal and reinstate her compensation and health benefits retroactive to July 1, 2022. McGovern's Affidavit states, inter alia: that she has not been indicted for any crime; the school district has not filed tenure charges; upon her information and belief, the Board's action to terminate her employment was without the Superintendent's recommendation; the lack of salary and health benefits is taking a toll on her financially, physically and emotionally; and, as a result of the termination, her reputation in the community and school district has been tarnished and continues to be tarnished with each passing day.

LEGAL ANALYSIS AND CONCLUSIONS

Per the Tenure Employees Hearing Law (N.J.S.A. 18A:6-10—18A:6-18.1), "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, and then only after a hearing held pursuant to the Tenure Employees Hearing Law, by the commissioner, or a person appointed by him to act on his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in the Tenure Employees Hearing Law. N.J.S.A. 18A:6-10(a). (Emphasis added.)

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. N.J.S.A. 18A:6-11. 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. Ibid. 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. Ibid. The board of education shall forthwith notify the employee against whom the charge has been made of its determination. Ibid. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S.18A:6-16, together with a certificate of such determination. Ibid. (Emphasis added.) The consideration and actions of the board as to any charge shall not take place at a public meeting. Ibid. If the board does not make such a determination within 45 days after receipt of the written charge, the charge shall be deemed to be dismissed and no further proceeding or action shall be taken thereon. N.J.S.A. 18A:6-13.

Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made. N.J.S.A. 18A:6-14. Should the charge be dismissed at any stage of the process, the person shall be reinstated immediately with full pay from the first day of such suspension. Ibid. Should the charge be dismissed at any stage of the process and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. Ibid. Should the charge be sustained on the original hearing or an appeal therefrom, and should such person appeal from the same, then the suspension may be continued unless and until such determination is reversed, in which

event he shall be reinstated immediately with full pay as of the time of such suspension. Ibid.

Upon receipt of such a charge and certification, or of a charge lawfully made to the commissioner, the commissioner or the person appointed to act on the commissioner's behalf in the proceedings shall examine the charges and certification. N.J.S.A. 18A:6-16. The individual against whom the charges are certified shall have 15 days to submit a written response to the charges to the commissioner. Ibid. Upon a showing of good cause, the commissioner may grant an extension of time. The commissioner shall render a determination on the sufficiency of charges as set forth below within 10 days immediately following the period provided for a written response to the charges. Ibid. If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. Ibid. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to N.J.S.A. 18A:6-17.1 for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion. Ibid.

Despite the foregoing requirements, the Board terminated McGovern—a tenured employee—without a hearing by the commissioner in clear violation of the Tenure Employees Hearing Law. Additionally, notwithstanding the provisions of any law, rule or regulation to the contrary, a board of education shall remove a certificated or non-certificated employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. N.J.S.A. 18A:27-4.1(a). The Board has submitted nothing to dispute petitioner's allegation that there was no such recommendation or vote, as its only "response" was a letter confirming that no response to the Motion for Emergent Relief or to the Petition would be submitted.

Pursuant to N.J.A.C. 6A:3-1.6(a), where the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the commissioner, the petitioner may include with the petition of appeal,

a separate motion for emergent relief or a stay of that action pending the commissioner's final decision in the contested case. A motion for a stay or emergent relief must be accompanied by a letter memorandum or brief which addresses 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.

To prevail on an application for emergent relief, the petitioner must meet all four prongs as set forth above. Inasmuch as there is no question that the Board acted beyond its legal power or authority in terminating petitioner's employment in the way it did, it is evident that the legal right underlying petitioner's claim is settled and that she would prevail on the merits of the underlying claim. Certainly, when the equities and the interests of the parties are balanced, petitioner will suffer the greater harm than respondent, because the Board's action in terminating her was ultra vires. Further, under such circumstances, that petitioner may suffer irreparable harm is sufficient to warrant emergent relief.

Whether or not McGovern "made a racially insensitive remark"[1] warranting termination is of no moment in this matter, as this is not a tenure hearing on such charge. The Petition alleges only that petitioner was effectively terminated in violation of her tenure rights – which is essentially undisputed. In view of the applicable law, I **CONCLUDE** that the Board effectively terminated petitioner in clear violation of the Tenure Employees Hearing Law. I therefore further **CONCLUDE** that petitioner should be immediately reinstated to her tenured position as principal and resume her pay and health benefits retroactive to July 1, 2022. I further **CONCLUDE** that since the Board directed its attorney

[1] See Petition, Count One, ¶4.

not to file a response to the Petition, this order on motion for emergent relief also resolves all the issues raised in the Petition.

ORDER

It is hereby **ORDERED** that petitioner's motion for emergent relief is **GRANTED** and **ORDERED** that the Board immediately reinstate petitioner to her tenured position as principal and resume her pay and health benefits retroactive to July 1, 2022. Additionally, since the Board directed its attorney not to file a response to the Petition, this order on motion for emergent relief also resolves all the issues raised in the Petition; and it is **ORDERED** that no further proceedings on this Petition are necessary.

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

Kelly J Kirk

August 2, 2022

DATE

KELLY J. KIRK, ALJ

Date Received at Agency

Date Mailed to Parties:

201-22SEC
SEC Dkt Nos. C56-19 and C57-19 (Consolidated)
OAL Dkt. Nos. EEC 01230-20
Agency Dkt. No. 202-8/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Daniel Leonard,
Toms River Regional Board of Education,
Ocean County.

The Commissioner has reviewed the record of this matter and the November 23, 2021 decision of the School Ethics Commission (Commission). The Commission found that respondent Daniel Leonard, a member of the Toms River Regional Board of Education, violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members (Code). The Commission recommended a penalty of censure for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, for the reasons thoroughly detailed in the Initial Decision of the Administrative Law Judge and the decision of the Commission, the Commissioner concurs with the penalty recommended by the Commission for respondent's violation of the Code in connection with certain posts he made to social media.

Accordingly, respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 12, 2022
Date of Mailing: August 12, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-01230-20
SEC Docket No.: C56-19 and C57-19 (Consolidated)
Final Decision

In the Matter of Daniel Leonard,
Toms River Regional Board of Education, Ocean County,
Respondent

I. Procedural History

This consolidated matter arises from two (2) separate but related Complaints. More specifically, on August 5, 2019, Sara Sheikh (Complainant Sheikh) filed a Complaint (**C56-19**) alleging that Daniel Leonard (Respondent), a member of the Toms River Regional Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* when he made certain posts to social media, further described below. Complainant Sheikh's Complaint alleged that Respondent violated *N.J.S.A.* 18A:12-24.1(b) and *N.J.S.A.* 18A:12-24.1(f) of the Code of Ethics for School Board Members (Code) in Count 1, and violated *N.J.S.A.* 18A:12-24.1(b) and *N.J.S.A.* 18A:12-24.1(e) of the Code in Count 2. On August 7, 2019, Nina Rossi (Complainant Rossi) also filed a Complaint (**C57-19**) alleging the same.

By correspondence dated October 9, 2019, the parties were notified that, pursuant to its authority as set forth in *N.J.A.C.* 6A:28-6.6, the Commission consolidated the Complaints filed by Complainant Sheikh and Complainant Rossi (collectively referred to as Complainants) against Respondent.

Complainants alleged that on April 12, 2019, Respondent shared a Facebook post from the "Rant Nation with Graham Allen" site to his personal Facebook page. The shared post appears to link to a video purporting to show United States Representative Ilhan Omar. The post additionally contains a picture of Congresswoman Omar wearing a hijab – a head scarf worn by many Muslim women. In sharing the post, Respondent commented, "Terrorist....100%." Complainants further alleged that on April 19, 2019, Respondent shared a Fox News article dated April 19, 2019, entitled, "Rashida Tlaib calls for hunger strikes to shut down ICE" to his personal Facebook page. The post includes a picture of Congresswoman Tlaib, with a comment by Respondent stating, "My life would be complete if she/they die...."

Finally, on April 28, 2019, Complainants alleged that Respondent shared a photograph on his personal Facebook page of a doll, with a black eye, bruise on her chin and dressed in a hijab. The body of the photograph bears the following text: "Sharia Barbie [-] Comes with a jihab [(sic)], bruises and quran [-] Stoning accessories available for additional purchase."[1]

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[1] The Commission acknowledges that the cited language/speech may be regarded as offensive, provocative, disagreeable, or vulgar; however, the cited language/speech is quoted directly from the parties' submissions. The inclusion of this language/speech is not intended to disparage, offend, or disrespect the reader.

On August 29, 2019, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss) to Complainant Sheikh's Complaint. Additionally, on September 5, 2019, Respondent filed a Motion to Dismiss to Complainant Rossi's Complaint.

At its meeting on November 19, 2019, the Commission considered the filings in this matter and, at its meeting on December 17, 2019, the Commission voted to ***grant*** the Motion to Dismiss as to the alleged violation of *N.J.S.A.* 18A:12-24.1(f), but to ***deny*** the Motion to Dismiss as to all other allegations in the Complaint. Based on its findings, the Commission also voted to direct Respondent to file an Answer to Complaint (Answer) as to the remaining allegations in the Complaint (*N.J.S.A.* 18A:12-24.1(b) in Count 1, *N.J.S.A.* 18A:12-24.1(b) and *N.J.S.A.* 18A:12-24.1(e) in Count 2, and *N.J.S.A.* 18A:12-24.1(b) and *N.J.S.A.* 18A:12-24.1(e) in Count 3), and to transmit the above-captioned matter to the Office of Administrative Law (OAL) following receipt of the Answer.

On January 22, 2020, the matter was transmitted to the OAL and was assigned to the Honorable Elia A. Pelios, Administrative Law Judge (ALJ Pelios). The matter was heard on October 6, 2020, and the record remained open to allow for the submission of written statements. After the hearing concluded, Complainant Sheikh withdrew her Complaint, leaving Complainant Rossi to prosecute the charges. On October 14, 2020, the record was closed.

The Commission acknowledged receipt of ALJ Pelios' Initial Decision on March 18, 2021; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was May 3, 2021. Prior to May 3, 2021, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to review the full record. Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until June 17, 2021. The Commission requested and was granted three additional extensions in order to permit Respondent time to order and receive the transcript(s) of the proceedings and file exceptions accordingly. On August 5, 2021, the Commission requested a fifth forty-five (45) day extension of time to issue its Final Decision prior to the November 1, 2021 deadline for issuing a Final Decision. Good cause having been shown, the time limit for issuing a Final Decision was extended until December 16, 2021.

At a meeting on October 19, 2021, the Commission considered ALJ Pelios' Initial Decision, and at its meeting on November 16, 2021, the Commission voted to adopt ALJ Pelios' Initial Decision as its Final Decision.

II. Initial Decision

Based on his review of the documents submitted and witness testimony offered, ALJ Pelios found the following as fact:

(1) In April 2019, Respondent was at all times a member of the Board.
(2) On April 12, 2019, Respondent shared a Facebook post from the "Rant Nation with Graham Allen" site to his personal Facebook page, "DP Leonard."

(3) The shared post appears to link to a video purporting to show U.S. Representative Ilhan Omar "MOCK[ING] Americans for Fearing al-Qaeda."

(4) The original post carried the commentary, "This newly discovered video from her past comes AFTER Congresswoman Omar claimed 9/11 was a situation where 'some people did something.' SHAME on you."

(5) The post contains pictures of Congresswoman Omar wearing a hijab, a head scarf worn by many Muslim women.

(6) In sharing the post, Respondent commented, "Terrorist.....100%."

(7) Respondent understands Representative Omar to be a member of the Muslim faith.

(8) On April 19, 2019, Respondent shared a Fox News article dated April 19, 2019, titled "Rashida Tlaib calls for hunger strikes to shut down ICE" to his personal Facebook page.

(9) The post contains a picture of Congresswoman Rashida Tlaib.

(10) In sharing the post, Respondent commented, "My life would be complete if she/they die ... ."

(11) Respondent understands Representative Tlaib to be a member of the Muslim faith.

(12) On April 28, 2019, Respondent shared a photograph to his personal Facebook page, which depicts a doll dressed in a hijab, the doll appears to be a woman, and has a black eye and a bruise on its chin.

(13) The body of the photograph bears the following text: "Sharia Barbie Comes with jihab [(sic)], bruises and quran. Stoning accessories available for additional purchase."

(14) On July 23, 2019, the New Jersey Chapter of CAIR issued a press release calling for the resignation of Respondent due to these posts.

(15) The matter of Respondent's posts received media attention.

(16) The matter was addressed at a Board meeting held on July 24, 2019, with many members of the public in attendance.

(17) On July 25, 2019, then Board President Joseph Nardini issued a letter (P-4) wherein he described the July 24, 2019, meeting as "contentious."

(18) Mr. Nardini denounced Respondent's posts and asserted that they were distracting the Board from its mission and purpose.

(19) Mr. Nardini stated in the letter that he had rescinded Respondent's appointment to the Board's Safety, Security, and Transportation Committee.

(20) Mr. Nardini also noted in the letter, that although the Board could not remove Respondent, he asked that Respondent consider resigning his seat on the Board in order to "remove the distraction from the Board's mission."

(21) Mr. Nardini described the posts as an "obstruction to the Board's message and duties."

(22) On July 30, 2019, Board attorneys Stephen R. Leone, Esq., and Melanie Appleby, Esq., issued a letter describing Respondent's posts as "racist, incendiary and offensive."

(23) The letter noted the inability of the Board to remove a member, but described the legal process by which alleged ethics violations could be addressed.

(24) Respondent did not resign, but he did not run for reelection, and is no longer a Board member.

Initial Decision at 6-9.

ALJ Pelios further examined Respondent's credibility, noting that "[a]lthough Respondent does not bear the burden of proof and although he does not dispute making the Facebook postings at issue, some aspects of his testimony must be assessed for credibility." *Id.* at 9. After describing the standard for credibility, ALJ Pelios found the following regarding Respondent: (1) he "did not see himself as acting on behalf of the Board or in his role as a Board member when he made the posts at issue to be credible"; (2) "his testimony that 'D.P. Leonard,' the Facebook account to which the posts were made, his personal, private Facebook account to also be credible,"; (3) "his testimony that he has a disclaimer on his account's profile page to acknowledge that the views expressed are his own and not those of the Board to be credible"; (4) "his testimony that he did not intend or expect his posts to be publicized beyond those permitted to view the post under his privacy settings to be credible, if not naïve and ultimately incorrect"; (5) "he intended and believed such to be the case when making the posts in question"; (6) "his testimony that he and his family received threatening communications after his posts were publicized" to also be credible. *Id.* at 10.

ALJ Pelios further finds that while Respondent "may sincerely believe he is not anti-Muslim" but rather "anti-certain aspects of Sharia law," "his posts suggest the presence of negative attitudes toward Muslim faith and culture broader than, as he has asserted, his personal understanding or interpretation of Sharia Law." *Id.* at 10-11. ALJ Pelios concludes that "his sharing of the posts in question was informed in significant measure by these attitudes." *Id.*

In the "Conclusions of Law" section of his *Initial Decision*, ALJ Pelios again notes that Complainant Sheikh withdrew her complaint and Complainant Rossi's three-count complaint remains. With respect to the alleged violation of *N.J.S.A.* 18A:12-24.1(b), ALJ Pelios discusses Complainant's burden of proof to establish factually a violation of the Code. After detailing the preponderance of evidence standard that applies, ALJ Pelios outlines that "factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(b) 'shall include evidence that the respondent(s) willfully made a decision contrary to the educational welfare of children, or evidence that the respondent(s) took deliberate action to obstruct the programs and policies designed to meet the individual needs of all children, regardless of their ability, race, color, creed or social standing.'" *Id.* at 14.

ALJ Pelios further states "Respondent does not dispute making the posts at issue, and the record reflects that he did not believe he was acting in any official capacity when he made the posts." *Id.* Furthermore, "his posts and/or comments do not constitute a decision(s) related to the Board and/or the business of the Board or [District], nor do they constitute action that obstructed the District's programs or policies" in violation of *N.J.S.A.* 18A:12-24.1(b). *Id.* According to ALJ Pelios, "absent the establishment of a nexus between [R]espondent's posts and/or comments on social media and an actual – not theoretical – decision(s) or action(s)," ALJ Pelios is "constrained" to conclude Complainant Rossi "has not met her evidentiary burden in demonstrating violations of *N.J.S.A.* 18A:12-24.1(b)." *Id.* ALJ Pelios concludes that the alleged violations of *N.J.S.A.* 18A:12-24.1(b) should be dismissed as to Counts One, Two, and Three of Complainant Rossi's petition.

The only remaining allegation is *N.J.S.A.* 18A:12-24.1(e) in Count 2 and Count 3. *N.J.S.A.* 18A:12-24.1(e) provides that a board member "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." ALJ Pelios asserts, "the record is devoid of any evidence or allegation that [R]espondent made any personal promise to anyone in posting the article and comment regarding Rep. Tlaib or the picture of 'Sharia Barbie.'" *Id.* at 15. Therefore, ALJ Pelios maintains, "What remains is to determine whether in making those posts [R]espondent took private action, that is, action beyond the scope of his duties, such that, by its nature, had the potential to compromise the Board." *Id.*

ALJ Pelios notes, "testimony by all three witnesses and documents in evidence paint a picture of numerous phone calls to Board staff constituting harassment and threats that no doubt have had a negative impact to the Board's operation. Furthermore, and more perilous, is the potential for further compromise." *Id.* at 16. According to ALJ Pelios, the Legislature made "it clear" that "it is essential ... BOARD members 'must avoid conduct which is in violation of their public trust or which created a justifiable impression ... that such trust is being violated.'" *Id.* ALJ Pelios asserts, "It is appropriate to conclude that conduct creating such an impression has the potential to cause the impairment of the Board or to expose it to discredit or suspicion – in other words, to compromise the Board." *Id.* at 16-17. ALJ Pelios concludes Respondent's admitted conduct has that same potential.

According to ALJ Pelios, "It is not a stretch to consider that students or families of students of Muslim faith may fear that their culture or faith may play a role in adverse decisions by the Board" based on Respondent's "public expression of negative attitudes towards Muslim culture and faith." *Id.* at 17. Furthermore, "they may well be discouraged from even seeking redress to the Board if they feel there is no point." *Id.* ALJ Pelios contends, "This is clearly an example of conduct that would cause members of the Board to lose the confidence and respect of the people, and ... 'creates an unjustifiable impression ... that such trust is being violated.'" *Id.* Therefore, ALJ Pelios concludes Respondent's posting and commenting as described in Counts 2 and 3 of Complainant Rossi's petition constitute private action that has the potential to compromise the Board and, therefore, violates *N.J.S.A.* 18A:12-24.1(e). Furthermore, ALJ Pelios notes the Commission "has indicated that in exercising those rights, board members must comply with the [Act]." *Id.* ALJ Pelios asserts the record shows that Respondent "has not complied with, and in fact has violated, the Act and, therefore, ALJ Pelios concludes that charges of violating *N.J.S.A.* 18A:12-24.1(e) should be sustained as to Counts 2 and 3. *Id.* at 18.

Having found violations of the Act, and with regard to the appropriate penalty, ALJ Pelios notes that Respondent's term on the Board has ended and he did not run again; therefore, removal is not appropriate since he no longer serves on the Board. However, ALJ Pelios found that Respondent should be censured for the violations of *N.J.S.A.* 18A:12-24.1(e) in Counts 2 and 3.

III. Exceptions

Neither Petitioner nor Respondent filed Exceptions to the *Initial Decision*.[2]

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission **adopts** ALJ Pelios' findings of fact, and **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e), but did not violate *N.J.S.A.* 18A:12-24.1(b).

Pursuant to *N.J.S.A.* 18A:12-24.1(b), Board members shall "make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing." The Commission agrees that Respondent did not act in his official capacity when making the posts at issue. Further, the Commission agrees that Complainant did not meet her evidentiary burden pursuant to *N.J.A.C.* 6A:28-6.4 to demonstrate that the posts made by Respondent obstructed the District's programs and policies. Therefore, the Commission agrees to dismiss the alleged violations of *N.J.S.A.* 18A:12-24.1(b).

In finding a violation of *N.J.S.A.* 18A:12-24.1(e), ALJ Pelios appropriately concluded that Respondents action constituted "private action that may compromise the Board." In discussing the legislative intent for the School Ethics Act, ALJ Pelios properly highlighted that Board members "must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." *N.J.S.A.* 18A:12-22(a). The Commission notes that board members do not surrender the rights that they have as citizens such as freedom of speech when they become members of a school board. However, as discussed in *Dunbar Bey v. Brown*, Camden Board of Education, Camden County, Commission Docket No. C25-11 *(Brown)*, and in light of the social media posts by Respondent, the Commission echoes its decision in *Brown*, specifically that "when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen." *Brown* at 7. In *Brown*, the Commission found that the respondent, a board of education member, violated the Code when he posted a message on his Facebook page ("Now if we could only do something about our local terrorists that destroy dreams and burn futures"), the Superintendent's photo came up as a result of the post, and he did not remove it. Further, the Commission emphasized "that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked." *Id.* at 8. With the above in mind, Respondent's disparaging posts to social media at issue constituted conduct that undermined the public's trust in the Board and compromised the Board's ability to engage with the public. As ALJ Pelios discussed, Respondent's post had the potential to discourage members of the public, namely members of the Muslim community, to engage with the Board "given what may seem to be an apparent bias." As such, ALJ Pelios' determination is entirely appropriate.

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[2] The Commission notes that Respondent received all requested transcripts from the proceedings referenced in section I, and subsequently thereafter indicated to the Commission on August 26, 2021 via e-mail that he would not be filing exceptions in the matter.

V. Decision

For all of the aforementioned reasons, the Commission **adopts** findings of fact and the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(b), but violated *N.J.S.A.* 18A:12-24.1(e) in Counts 2 and 3 when he made certain posts to social media.

VI. Penalty

As ALJ Pelios notes, the Commission acknowledges Respondent's term on the Board has ended and he did not run again. Therefore, removal is not possible. However, the Commission agrees with ALJ Pelios and adopts the recommended penalty of censure for the violations of N.J.S.A. 18A:12-24.1(e) in Counts 2 and 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 Commission's recommended penalty. The parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, **within thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* **within thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: November 23, 2021

Resolution Adopting Decision in Connection with C56-19 and C57-19 (Consolidated)

Whereas, at its special meeting on December 17, 2019, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, following transmittal, the Honorable Elia A. Pelios, Administrative Law Judge (ALJ Pelios) issued an *Initial Decision* dated March 18, 2021; and

Whereas, ALJ Pelios found that Respondent violated *N.J.S.A.* 18A:12-24.1(e), but did not violate *N.J.S.A.* 18A:12-24.1(b) and recommended that Respondent be censured, noting that Respondent no longer serves on the Toms River Board of Education; and

Whereas, at its meeting on October 19, 2021, the Commission reviewed the record in this matter, and discussed adopting ALJ Pelios' findings of fact; adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e); and adopting the recommended penalty of censure; and

Whereas, at its meeting on November 16, 2021, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on October 19, 2021; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at a meeting on November 16, 2021.

Salma T. Chand

Salma T. Chand, Executive Director
School Ethics Commission

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing
of Robert Ambrosio

School District of the Borough of Fairview (Bergen County),

"Petitioner,"

-and-

Robert Ambrosio,

"Respondent."

DECISION APPROVING SETTLEMENT AGREEMENT

Agency Docket No. 21-2/22

Appearances:

For the Petitioner:
Stephen F. Pellino, Esq.
Basile Birchwale & Pellino

For the Respondent
Ronald J. Ricci, Esq.
Ricci Fava

On February 23, 2022, I was assigned as the arbitrator for the above referenced matter. A videoconference session was held with counsel on March 9, 2022.. During this session, the parties agreed to pursue a settlement of the matter rather than proceeding with a full evidentiary hearing. Numerous videoconferences and conference calls were conducted from March through August 2022. I also corresponded with counsel through various e-mail exchanges.

On August 10, 2022, I received a fully-executed Settlement Agreement between the Board and Respondent Ambrosio. On August 11, 2022, I conducted a final conference with the parties' Counsel and the Respondent to discuss the terms of settlement.

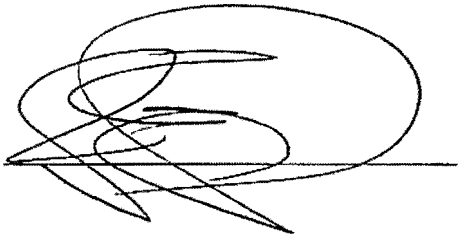
N.J.A.C. 6A:3-5.6 requires the arbitrator to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement.

The parties' settlement agreement expressly details the basis for resolution of attendance-related allegations. I have thoroughly reviewed and considered the parties' reasons for settlement in accordance with the six (6) standards outlined and adopted by *In re Cardonick*, State Board Decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846) that must be met before a settlement is approved. Having considered the stated reasons in conjunction with the issues

raised in the Statement of Tenure Charges and the Statement of Evidence filed by the Petitioner and the Response to Tenure Charges filed by the Respondent, I am persuaded that the parties entered the settlement agreement knowingly and willingly and that the terms of the settlement agreement represent a reasonable basis for settlement that will serve the public's interest and are consistent with the public good.

Accordingly, and based upon the foregoing, I approve the parties' settlement agreement.

Dated: August 15, 2022
Sea Girt, New Jersey



State of New Jersey }
County of Monmouth }ss:

On this 15th day of August, 2022, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L Gifford
Notary Public
Expires 1-10-26

204-22+

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Trenton,
Mercer County,

Petitioner,

v.

New Jersey Department of Children
and Families,

Respondent.

Synopsis

In October 2021, the Board of Education of the City of Trenton (Trenton) filed a petition contending that the respondent, the New Jersey Department of Children and Families (DCF), improperly required Trenton to make tuition payments for the educational costs of several children, including J.M., who were placed by DCF into educational programs at State facilities. DCF filed a motion to dismiss, arguing that student J.M. was not placed in his residential treatment facility by DCF and, further, that the facility in question is not a State facility; DCF contended, therefore, that Trenton is responsible for J.M.'s education and related costs.

The ALJ found, *inter alia,* that: J.M. and his parent resided in Trenton at the time of his placement at Legacy Treatment Services (LTS); J.M. is not a ward of the State and his parents and/or guardians were involved in and consented to his placement at LTS; the facility into which J.M. was placed was contracted by the State to provide such services; and the State determined that Trenton was the District of Residence (DOR) and therefore responsible for the educational costs of tuition and transportation for J.M. while he was a resident at LTS. The ALJ concluded that Trenton did not meet its burden to demonstrate that the determination of the DOR by the State was improper; accordingly, Trenton is responsible for the costs of J.M.'s education at LTS. The ALJ granted DCF's motion to dismiss the petition.

Upon a comprehensive review, the Commissioner disagreed with the ALJ that dismissal of the petition was appropriate at this juncture, as the Initial Decision, *inter alia*, failed to address any of the other students referenced in the case, despite the fact that the petition alleged that multiple students were placed by DCF in State facilities. Accordingly, the Commissioner reversed the Initial Decision granting DCF's motion to dismiss and remanded the matter to the OAL for further proceedings. In so doing, the Commissioner clarified, *inter alia*, that if J.M. or any of the other students was placed by DCF in a State facility, Trenton's financial responsibility is established by *N.J.S.A.* 18A:7F-24. Further, in the case of students placed by DCF in State facilities, the district of residence is not responsible for making direct tuition payments for the costs of the student's education; rather, the DOR's financial responsibility is limited to the reduction of its State aid.

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

204-22+
OAL Dkt. No. EDU 10036-21
Agency Dkt. No. 195-10/21

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Trenton,
Mercer County,

Petitioner,

v.

New Jersey Department of Children and Families,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

This matter involves the question of which party is responsible for providing the educational program and paying tuition and transportation costs for students in residential facilities. The Trenton Board of Education (Trenton) filed a petition of appeal, contending that the Department of Children and Families (DCF) improperly required Trenton to make tuition payments for the educational costs of several students.[2] According to Trenton, the students

[1] Respondent did not file a reply to petitioner's exceptions.

[2] In one paragraph, the petition identifies eight students by initials, while in another paragraph, it indicates that the dispute pertains to six students.

were placed by DCF in State facilities and, therefore, DCF must pay for their educational programs, rather than Trenton.[3]

DCF filed a motion to dismiss, arguing that student J.M. was not placed in his residential treatment facility by DCF, nor is the facility a State facility. DCF contends that the State is not J.M.'s legal guardian, and he is not in State custody. Therefore, according to DCF, Trenton is responsible for J.M.'s education and costs. Following transmittal and further briefing, the Administrative Law Judge (ALJ) concluded that Trenton is responsible for the costs of J.M.'s education because J.M. was unilaterally placed at Legacy Treatment Services (LTS) by his parents, and Trenton was the district where his parents resided as of the date of his placement.

In its exceptions, Trenton argues that the ALJ disregarded the fact that the petition involves multiple students, not just J.M. Trenton further notes that it has never disputed that Trenton is the district of residence for the students at issue and contends that the ALJ incorrectly analyzed the laws pertaining to a district of residence determination, even though the basis for the petition is a different portion of the statute, which the ALJ misinterpreted. According to Trenton, DCF's motion to dismiss for failure to state a claim did nothing to challenge the sufficiency of the allegations contained in the petition, and therefore dismissal was inappropriate. Trenton argues that DCF's motion was not supported by certification or affidavit by someone with personal knowledge and the ALJ improperly accepted statements made by DCF as fact without proof, when the facts as presented by DCF are disputed by Trenton.

[3] The petition and other filings acknowledge that *N.J.S.A.* 18A:7B-12 may require Trenton's State aid payments to be reduced, and that amount forwarded to DCF, in certain circumstances, as described below. However, Trenton contends that DCF has required Trenton to make tuition payments beyond the amounts required by *N.J.S.A.* 18A:7B-12, and for incorrect time periods.

Upon review, the Commissioner disagrees with the ALJ that dismissal is appropriate at this juncture. Most significantly, the Initial Decision fails to address any students other than J.M., despite the fact that the petition alleges that multiple students were placed by DCF in State facilities and are at issue in the dispute.[4]

Furthermore, even with regard to J.M., dismissal is inappropriate. In evaluating a motion to dismiss for failure to state a claim upon which relief can be granted, "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." *Rieder v. State*, 221 *N.J. Super.* 547, 552 (App. Div. 1987) (internal quotation and citation omitted). The Commissioner must assume that the facts asserted by the petitioner are true. *Velantzas v. Colgate-Palmolive Co.*, 109 *N.J.* 189, 192 (1988). Here, the petition of appeal contends that J.M. was placed by DCF in a State facility. Pursuant to *N.J.S.A.* 18A:7B-2, if Trenton is correct in this contention, then Trenton is not responsible for making direct tuition payments for J.M.'s education; instead, Trenton's State aid payment would be reduced in the amount of DCF's per pupil cost. While DCF argues in its motion to dismiss that Trenton has produced no convincing evidence that LTS is operated by, contracted with, or otherwise specified by DCF, and therefore it is not a State facility, this argument applies the wrong standard. Trenton is not required to provide "convincing proof" to survive a motion

[4] The petition refers to various dates for the placements of the students – 2012, 2015, six years prior to the filing of the petition, and 2021. The Commissioner notes that *N.J.A.C.* 6A:3-1.3(i) requires a petition of appeal to be filed within 90 days from the date of receipt of notice of a final order, ruling, or other action that is the subject of the requested contested case hearing. Accordingly, some of the Board's claims may be time-barred. However, the ALJ's decision to dismiss the case does not indicate that the Board's claims regarding students other than J.M. were dismissed because they were time-barred. Rather, it appears that because DCF only presented arguments regarding J.M. in its motion to dismiss, the ALJ simply failed to address the Board's claims regarding any other students. The timeliness of Trenton's claims regarding other students depends on when Trenton received notice of DCF's actions, and the record is devoid of any facts addressing this issue. Accordingly, the Commissioner cannot reach any conclusions regarding timeliness and directs that this issue be addressed on remand if Trenton continues to pursue claims regarding earlier years.

to dismiss. The Commissioner instead must assume that the facts in the petition – namely, that J.M. was placed by DCF in a State facility – are true. This assumption is sufficient to support the conclusion that Trenton has stated a claim upon which relief can be granted and that dismissal is not warranted at this stage.

It appears that while citing to the standards for a motion to dismiss, the ALJ actually treated the motion as one for summary decision, because she relied on "facts" and documents presented by DCF that are outside the pleadings. According to *N.J. Ct. R.* 4:6-2, which is applicable to OAL proceedings pursuant to *N.J.A.C.* 1:1-1.3, when a motion to dismiss for failure to state a claim on which relief can be granted presents matters outside the pleading, such motion shall be treated as a motion for summary decision. A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 528-29 (1995).

The Commissioner concludes that DCF's motion also fails to meet the standard necessary to grant a motion for summary decision. The ALJ's finding that J.M. was unilaterally placed at LTS by his parents is wholly unsupported by the record. DCF's motion includes no affidavits or certifications, and no testimony was taken in support of the motion.[5]

[5] The Commissioner notes that DCF argues that *N.J.S.A.* 30:4C-52 defines a "child placed outside his home" as "a child under the care, custody, or guardianship of the [Division of Child Protection and Permanency (DCP&P)]" who resides in certain places, including residential treatment facilities. According to DCF, it is undisputed that J.M. was not in the custody of DCP&P, nor was he a ward of the State, and therefore he cannot have been placed by DCF at LTS. Initially, it is not clear to the Commissioner that DCP&P must have custody or guardianship of the child for the child to be "placed" by DCF, as even the definition relied upon by DCF includes "a child under the care" of DCP&P as a child who can be "placed outside the home." Based on the current record, the Commissioner cannot determine whether a child to whom DCP&P provides services, without custody or guardianship, is a child "under

Furthermore, even if this "fact" as averred by DCF were accepted into the record, it is disputed by Trenton, creating a genuine issue of material fact that precludes summary decision. Further fact-finding is necessary to determine whether DCF placed J.M. at LTS, and whether LTS is a State facility.[6]

The ALJ also found that the Department of Education (DOE) determined that Trenton was responsible for J.M.'s costs, but there is no basis in the record to support that finding. DCF's motion refers to an email from the DOE's Mercer County Education Specialist, which allegedly stated that J.M.'s placement is not in a State facility and that Trenton is responsible for his costs. Although DCF's brief indicates that this email was included as an exhibit, it does not appear in the filing. Additionally, even if the Commissioner accepted that the email does exist and includes the statement alleged by DCF, the conclusion of the Education Specialist is not binding on the Commissioner.[7]

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the care" of DCP&P, such that he could be considered a child "placed" by DCF for purposes of applying *N.J.S.A.* 18A:7B-12. Indeed, the fact that the Legislature included "care" as a separate term from "custody" or "guardianship" suggests that "care" means something different and requires a different analysis. Trenton argues a parent cannot place a student at LTS and that only DCF, through the Children's System of Care (CSOC) and Care Management Organizations (CMOs), can make such a placement. At the stage of a motion to dismiss or motion for summary decision, the lack of clarity on the record regarding this issue is sufficient to preclude judgment in favor of DCF. Moreover, even accepting DCF's argument that custody or guardianship is required for a child to be placed by DCF, there is nothing in the record, apart from DCF's unverified arguments, to support the finding that J.M. is not in the custody or guardianship of DCP&P. Accordingly, dismissing the petition or granting summary decision to DCF is inappropriate at this stage.

[6] Fact-finding may require a review of the relationship between DCF, DCP&P, CSOC, the CMOs, and LTS, as well as the actions of each, and of J.M.'s parents, with regard to his placement. Similar fact-finding may also be necessary regarding the other students at issue in the petition, should Trenton's claims regarding those students proceed.

[7] The ALJ noted that the State's determination regarding a student's district of residence is entitled to a presumption of correctness. However, the issue in this case is not whether Trenton is J.M.'s district of residence, but rather whether J.M. was placed by DCF in a State facility, a determination not within the purview of the Education Specialist.

On remand, should the ALJ determine that J.M., or any of the other students, was placed by DCF in a State facility, Trenton's financial responsibility is established by *N.J.S.A.* 18A:7B-12. In the case of such a placement, the State aid payment made to the district of residence by the DOE is reduced by the per pupil cost calculated by the DOE pursuant to *N.J.S.A.* 18A:7F-24, and that amount is forwarded to DCF.[8] This reduction occurs only when the student is placed in the facility by the last school day prior to October 16 in the prebudget year. *N.J.S.A.* 18A:7B-12(a) ("No district shall be responsible for the tuition of any child admitted by the State to a State facility after the last school day prior to October 16 of the prebudget year."). The prebudget year is "the school fiscal year preceding the year in which the budget is implemented." *N.J.S.A.* 18A:7F-45. A sample timeline may be illustrative. The State aid payments made by the DOE in the fall of 2021 were for the budget year of 2021-2022. In this example, the prebudget year is 2020-2021. Accordingly, for any student placed by DCF in a State facility after October 15, 2020 (the last school day prior to October 16 of the prebudget year), there would be no reduction to the State aid payment made to the district for the 2021-2022 school year, and no increase to the State aid payment made to DCF for the 2021-2022 school year.[9] However, for any DCF-placed student who resided in a State facility on

[8] In the case of students placed by DCF in State facilities, the district of residence is not responsible for making direct tuition payments for the costs of the student's education. The district of residence's financial responsibility is limited to the reduction of its State aid.

[9] Accordingly, if J.M. was placed by DCF in a State facility when he was admitted to LTS in August 2021, Trenton's State aid payment for the 2021-2022 school year would not be reduced, nor would DCF's 2021-2022 payment be increased. The Initial Decision indicates that, even if J.M. was placed by DCF in a State facility, Trenton's State aid payment for 2021-2022 should be reduced, as the August 2021 admission was in advance of the October 16, 2021 reporting deadline. However, that statement is inconsistent with the statute, which clearly requires admission by October 16 of the prebudget year, not the budget year, for the district of residence's State aid payment to be reduced.

October 15, 2021, the State aid payment to the district for the 2022-2023 school year would be reduced, and that amount sent to DCF as part of its 2022-2023 State aid payment.[10]

Accordingly, the Initial Decision granting DCF's motion to dismiss is reversed. This matter is hereby remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 15, 2022
Date of Mailing: August 17, 2022

[10] It is not clear from the record whether J.M. remained admitted on October 15, 2021. If he was, and if DCF placed him at LTS and LTS is a State facility, Trenton's State aid payment for the 2022-2023 school year would be reduced by DCF's per pupil cost, and that amount forwarded to DCF for 2022-2023.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10036-21
AGENCY DKT. NO. 195-10/21

CITY OF TRENTON
BOARD OF EDUCATION,
MERCER COUNTY,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF
CHILDREN AND FAMILIES,
Respondent.

Elesia L. James, Esq., for petitioner (Legal Department, Trenton Board of Education, attorneys)

Christina Duclos, Deputy Attorney General, for respondent (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

Record Closed: April 11, 2022 Decided: May 25, 2022

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Trenton Board of Education brings this action seeking a declaration that New Jersey Department of Children and Families is financially responsible for the education of J.M. who was placed in a residential placement/treatment facility. The petition was filed on October 15, 2022, and was transmitted to the Office of Administrative Law as a contested matter on December 9, 2021. N.J.S.A.52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The respondent filed a motion dismiss in lieu of an Answer on December 6, 2021. Opposition was filed by Trenton on January 14, 2022, and a reply was filed by DCF on February 14, 2022. There was an oral argument by the parties on April 6, 2022.

STATEMENT OF FACTS

Petitioner, Trenton Board of Education (Trenton) is a local education agency and is the District of Residence (DOR) for the child at issue in this matter. New Jersey Department of Children and Families (DCF) is a State agency that serves and supports at-risk children and families, and provides among others, mental health, behavioral health, and addiction services. Children's System of Care (CSOC) provides services to children and adolescents (along with their families) with emotional and behavioral challenges, those with developmental and intellectual disabilities, and those with substance use challenges. J.M. was placed in Legacy Treatment Facility (LTF), a facility, which is contracted by the State to provide such services. DCF was involved in the placement, in connection with the advice and consent of the parents. There has been no termination of the parental rights of J.M., and they remain residents of Trenton.

J.M., was admitted on August 13, 2021, to (LTS), a residential treatment facility located in Burlington County, New Jersey. In connection with this placement, J.M. was to attend the Burlington County Special Services School District in Lumberton, N.J. On or about September 2, 2021, CSOC sent a letter to Trenton notifying them of J.M.'s admission to LTS and requesting acknowledgment by the Board that it would be financially responsible for J.M.'s education and transportation costs while at LTS. Trenton declined to acknowledge their financial responsibility and claimed that it was DCF who was responsible for the educational/tuition and transportation costs for J.M.

because he was "State-placed" in a "State facility." DCF counters that under the plain language of the State Facilities Act, the DOR is responsible for the education and transportation of its students in such facilities. In addition, J.M. was unilaterally placed by his parent who is a resident of Trenton. J.M. is not now, nor has he ever been, a ward of the State.

The relevant FACTS in this matter are undisputed and that matter is ripe for disposition on a Motion to Dismiss.

The relevant facts are, and I **FIND** the following as FACT:

1. J.M. and his parent reside in the City of Trenton and were residents of Trenton at the time of the placement at LTS.

2. J.M. is not a ward of the State and his parents and/or guardians were involved in, and consented to his placement at LTS.

3. The facility that J.M. was placed in was contracted by the State to provide such services.

4. The State determined that Trenton was the DOR and as such, was responsible for the educational costs of tuition and transportation for J.M. while he was a resident at LTS.

LEGAL ANALYSIS AND CONCLUSION

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted under R. 4:6-2(e), "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." Rieder v. State, Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (emphasis added). The court may not consider anything beyond whether the complaint states a cognizable cause of action. Id. For purposes of determining the motion, the court must "assume the facts as asserted by [petitioners] are true and give [them] the benefit of all

inferences that may be drawn in [their] favor." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). If the complaint states no basis for relief and discovery would not supply one, dismissal is the appropriate remedy. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). If the factual allegations are "palpably insufficient to support a claim upon which relief can be granted," the court must dismiss the complaint. Rieder. Moreover, it "runs against the grain of public policy to force a public entity to incur the cost of defending an action that ultimately and undoubtedly will be dismissed on the merits." Tryanowski v. Lodi Bd. of Educ., 274 N.J. Super. 265, 268-69 (Law Div. 1994) (emphasis added).

It is well settled that when children are placed residentially run by the State or contracted by the State, local school districts remain financially responsible for their educational services. The State Facilities Education Act (SFEA) 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) . . . .

Regulations promulgated by the Commissioner further clarify which district retains fiscal responsibility for children such as J.M. These regulations recognize that a parent's residence may change, and, accordingly, N.J.A.C. 6A:23A-19.2 provides as follows:

> (a) The district of residence for school funding purposes shall be determined according to the following criteria:
>
> > 1. The "present district of residence" of a child in a residential state facility defined in N.J.S.A. 18A:7F-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.

When the State makes a determination as to who is responsible for the child's education and/or a determination about the "district of residency," it 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 DOR determination, 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. In this case, there has been no termination of parental rights and the child's DOR is Trenton. The State determined that J.M. was a resident of Trenton when placed in the facility in question. Although this is not a residence dispute, the State is entitled to a presumption of correctness and the burden lies on the district challenging the determination, in this case the City of Trenton.

The determination that Trenton is financially responsible for J.M. was consistent with the applicable law and regulations. It is uncontroverted that on the date on which J.M. was placed residentially, his mother resided in Trenton. In accordance with N.J.S.A. 18A:7B-12(b) and N.J.A.C. 6A:23A-19.2, Trenton was responsible for J.M.'s educational costs because Trenton 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). The dispute about whether it is a State placement, or a State agency do not come into play in this situation. The child, who was not a ward of the State, and was a resident of Trenton at the time was placed in a State facility.

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. SFEA, 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. The plain language of N.J.S.A. 18A:7B-1 et seq. and N.J.A.C. 6A:23A-19.2 are clear. 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).

Even assuming that J.M.'s admission to LTS can be construed as a State placement at a State facility, the law on which entity is financially responsible for his educational and transportation costs is clear. The relevant sections discussing the allocation of financial responsibility are found at N.J.S.A. 18A:7B-2 and -12 under the SFEA. N.J.S.A. 18A:7B-2 states that:

> [f]or each state-placed [and district-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 . . . . The amount deducted . . . shall be forwarded to the Department of Human Services or the Department of

> Children and Families, as applicable, if the facility is operated by or under contract with that department . . . . Amounts so deducted shall be used solely for the support of educational programs and shall be maintained in a separate account for that purpose. No district shall be responsible for the tuition of any child admitted by the State to a state facility after the last school day prior to October 16 of the prebudget year.

Trenton argues that this section provides that a student is placed by the State in a State facility prior to the last school day before October 16, the Commissioner of Education will deduct the amount of aid normally allocated to that student and distribute it to the facility where the student has been placed, and that the district will not be responsible for the tuition of the child. However, such a release of the district's financial responsibility is inconsistent both with the legislative history and the section discussing the criteria for determining the DOR when that child is not a ward of the State and the parents have been involved in the placement. Such an interpretation is also inconsistent with the purpose of the SFEA.

N.J.S.A. 18A:7B-12, States that for purposes of school funding, a child's DOR is determined based on a number of criteria, specifically:

> 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 [their] most recent admission to a state facility or most recent placement by a state agency.
>
> [Id. at (b).]

This section states the State will take financial responsibility only in specific scenarios. If the DOR cannot be determined according to the criteria contained herein, if the criteria contained herein identify a DOR outside of the State, or if the child has resided in a domestic violence shelter, homeless shelter, or transitional living facility located outside of the DOR for more than one year, the State shall assume fiscal responsibility for the tuition of the child. And "[i]f the State has assumed fiscal

responsibility for the tuition of a child in a private educational facility approved by the Department of Education to serve children who are classified as needing special education services." Id. at (e).

Looking to the legislative history of the SFEA, this act was created to ensure that all children in New Jersey were provided a thorough and efficient education. Sponsor's statements L. 1979, c. 207. The bill's sponsor noted that previously children in State institutions and facilities rarely received an adequate education due to a number of factors, including inadequate appropriations, insufficient emphasis on education within the facilities, a lack of uniform program standards, and ill-defined responsibilities for operating the classes. Ibid. The SFEA was to help ensure that children in such facilities were treated as much as possible like children in the public schools. "First, [the children] will be carried on the roles of the district, and their education will be supported by state aid and district taxes . . . [to] ensure a stable and sufficient source of funds." Ibid.

Both the sponsor's and committee's statements expressly stated that even prior to the SFEA the law held that school districts were required to pay tuition for children in State institutions, but the law was not enforced due to the financial burden the prior funding scheme would place on the school districts. Ibid. As the burden would primarily fall on districts that contained State institutions, rather than spreading the costs to all involved districts. Therefore, the SFEA simplified the guidelines for designating the DOR by tying the child's DOR to the residence of the parent(s) and/or guardian(s) with whom the child resided prior to their placement or admission, or the last known DOR of the child.

When looking to the original text of N.J.S.A. 18A:7B-12(d), the default DOR was the district where the child resided prior to their admission or placement, the district where the child was placed, or the district where the State facility was located. L. 1979, c. 207, § 18. However, when the SFEA was amended in 1985, it is clear that the Legislature considered assigning the financial responsibilities over such children to the State under additional circumstances. In that regard, the bill's language originally stated that the State would be financially responsible for a child's tuition when the DOR could

not be determined for children placed in a State facility or by a State agency. L. 1985, c. 244, § 1. However, amendments by the Assembly's Education Committee removed this addition and changed it to the DOR where the child resided prior to the admission or placement but added that if the DOR still could not be determined or if the DOR was outside of the State, only then would the State assume financial responsibility for the child's tuition. This amendment to the SFEA was proposed to rectify an unintended consequence where districts where State facilities and institutions were located were still paying the tuition costs for children when their normal DOR could not be determined. There is no dispute in this matter that the DOR is Trenton.

It is clear from the legislative history of the SFEA that the Legislature intended the various school districts to remain financially responsible for the children within their districts, or where the children would return after a placement or admission to a State facility for a period of time. The second is clear from the decision to connect the child's DOR to their parents' and/or guardians' present DOR, or the last DOR the child was at before their placement or admission. It also appears evident that the Legislature was concerned with overburdening school districts that contained State facilities and institutions. Finally, the instances where the State assumes financial responsibility are in cases where no district within the State would have, in the pre-budget year, claimed the child as enrolled or present in their district, and so the district would not have budgeted for the child. The Legislature has stated there are few instances where the State is financially responsible and indicates that it is only in these unusual circumstances that the State or its agencies would be responsible for the tuition, transportation, and educational costs of a child in a State facility. There are no unusual circumstances that exist here.

Finally, reading N.J.S.A. 18A:7B-2 in the context of the mandatory reporting deadline of October 20 by which school districts must report to the Commissioner the enrollment numbers for the allocation of state aid, N.J.S.A. 8A:7F-33, it seems far more logical for the exemption to a district's requirement to pay tuition for a child to occur only when a child is moved into a school district after the reporting deadline has passed. Thus, limiting the small time period when a school district may be unexpectedly required to pay for the educational and other costs of a child in a State-facility within the district.

But as this small exemption may cover at most a long weekend due to a State or school holiday, this also fits with the Legislature's intent of enforcing existing law requiring school districts to pay the cost for educating children in State facilities within the district's boundaries. See Bd. Of Educ. Of Piscataway Twp. V. N.J. Dept. of Educ., EDU 05063-10, Oct. 4, 2010 (initial decision), adopted Nov. 8, 2010, aff'd 2012 N.J. Super. Unpub. LEXIS 873 (App. Div. 2012); Bd. Of Educ. Of Boonton v. N.J. Dept. of Educ., EDU 12227-12, Feb. 24, 2014 (initial decision). As J.M. was admitted to LTS in August of 2021, with Trenton being aware of his admission on or about September 2, 2021—far before the October 16 deadline—this exemption would not apply regardless.

Accordingly, I **CONCLUDE** that the City of Trenton is the District of Residence for J.M. and as such, the financial responsibility for the education and transportation for J.M. is with the City of Trenton. I further **CONCLUDE** that the City of Trenton has not met its burden to demonstrate that the determination of the District of Residence by the State was improper.

ORDER

Based on the foregoing, it is hereby **ORDERED** as follows:

1. The Motion to Dismiss filed by DCF is **GRANTED.**

2. The Petition is **DISMISSED.**

3. It is further **ORDERED** that Trenton is the District of Residence and is liable the education and transportation of J.M. and others similarly situated in their 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.

May 25, 2022 _____
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: May 25, 2022

Date Mailed to Parties: May 25, 2022

SGC:sm

205-22+

New Jersey Commissioner of Education

Final Decision

D.S., on behalf of minor child, M.S.,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

Synopsis

Petitioner challenged the decision of the respondent Board to deny her application for an attendance zone waiver to change M.S.'s school assignment for the 2021–2022 school year from Hamilton High School-East, also known as Steinert High School (Steinert), to Hamilton High School-West (HHS-West). Petitioner's request for the zone waiver was filed prior to October 29, 2021. The Board notified petitioner by letter dated October 29, 2021 that her request was denied. Further, counsel for the Board notified petitioner by letter dated November 5, 2021, that an appeal of the Board's zone waiver denial must be filed with the Commissioner of Education within ninety days of the date of the final decision. Petitioner did not file her appeal of the Board's decision to deny her application for a zone waiver until March 8, 2022. The Board filed a motion for summary decision, which was opposed by the petitioner.

The ALJ found, *inter alia*, that: there is no issue of material fact in this case, and the matter is ripe for summary decision; pursuant to *N.J.A.C.* 6A:3-1.3(i), petitioners must 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; here, the petitioner received notice of the Board's final decision to deny her request for a zone waiver on October 29, 2021, and on November 5, 2021, counsel for the Board sent a more detailed explanation of the grounds for respondent's decision; petitioner's appeal was not filed until March 8, 2022. The ALJ concluded that the appeal was filed 102 days after petitioner received final notice that her request was denied. Accordingly, the ALJ granted summary decision to the Board and dismissed the petition.

Upon a comprehensive review, the Commissioner concurred with the ALJ that this matter is time-barred by the 90-day limitations period set forth in *N.J.A.C.* 6A:3-1.3(a). Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed as untimely.

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

205-22+
OAL Dkt. No. EDU 02521-22
Agency Dkt. No. 37-3/22

New Jersey Commissioner of Education

Decision

D.S., on behalf of minor child, M.S.,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions to the Initial Decision filed by the petitioner.

Upon such review, the Commissioner concurs with the Administrative Law Judge's determination that the petition of appeal was time-barred under *N.J.A.C.* 6A:3-1.3(i). Additionally, the petitioner has failed to present any exceptional circumstances that might justify a finding that strict adherence to the 90-day rule would result in injustice. *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572, 590 (1993); *N.J.A.C.* 6A:3-1.16. Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 15, 2022
Date of Mailing: August 17, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 02521-22
AGENCY DKT. NO. 37-3/23

D.S. ON BEHALF OF M.S.,
Petitioner,
v.
HAMILTON TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

D.S., petitioner, pro se

Michael A. Pattanite, Jr., Esq., for respondent (Lenox Law Firm, attorneys)

Record Closed: June 27, 2022 Decided: July 5, 2022

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

Petitioner D.S. on behalf of M.S. challenges the decision of respondent Hamilton Township Board of Education, Mercer County (Board) to deny her application for an attendance zone waiver to change M.S.'s school assignment for the 2021–2022 school

year from Hamilton High School-East, also known as Steinert High School (Steinert), to Hamilton High School-West (HHS-West).

PROCEDURAL HISTORY

On March 8, 2022, petitioner filed a petition of appeal with the New Jersey Department of Education (DOE), Office of Controversies and Disputes. On March 28, 2022, respondent filed a motion for summary decision in lieu of an answer.[1] The Acting Commissioner of Education did not rule on the motion but transmitted it with the petition to the Office of Administrative Law (OAL) on April 4, 2022, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15, and N.J.S.A. 52:14F-1 to -13.

The matter was assigned to the Honorable Jeffrey N. Rabin, ALJ, and scheduled for a prehearing conference. By emails dated May 3, 2022, petitioner requested that the matter be reassigned due to an alleged conflict of interest; the matter was reassigned to the undersigned[2] and scheduled for a prehearing conference on May 31, 2022. During the prehearing conference, petitioner made an offer of settlement; counsel for respondent agreed to report on his client's response on or before June 13, 2022.

On June 12, 2022, petitioner received notice by electronic mail that respondent declined her offer of settlement. The parties appeared for a telephone conference on June 13, 2022;[3] petitioner requested and was granted the opportunity to submit a brief in opposition to the motion for summary decision on or before June 27, 2022. With petitioner's timely submission, respondent's motion is now ripe for review.

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[1] Respondent filed a motion for summary decision rather than a motion to dismiss because respondent relies on materials outside the pleadings. R. 4:6-2(e).

[2] On several occasions, petitioner has stated in writing that during an earlier proceeding involving these same parties, I advised her to file this appeal. That statement is not accurate. During discussions of the potential settlement of the matter docketed as EDS 05336-21, petitioner expressed her continued interest in having M.S. attend HHS-West and I asked her if she had appealed the District's decision to deny her application for a zone waiver. When she responded that she had not appealed, I noted that she was by then precluded from doing so by regulation requiring appeals within ninety days of the disputed action. During the telephone conference of May 31, 2022, petitioner agreed with my recollection of our discussion.

[3] As petitioner notes, despite due notice, the firm representing respondent did not appear for this conference until contacted by petitioner at my request. See Petitioner's Supplement to Pro Se Petition (June 27, 2022), ¶ 8.

FACTUAL DISCUSSION AND FINDINGS

The following **FACTS** are not in dispute and accordingly, I **FIND:**

The Hamilton Township School District (District) operates three high schools and assigns students within the District to a specific high school based on pre-determined residential boundary lines. The District Regulation #5120 (quoted below) sets forth the criteria that the District uses to evaluate a request for permission to attend a high school outside of the applicable boundary lines.

M.S. is a seventeen-year-old female. She began the 2021–2022 school year in eleventh grade at Gateway High School in Florida. On or before November 1, 2021, M.S. moved with her mother, D.S., back to New Jersey and took up residence in Hamilton Township within the geographic zone assigned by the District to Steinert.

On or before October 29, 2021, D.S. applied to the District for an attendance zone waiver by which M.S. would attend high school at HHS-West rather than Steinert.[4] By letter dated October 29, 2021, the District denied petitioner's application. This letter stated in pertinent part:

> If you have any additional data/documentation to provide which meets the [Regulation #5120] criteria, please contact the Office of Administration. Your new information will be reviewed to determine your eligibility.
>
> [Brief in Support of Respondent's Motion for Summary Decision (March 28, 2022), Ex. C.]

On October 29, 2021, petitioner notified respondent that M.S. would be residing at an alternative address within the zone for HHS-West. In response, James Altobello, Ed.D., Director of Secondary Education, provided petitioner with detailed instructions for registering M.S. using a third-party address rather than her parent's address.[5] Id., Ex. E.

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[4] Neither party provided this application, but there is no dispute that it was submitted by petitioner to respondent in advance of October 29, 2021.

[5] Respondent claims that petitioner did not submit paperwork to support the use of a third-party address. Petitioner has not provided proof of such a submission, nor has she disputed this assertion by respondent.

By letter dated November 5, 2021, counsel for the Board notified petitioner of the basis for the decision to deny her application for a zone waiver and stated that an appeal of this decision must be filed with the Commissioner of Education within ninety days of the date of the decision. Id., Ex. F. Petitioner contends that staff at the DOE stated that the deadline for an appeal of a Board decision is two years after the date of the decision. Petitioner's Supplement to Pro Se Petition (June 27, 2022), ¶ 1.

Since approximately November 8, 2021, M.S. has attended eleventh grade at Steinert.

Petitioner filed her appeal of respondent's decision to deny her application for a zone waiver on March 8, 2022, 102 days after she was notified of respondent's decision.

LEGAL ANALYSIS AND CONCLUSIONS

To begin, petitioner disputes the designation of this matter by the DOE as one arising under the school laws (and therefore, bearing the OAL heading "EDU") rather than under the federal Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 to 1482 (IDEA) (which would bear the OAL heading "EDS"). Petitioner's Supplement, ¶ 2.

The Commissioner of DOE is authorized to hear and determine controversies under the school law. N.J.S.A. 18A:6-9; N.J.A.C. 6A:2-1.2. However, the State Director of the Office of Special Education (OSE) determines whether a local education agency has violated the requirements of state and federal laws regarding the provision of special education and related services. N.J.A.C. 6A:14-9.2. Petitioner argues that the decision to deny her petition to place M.S. at HHS-West results in a failure to provide M.S. with a free appropriate public education (FAPE) because Steinert does not provide M.S. with the services she is due under her IEP. Petitioner's Supplement, ¶ ¶ 2, 5.

There is no dispute that M.S. is eligible for special education and related services and has an individual education program (IEP) developed for her by the child study team at Steinert. Petitioner has brought several claims on behalf of M.S. under the IDEA. By her own words, however, petitioner filed this matter to appeal the decision of the District

to deny her application for a zone waiver. I **CONCLUDE** that this matter was properly transmitted by the DOE as arising under the school laws.

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides as follows:

> [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 explaining the standard to be applied in summary motion practice, the Brill Court explained:

> The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.
>
> [Id. at 536-3.7.]

As discussed above, I **CONCLUDE** that the parties raise no dispute with respect to material facts and the issue of whether petitioner's appeal must be dismissed for being filed after the applicable statutory deadline can be decided as a matter of law.

N.J.A.C. 6A:3-1.3(i) states that to initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws,

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

The purpose of the ninety-day limitation period is "to stimulate litigants to pursue a right of action within reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims[,]" to penalize delay, and to provide some assurance that a claim will not be raised after the limitations period has passed. Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572, 587 (1993) (citations omitted). With regard to the adequacy of notice, the Supreme Court explained that "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[,]" such that the individual has the information needed to file a timely claim. Id. at 588-89 (an unofficial and informal note that Board had taken a position contrary to petitioner was sufficient to trigger the start of the ninety-day period).

Here, on October 29, 2021, the District issued a written denial to which petitioner responded multiple times the same day. On November 5, 2021, counsel for the Board sent a more detailed explanation of the grounds for respondent's decision. I **CONCLUDE** that the respondent fulfilled the notice requirement on October 29, 2021.

The regulations further provide the Commissioner with discretion to relax the limitations period "in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." N.J.A.C. 6A:3-1.6. Case law makes clear, however, that relaxing the ninety-day rule occurs only under exceptional circumstances or if there is a compelling reason to do so. 131 N.J. at 590; Polaha v. Buena Reg'l. Sch. Dist., 212 N.J. Super. 628, 635 (App. Div. 1986) (case remanded to Commissioner to consider whether the ninety-day rule should be relaxed because the petitioner and the respondent engaged in discussions in an attempt to "agree on an acceptable position"). Here, there is no evidence that the District gave any consideration

206-22SEC+
SEC Dkt. No. T26-21
Agency Dkt. No. 131-5/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Gregory Johnson,
Board of Education of the Township of
Lawrence, Mercer County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent completed the required training before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days.

Following the SEC's May 24, 2022 decision, respondent emailed the SEC, indicating that the SEC was using an incorrect email address and that he had not received any of the communications from the SEC prior to the May 24, 2022 decision. Accordingly, respondent

Before the School Ethics Commission
Docket No.: T26-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Gregory Johnson,
Lawrence Township Board of Education, Mercer County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 16, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Gregory Johnson (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Lawrence Township Board of Education (Board), located in Mercer County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by December 31, 2021.

On or April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and the list provided included Respondent. Prior to this time, multiple communications about mandated training

[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by December 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon issuance of the Commissioner of Education's decision. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon issuance of the Commissioner of Education's 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 Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o

Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: May 24, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T26-21

Whereas, Gregory Johnson (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent failed to respond to the Commission's OTSC as to why he did not complete training by March 31, 2021, and also failed to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, at its meeting on May 24, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its meeting on May 24, 2022, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon issuance of a final decision by the Commissioner of Education. However, if Respondent completes training before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon issuance of a final decision by the Commissioner of Education; and

Whereas, at its meeting on May 24, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on May 24, 2022.

Kathryn A. Whalen, Esq., Director

207-22+

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Englewood, Bergen County,

Petitioner,

v.

Angela David,

Respondent.

Synopsis

The Englewood Board of Education filed a petition and motion for emergent relief, seeking the removal of the respondent from the Board based on an alleged conflict of interest pursuant to *N.J.S.A.* 18A:12-2. Respondent is also on the Board of Trustees of ESTEPNJ, Inc. (ESTEP), a nonprofit entity that filed an application for the use of one of the school district's facilities for a summer theater arts program in 2018. In May 2019, the Board initiated a lawsuit against ESTEP for failure to pay $4,535 of the $24,750 total rental cost for the facility, and a judgment was entered against ESTEP in that amount in November 2019. The Board alleged that respondent's interest in the judgment and total amount due and owing to the Board disqualifies respondent from membership on the Board. Respondent claimed that the motion for emergent relief was substantively and procedurally barred and sought dismissal of the petition as well as costs and attorney fees.

The ALJ found, *inter alia*, that: the Board demonstrated entitlement to emergent relief; ESTEP and the petitioning Board had adverse interests; respondent, as a member of ESTEP's Board of Trustees, must therefore be disqualified from membership on the Englewood Board of Education; and no further issues are left to be decided in this matter. Accordingly, the ALJ granted the Board's motion for emergent relief and ordered respondent suspended from her position on the Board; further, respondent's request for attorney fees and costs was denied.

Upon review, the Commissioner, *inter alia*, disagreed with the ALJ's findings and conclusion, and found instead that the Board's judgment against ESTEP does not create a disqualifying conflict of interest. In so doing, the Commissioner concluded that the inconsistent interests that can result in disqualification under *N.J.S.A.* 18A:12-2 are limited to those listed in the statute, i.e., a contract with the board, or a claim *against* the Board. Here, the claim at issue is the *Board's* claim against ESTEP – a claim that does not meet the requirement of the statute. Accordingly, the Commissioner reversed the Initial Decision of the OAL. Respondent was not disqualified from membership on the board by virtue of *N.J.S.A.* 18A:12-2 and may continue to serve in her position; however, her motion for legal fees and costs related to her defense herein was denied, as the Commissioner does not have the authority to award such fees.

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

207-22+

OAL Dkt. No. EDU 05193-22
Agency Dkt. No. 156-6/22

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Englewood, Bergen County

Petitioner,

v.

Angela David,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

The Board filed a petition of appeal and motion for emergent relief, seeking the removal of respondent from the Board based on an alleged conflict of interest pursuant to *N.J.S.A.* 18A:12-2. Respondent is on the Board of Trustees of ESTEPNJ, Inc. (ESTEP), a nonprofit entity that filed an application for the use of one of the district's school facilities for a summer theater arts program in 2018. In May 2019, the Board initiated a lawsuit against ESTEP for failure to pay $4,535 of the $24,750 total rental cost for the facility. In November 2019, the Superior Court entered a judgment against ESTEP for that amount, plus court costs and attorney's fees; the judgment amount has since increased to $5,831.87 due to interest and additional costs and

fees. The Board's petition alleged that respondent's interest in the judgment and total amount due and owing to the Board disqualifies respondent from membership on the Board.

Following submissions and oral argument, the ALJ concluded that the Board had demonstrated entitlement to emergent relief. The ALJ found that ESTEP and the Board had adverse interests and that respondent, as a trustee of ESTEP, was therefore disqualified from membership on the Board. The ALJ also found that there were no further issues left to be decided in this matter.

In a letter which was not expressly identified as exceptions, but which the Commissioner deems to be exceptions, respondent argues that this matter involves a political issue that is not proper for judicial review. Respondent states that she had no financial interest in ESTEP, which has not operated since 2018. Respondent contends that this matter has already been adjudicated in her favor when the School Ethics Commission ruled that a complaint against her related to ESTP was out of time, such that this matter is barred by the doctrines of res judicata and collateral estoppel. Finally, respondent argues that the petition is untimely because her involvement with ESTEP has been known to the Board for over two years.[1]

In its reply to petitioner's exceptions,[2] the Board argues that respondent has a disqualifying interest in the Board's claim, and that respondent's service as a member of the

[1] Respondent also submitted a July 10, 2022 document removing her from the Board of Trustees of ESTEP. Pursuant to *N.J.A.C.* 1:1-18.4(c), evidence not presented at the hearing shall not be submitted as part of an exception. Accordingly, neither this evidence, nor the Board's response thereto, was considered.

[2] The Board argues that respondent's letter does not comply with *N.J.A.C.* 1:1-18.4 because it does not specify the findings of fact or conclusions of law to which exception is taken, propose alternative findings or conclusions, or set forth supporting reasons. The Commissioner notes the Board's argument, but nonetheless has determined to accept respondent's letter as her exceptions, with any deficiencies in the format of her filing going to the weight of her arguments, rather than the acceptance of the document as exceptions.

board of trustees of ESTEP places her in a position of competing loyalties between ESTEP and the Board. The Board also contends that respondent's res judicata and collateral estoppel arguments are without merit, because the issues raised in this matter have never been considered or decided in any other forum.

N.J.S.A. 18A:12-2 provides that a member of a board of education may not "be interested directly or indirectly in any contract with or claim against the board."[3] While the title of this provision is "Inconsistent interests or office prohibited," the title of the provision cannot expand the actual, plain language of the statute. The inconsistent interests that can result in disqualification are only those listed in the statute – a contract with the board, or a claim *against* the Board.[4] Here, the claim at issue is the *Board's* claim against ESTEP – a claim that does not meet the requirement of the statute.[5] Accordingly, the Commissioner concludes that the Board's judgment against ESTEP does not create a disqualifying conflict of interest.

The Commissioner notes that *N.J.S.A.* 18A:12-2 also prohibits a board member from being interested in a contract with the board. The petition alleges only that respondent "has a direct and/or indirect interest in the Board's claim that it is presently owed $5,831.87" and that respondent's "interest in the judgment and total amount due and owing to the Board"

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[3] *N.J.S.A.* 18A:12-2 also prevents board members from holding certain other public offices, a provision that is not at issue here.

[4] The Commissioner notes that other types of conflicts may be violations of the School Ethics Act, *N.J.S.A.* 18A:12-24 *et seq.* However, the pending matter does not allege any violations of the School Ethics Act, nor would the Commissioner have jurisdiction to address those claims, as jurisdiction lies with the School Ethics Commission.

[5] The cases cited by the Board, where the Commissioner or court found that removal was appropriate, all involve board members who had monetary claims against the boards on which they served. *See Bd. of Educ. of City of Sea Isle v. Kennedy*, 196 *N.J.* 1 (2008); *Bd. of Educ. of Twp. of Barnegat v. Robert A. Houser*, Commissioner Decision No. 306-07, decided July 30, 2007; *Bd. of Educ. of Bor. of Hawthorne, Passaic Cty. v. Albert W. Taliaferro*, Commissioner Decision No. 328-93, decided Dec. 30, 1993; *Bd. of Educ. of Twp. of Jackson, Ocean Cty. v. Gustavo Acevedo, Jr.*, Commissioner Decision No. 22-92, decided Feb. 6, 1992.

disqualifies her from membership. Nonetheless, in the interest of completeness, the Commissioner will also address the portion of *N.J.S.A.* 18A:12-2 pertaining to contracts with the board. It is not clear to the Commissioner, based on the record, that there was a contract between ESTEP and the Board. However, even assuming that ESTEP's application to use school facilities and the Board's approval of that application created a contract, that contract has been fully concluded.[6] As such, respondent is not currently interested in a contract with the Board, and the Commissioner finds no basis in the statute or related case law to conclude that a past contract creates a current disqualifying interest.[7]

Accordingly, the Initial Decision is reversed. Petitioner is not disqualified from membership on the board by virtue of *N.J.S.A.* 18A:12-2 and may continue to serve in her position.[8]

IT IS SO ORDERED.[9]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 15, 2022
Date of Mailing: August 17, 2022

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[6] There is no indication in the record that there is any ongoing business between the Board and ESTEP. Furthermore, to the extent that the payment owed pursuant to the (presumed) contract is outstanding, that amount has been litigated and entered as a judgment, such that there is no possible further business between the parties that is specific to the contract.

[7] In light of this conclusion, the Commissioner does not reach the issues of res judicata and collateral estoppel raised by respondent. However, the Commissioner does note that the School Ethics Commission adjudicates claims under the School Ethics Act and does not have jurisdiction to make determinations regarding disqualifying conflicts of interest pursuant to *N.J.S.A.* 18A:12-2.

[8] Respondent filed a cross-motion for legal fees and costs related to her defense of the petition of appeal. The Commissioner does not have the authority to award legal fees and costs and, therefore, the motion is denied.

[9] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION SEEKING
EMERGENT RELIEF AND ON
MOTION SEEKING COSTS
AND ATTORNEY'S FEES
OAL DKT. NO. EDU 05193-22
AGENCY DKT. NO. 156-6/22

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Petitioner,

v.

ANGELA DAVID,

Respondent.

Perry L. Lattiboudere, Esq., for Petitioner (Adams Gutierrez & Lattiboudere, LLC, attorneys)

Eric V. Kleiner, Esq., for Respondent

Record Closed: June 29, 2022 Decided: June 30, 2022

BEFORE: **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE

The Englewood Board of Education ("Petitioner" or "Englewood BOE" or "BOE") seeks an Order for injunctive relief from the Commissioner of Education suspending a BOE member, Angela David ("A.D."), from serving on the BOE pending the Commissioner's determination of her qualifications under N.J.S.A. 18A:12-2 (the section captioned, "Inconsistent interests or office prohibited") due to an outstanding monetary judgment obtained by the BOE against ESTEPNJ, Inc. ESTEPNJ, Inc. is a non-profit corporation on whose Board of Trustees A.D. has served since its incorporation. Respondent-A.D. claims that the emergent petition presently before the Tribunal is substantively and procedurally barred and she seeks a denial of the BOE's petition as well as costs and attorney's fees.

PROCEDURAL HISTORY

On June 23, 2022, the BOE filed with the New Jersey Department of Education a "Motion for Emergent Relief pursuant to N.J.A.C. 6A:3-1.6" seeking an Order immediately suspending A.D. from serving as a member of the BOE pending the Commissioner's determination of her qualifications under N.J.S.A. 18A: 12-2.

On June 24, 2022, A.D.'s counsel filed A.D. Opposition papers claiming that the BOE's emergent petition is substantively barred and procedurally barred, and seeking costs and attorney's fees incurred in this matter. A.D. supplemented her opposition on June 28, 2022.

On June 24, 2022 the N.J. Department of Education, Office of Controversies and Disputes transmitted this matter to the Office of Administrative Law, where is was filed on June 24, 2022 as a contested case.

DISCUSSION AND FINDINGS OF FACT

The Office of Controversies and Disputes did not frame either a specific fact question or a specific legal question for this Tribunal to decide.

During the June 29, 2022 hearing, Mr. Lattiboudere (counsel for the Englewood BOE) and Mr. Kleiner (counsel for A.D.) agreed with me on the following **Statements of Fact**:

(1) ESTEPNJ, Inc. is a 501 (c) (3) non-profit corporation incorporated in New Jersey on April 3, 2018.

(2) ESTEPNJ, Inc. is not a "for profit" corporation and, as such, has no shares of stock and no stockholders.

(3) As noted on the Certificate of Incorporation (ITEM #2 of Attorney Kleiner's exhibits), ESTEPNJ, Inc.'s initial Board of Trustees consisted of Darryl David, Angela David, and Brianna David, all of whom remain as members of the Board of Trustees today.

(4) Darryl David and Angela David are married to each other and Brianna David is their daughter.

(5) To the best of the Attorney's knowledge and belief, Darryl David and Angela David filed a Petition for Bankruptcy, but it appears that ESTEPNJ, Inc. did not file for bankruptcy.

(6) ESTEPNJ, Inc. is still a viable incorporated entity, but it is currently not active nor conducting business.

(7) On May 21, 2019 the Englewood BOE filed a lawsuit in the Bergen County Special Civil Part against ESTEPNJ, Inc. alleging breach of a contract and seeking monetary damages.

(8) On November 8. 2019, the Bergen County Special Civil Part issued a judgment in favor to the Englewood BOE against ESTEPNJ, Inc. in the amount of $4,722.70, which is still unsatisfied.

APPLICABLE LAW

N.J.A.C. 6A:3-1.6(a) provides:

> Where the subject matter of the controversy is a particular course of action by a district board of education ... the petitioner may include with the petition of appeal, a separate motion for emergent relief ... pending the Commissioner's final decision in the contested case."

N.J.A.C. 6A:3-1.6(b) provides:

> A motion for 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.

Crowe v. DeGioia, 90 N.J. 126 (1982) arose out of a set of circumstances regarding support and palimony matters. Nonetheless, the case has been the polestar decision in New Jersey for cases wherein injunctive relief is sought. The case stands for the proposition that an injunction cannot be granted unless and until the party seeking relief presents clear and convincing evidence that: (1) the injunction is "necessary to prevent irreparable harm"; (2) that "the legal right underlying the claim is settled"; (3) that the party seeking relief has made "a preliminary showing of a reasonable probability of ultimate success on the merits"; and (4) that "the relative hardship to the parties in granting or denying [injunctive] relief", on a balancing of the equities, weighs in his favor. Crowe, 90 N.J. at 132-34. In order to prevail, the party seeking injunctive relief must demonstrate by clear and convincing evidence that he meets all four Crowe factors. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012).

"[A] party who seeks mandatory preliminary injunctive relief must satisfy a 'particularly heavy' burden." Guaman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011), Rinaldo v. RLB Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006).

Also, "[w]hen a case presents an issue of 'significant public importance', a court must [also] consider the public interest in addition to the traditional Crowe factors." Garden State Equal. v. Dow, 216 N.J. 314, 321 (2013).

Appellate courts are bound by the trial court's factual findings if they are supported by "substantial, credible evidence" in the record. Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292,315 (App. Div. 2010).

Under the first Crowe factor, a party who seeks injunctive relief must establish that injunctive relief is necessary to prevent irreparable harm and to preserve the status quo. Citizens Coach Co. v. Camden Horse R.R. Co. , 29 N.J. Eq. 299, 303 (E.&A. 1878). Irreparable harm is an "injury to be suffered in the absence of injunctive relief [that] is *substantial* and *imminent*." Waste Mgmt. of N.J., Inc. v. Union City Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Under the second Crowe factor, injunctive relief will be withheld when the legal right underlying the claim is unsettled. Citizens Coach, at ps. 304-05.

Under the third Crowe factor, the party seeking relief is obligated to present clear and convincing evidence that he / she has a reasonable probability of ultimate success on the merits. Therefore, injunctive relief will not be granted where there are material facts in controversy. Citizens Coach at ps. 305-06. The party who seeks injunctive relief must be prepared to demonstrate facts which support his case and "must make a preliminary showing of reasonable probability of success on the merits." Crowe, at p. 133.

The second and third Crowe factors involve fact-sensitive analysis that "requires a determination of whether the material facts are in dispute, and whether the applicable law is settled." Waste Mgmt., at p. 528.

Under the fourth Crowe factor, the party who seeks injunctive relief must address the issue of relative hardship to the parties and he must establish that, on balance, the equities favor the grant of temporary relief to maintain the *status quo* pending the outcome of a final hearing." Crowe at p. 134. The party seeking injunctive relief must prove his case by clear and convincing evidence. Brown at p. 183 and thus his burden is 'particularly heavy'. Guaman at p. 247.

N.J.S.A. 18A:12-2 states:

> **No member of any board of education shall be interested directly or indirectly in any** contract with or **claim against the board,** nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county. [Emphasis supplied.]

N.J.S.A. 18A:12-24(j) states:

> Nothing shall prohibit any school official, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests.

In Board of Educ. of Sea Isle City v. Kennedy, 196 N.J. 1 (2008) a Board of Education member (the President of the BOE) and his wife had an autistic child for whom they sought an IEP. Litigation ensued between the Kennedys and the school district. Kennedy voluntarily resigned from the BOE. The parties reached a settlement. The following year, Kennedy was again elected to the BOE. Claiming that the school district had violated the settlement agreement, Mrs. Kennedy filed applications requesting a due process hearing and an emergent hearing seeking various relief, including payment for services which Mrs. Kennedy provided for her son, attorney's fees, expert's fees, costs, and expenses. The school district sought a declaratory ruling from the Commissioner that the applications created a conflict of interest, which was incompatible with Mr. Kennedy's continued BOE membership. The matter was referred to the Office of Administrative Law, where an ALJ issued a decision finding that Mr. Kennedy's conduct

was permissible under the School Ethics Act (N.J.S.A. 18A: 12-21 to -34 because Kennedy's due process request was designed to protect the educational rights of his child and was permitted by N.J.S.A. 18A:12-24(j), which allows a school official to represent himself or his immediate family member concerning his / their own interests. Nonetheless, the Commissioner rejected the ALJ's recommendation, determined that Kennedy's actions created a disqualifying conflict of interest under N.J.S.A. 18A:12-2 and ordered Kennedy's removal from the BOE. The State Board of Education affirmed the removal. The Appellate Division also affirmed the removal.

The Supreme Court undertook the task of harmonizing the N.J.S.A. 18A:12-2 and N.J.S.A. 18A: 12-24j. In Kennedy, the Supreme Court held that not all controversies and disputes between parents and school districts should require a sitting board member's removal from office. The Court emphasized that what was needed was a fact-sensitive analysis in each individual case to determine whether the BOE member's interest constitutes a substantial conflict requiring his removal from office as the sole remedy. The Court noted that not all claims result in a substantial conflict. Because of this, the Court considers all factors such as whether the BOE member is pursuing a claim in the public interest or whether he is pursuing a claim for his own aggrandizement or financial gain. The Court expressed its concern that BOE members who have handicapped children should not have to fear the loss of their elected office in the event that they question or challenge the appropriateness of their own children's education. The Supreme Court concluded that a BOE member should not be removed from office merely because he has advanced any claim "in a proceeding" against a school district involving the member's or an immediate family member's interests. However, in the Kennedy case, because the due process claim included a request for monetary relief, the Supreme Court affirmed the decision of the Appellate Division, as modified therein.

ANALYSIS OF THE ARGUMENTS ON THE PENDING MOTION

Counsel for Petitioner-BOE makes the following arguments pursuant to the four factors governing the granting of injunctive relief set forth in Crowe v. DiGioia, 90 N.J. 126 (1982).

The First Crowe Factor

Regarding the first Crowe factor, the BOE's counsel notes that irreparable harm can be found when money damages is not a sufficient remedy, or when there is no adequate after-the-fact remedy available, or when the party seeking relief suffers severe personal inconvenience. The BOE's argument in support of proving irreparable harm is that if A.D. is ultimately determined by the Commissioner to be unqualified under N.J.S.A. 18A:12.2, then A.D.'s continued interim presence on the BOE, and her continued voting on matters coming before the BOE, can and will bring all her votes into question and thereby create a likelihood of litigation against the BOE by persons and entities affected by said votes. This exposure to litigation and possible liability would result in substantial and irreparable harm to the BOE. Moreover, A.D.'s continued presence on the BOE, pending the Commissioner's Final Decision, would put her in a position where she would learn sensitive and confidential information not available to the general public. Should the Commissioner's Final Decision determine that A.D. is unqualified and should therefore be removed from the BOE, the knowledge obtained in the interim could, if divulged, prejudice the interests of the BOE.

The Second Crowe Factor

Regarding the second Crowe factor, the BOE's counsel argues that the legal rights underlying its claim for relief is well settled. Counsel points out that N.J.S.A. 18A:12-2 unequivocally prohibits a BOE member's continued membership if he or she has an interest that is adverse to the interests of the BOE. Here, the BOE has a money judgement against ETEPNJ, Inc. a non-profit corporation to which A.D. owes a fiduciary duty since she serves as one of ESTEPNJ, Inc.'s Trustees. The word "interest" in the Statute denotes more than a financial interest in a for-profit or a non-profit corporation or any other entity. It encompasses any concern with any such entity. A trustee of a non-profit corporation is duty-bound as a fiduciary to protect the interests of that entity and thus there is a readily discernable "concern" or "interest". The BOE seeks to recover the money owed to it by ESTEPNJ, Inc. and ESTEPNJ, Inc. has not yet satisfied the judgment issued by the Bergen County Special Civil Part on November 8, 2019. It is therefore clear that the interests of the two entities to which A.D. owes her loyalty are adverse (i.e., A.D.

has been placed in a position where she has conflicting loyalties). Therefore, there is no doubt that the BOE's right to seek A.D.'s removal from the BOE, pursuant to N.J.S.A. 18A:12-2, has been established.

The Third Crowe Factor

That the money judgment issued by the Bergen County Special Civil Part on November 8, 2019 is still unsatisfied, in and of itself demonstrates that the BOE has a reasonable probability of ultimate success on the merits of its claim against ESTEPNJ, Inc., an entity to which A.D., as a trustee, owes a fiduciary duty.

The Fourth Crowe Factor

The BOE's argument in support of the fourth Crowe factor (that the relative harm to the parties falls heavier on it than it does on A.D.) is, as noted above, that any votes cast by A.D. on BOE matters can and will expose the BOE to the probability of claims and lawsuits and potential liability, if the Commissioner ultimately determines in his Final Decision that A.D. is (and has been) unqualifies to serve as a BOE member pursuant to N.J.S.A. 18A: 12.2. This would expose the BOE to a greater harm than any conceivable harm to A.D. in the circumstances presented. The BOE's argument comes down to the following: the balance between A.D.'s interest in continuing to serve on the BOE and the BOE's potential exposure to multiple lawsuits weighs heavily in favor of the relief seeker, the BOE.

LEGAL ANALYSIS OF THE ARGUMENTS CONCERNING THE CROWE FACTORS AND CONCLUSIONS

Analysis of the First Crowe Factor: The Claim of Irreparable Harm

A party seeking injunctive relief must demonstrate the need for relief by clear and convincing evidence. Brown, *supra*. The party seeking injunctive relief must demonstrate that the claim of irreparable harm is substantial and imminent. Waste Mgmt., *supra*. I

CONCLUDE that the BOE has adequately demonstrated that it can and will likely suffer irreparable harm and therefore the BOE has satisfied the first Crowe factor.

Analysis of the Second Crowe Factor: Whether The Law is Settled or Not

The Board cites and relies on the provisions of N.JS.A. 18A:12-2. I **CONCLUDE** that the law is settled, and that N.J.S.A. 18A:12-2 sets forth that a member of a BOE cannot continue to serve if she has interests that are in conflict with her duties to the BOE. I **CONCLUDE** that the BOE has demonstrated that A.D. is in a position where she serves two competing masters and therefore she cannot continue to serve on the BOE pursuant to N.J.S.A. 18A:12-2. I **CONCLUDE** that the BOE has satisfied the second Crowe factor.

Analysis of the Third Crowe Factor: That D'Amico has Shown a Reasonable Likelihood of Success on the Merits

I **CONCLUDE** that the BOE has demonstrated that it has a reasonable probability of success on the merits. Therefore, I **CONCLUDE** that the BOE has satisfied the third Crowe factor.

Analysis of the Fourth Crowe Factor : Relative Harm to the Parties

The BOE has demonstrated that its exposure to lawsuits is realistic and it can suffer harm that would be greater than any conceivable harm that might be visited upon A.D. Therefore, I **CONCLUDE** that the BOE has satisfied the fourth Crowe factor.

Application of the Kennedy Decision

Both parties cited the case of Board of Educ. of Sea Isle City v. Kennedy, 196 N.J. 1 (2008). The following is my analysis of the parties' arguments pursuant to the Kennedy decision.

The upshot of Kennedy case is that the Supreme Court held that removal should not be automatic, but rather should be appraised on a close factual analysis on a case-by-case. The Court would consider whether there is a substantial, disqualifying conflict of interest identified by the type of claim (one motivated by the desire to advance the benefit of the public at large versus one motivated, even in part, for personal aggrandizement or for financial reasons) or by the type of proceeding, i.e., whether it was brought under N.J.S.A. 18A:12-2 or under the School Ethics Act, N.J.S.A. 18A:12-21 to -34. The Court made it clear in Kennedy, that when the Board member has a financial interest in the claim, then he has a conflict of interest. Therefore, the court ruled that Kennedy could not continue to remain on the BOE and he can be removed. Furthermore, the language of N.J.S.A. 18A-12.2 is not limited to financial interests. It follows that any interest in an entity that is adverse to the interests of the BOE will suffice to trigger the disqualification of a BOE member from serving on the BOE.

In the matter at bar, the BOE has a money judgment against ESTEPNJ, Inc., which remains unsatisfied. A.D.'s service as a member of the Board of Trustees of ESTEPNJ, Inc. places her in a position where she has competing loyalties to ESTEPNJ, Inc. on the one hand and the BOE on the other. This division of loyalty is proscribed by N.J.S.A. 18A: 12-2 and the statute is clear that in such circumstances, the BOE member cannot continue to serve as a BOE member.

Therefore, in line with the plain language of N.J.S.A. 18A:12-2, I **CONCLUDE** that there is good reason for A.D.'s suspension from the Board pending the Commissioner's Final Decision.

I **CONCLUDE** that the facts and arguments presented by A.D.'s counsel to this Tribunal do not demonstrate that the issue before this Tribunal has previously been decided and is therefore barred by the doctrines of *res judicata* and/or *collateral estoppel*. The issue before this Tribunal involves whether A.D., who is a board member of the Englewood BOE and who is also a member of the Board of Trustees of ESTEPNJ, Inc. can continue to serve on the Englewood BOE in light of the prohibitions set forth in N.J.S.A. 18A: 12-2. The above-stated issue presently before this Tribunal does not pertain to whether or not Darryl Davis is an Englewood fireman, whether or not the

summer camp was closed due to allegations of improper fingerprinting or improper filings of paperwork, whether or not A.D. is an "owner" of ESTEPNJ, Inc., whether or not A.D. was a volunteer working for ESTEPNJ, Inc., whether A.D. was ever paid for her services rendered to ESTEPNJ, Inc., whether or not A.D. ever attempted to pay ESTEPNJ, Inc.'s debts with her own personal check, whether or not Angela David and Darryl David filed for bankruptcy, or whether or not A.D. has "political" enemies. I **CONCLUDE**, from the information before me, that the issue before this Tribunal has not been previously decided. I **CONCLUDE** that there are no further issues left to be decided by this Tribunal.

ORDER

It is hereby **ORDERED** that the BOE's motion for emergent relief in the form of an Order suspending Angela David from the Englewood BOE pending the ultimate determination of the Commissioner of Education should be, and hereby is **GRANTED**. It is further **ORDERED** that Angela David's motion for the award of her costs and attorney's fees should be, and hereby is **DENIED**.

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

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

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

June 30, 2022

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

210-22

OAL Dkt. No. EDU 1666-22
Agency Dkt. No. 18-2/22

New Jersey Commissioner of Education

Final Decision

K.D., on behalf of minor child, A.S.,

Petitioner,

v.

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

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 12, 2022
Date of Mailing: August 17, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01666-22
AGENCY DKT. NO. 18-2/22

K.D. ON BEHALF OF MINOR CHILD A.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FAIR LAWN, BERGEN COUNTY,
Respondent.

K.D., petitioner, pro se

Brittany R. Halpern, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: June 24, 2022 Decided: June 29, 2022

BEFORE **SUSANA E. GUERRERO**, ALJ:

Petitioner K.D. on behalf of A.S. filed a Petition of Appeal with the Commissioner of Education challenging the residency determination issued by the respondent Board of Education of Fair Lawn. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on March 4, 2022 as a contested case. At the hearing scheduled on June 20, 2022, the parties reached an amicable resolution.

Subsequently, counsel for respondent submitted the attached Settlement Agreement and General Release, along with correspondence from the Board approving the settlement.

I have reviewed the record and the terms of the consent order and I **FIND**:

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

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

I **CONCLUDE** that this 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.

6/29/22
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: 6-30-22

Date Mailed to Parties: 6-30-22

jb

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
(856) 234-4114
(856) 234-4262 Fax

Counsel for Respondent, Fair Lawn Public Schools Board of Education

BY: JOHN B. COMEGNO II, ESQUIRE
BRITTANY R. HALPERN, ESQUIRE

K.D. o/b/o A.S. Petitioner, v. FAIR LAWN PUBLIC SCHOOLS BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET No.: EDU 01666-22 AGENCY REF No.: 18/2/22

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (hereinafter referred to as the "Agreement") is entered into by and between Respondent, Fair Lawn Public Schools Board of Education ("Board" or "District"), located at 37-01 Fair Lawn Avenue, Fair Lawn, New Jersey, 07410, and Petitioner K.D. on behalf of her daughter, A.S. ("Petitioner" or "Parent"), whose residency within the District has not been proved by a preponderance of the evidence (the Board and Parents are collectively referred to as the "Parties"). This Agreement is being entered into by the Parties to resolve and settle all outstanding issues between the Parties as follows:

WHEREAS, the District investigated Petitioner's residency throughout the 2021-2022 school year while A.S. (Student ID: 15351) was registered as an in-district student and attending Fair Lawn High School located at 14-00 Berdan Avenue, Fair Lawn, New Jersey 07410; and

WHEREAS, the District's investigation was unable to verify Petitioner's Fair Lawn residency and notified the Petitioner of the investigation's conclusion on October 19, 2021; and

WHEREAS, on January 13, 2022, the Board held a hearing in which the Parent was afforded the opportunity to speak to the Board in objection to the non-residency determination; and

WHEREAS, on January 21, 2022, after considering the investigation and information provided at the hearing, the Board determined that student A.S. was not domiciled in Fair Lawn, and instead was domiciled in Prospect Park, New Jersey; and

WHEREAS, Petitioner filed a Residency Appeal with the Commissioner of Education with the New Jersey State Department of Education on February 9, 2022; and

WHEREAS, in consideration of the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties enter into this Agreement to outline their agreement, release claims, and express the full and complete and final terms of same; and

WHEREAS, this Agreement does not entitle Petitioner or her dependents to continue enrollment with the District without Board approval of the terms below;

NOW, THEREFORE, THE PARTIES HEREBY AGREE THAT:

1. Petitioner's domicile during the 2021-2022 school year was not proven by a preponderance of the evidence which entitles the District to tuition payments for the 2021-2022 school year for A.S.'s enrollment at Fair Lawn High School. Parties agree to settle the outstanding 2021-2022 School year payment for the lump sum of $3,000 from the Petitioner to the District. This tuition payment will be made to the District **no later than September 1, 2022.**

2. In the event the Parent violates any of the terms or provisions of this Agreement, the tuition referenced in Paragraph 1 above shall become immediately due and payable, plus interest. Parties acknowledge that the District can pursue judgment against the Petitioner in the event of the Petitioner's failure to pay the full aforementioned tuition prior to September 1, 2022.

3. Petitioner's payment of tuition for the 2021-2022 school year does not necessitate that A.S. will be enrolled within the District for any subsequent school years.

4. Petitioner agrees that in order for any of Petitioner's children to be considered for enrollment within the District, Petitioner must submit registration forms in conjunction with the "Affidavit Student" District Forms 211 and Form 212 [attached hereto].

5. Parties acknowledge that the District forms listed in Paragraph 4 must be submitted annually.

6. Petitioner agrees and understands that the District Residency Forms listed in Paragraph 4 above must be signed by each child's legal guardians as well as the guardians in which each child resides.

7. Parties acknowledge that all signatures on the forms listed in Paragraph 4 must occur in the presence of a New Jersey Notary Public. Petitioner agrees that the notarization of all signatures will be completed by a non-familial New Jersey Notary Public.

8. Parties acknowledge that submission of the Registration and "Affidavit Student" forms listed in Paragraph 4 is not a guarantee of District enrollment for any of Petitioner's dependents. Petitioner acknowledges that all submitted forms are subject to Board approval prior to her children's enrollment with the District.

9. This Agreement is dispositive of the issues in dispute between the Parties hereto.

10. 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.

11. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations.

12. This Agreement may only be amended in writing by way of a document signed by all Parties, subject to Board approval.

13. The Parents agree and acknowledge that this Agreement is subject to approval by the Board during its next regularly scheduled meeting following the execution of this Agreement.

14. The Parties acknowledge that they have read and understand the terms of this Agreement, that they have had the opportunity to have the Agreement reviewed by counsel if they so choose, and that they are entering into this Agreement knowingly, freely, voluntarily without coercion and not under the influence of anything or anyone.

15. The Parties hereby agree that each party shall be responsible for their own costs and fees, including, but not limited to, attorney's fees and costs, incurred by them in relation to the aforementioned violations and this Agreement.

16. This Agreement may be signed in counterparts, and facsimile signatures shall be deemed effective for the purposes of this Agreement.

17. The Parties agree that the terms and conditions of this Agreement shall remain confidential and that neither party may disclose its terms and conditions to a third party except to enforce this Agreement or if required to do so by court order issued from a court of competent jurisdiction.

18. The Parties agree that they shall cooperate with each other to the extent necessary to effectuate the provisions of this Agreement and any party's failure to cooperate in good faith shall be deemed a breach herein.

IN WITNESS WHEREOF, the Parties hereto set their hands and seals the day and year first written above.

PETITIONER

K.D., individually and on behalf of A.S.

Date: 6/21/2022

FAIR LAWN PUBLIC SCHOOLS BOARD OF EDUCATION

President of the Board of Education

Date: 6/23/2022

Fair Lawn Public Schools

John Serapiglia
Business Administrator/Board Secretary

37-01 Fair Lawn Avenue
Fair Lawn, New Jersey 07410
Tel: (201) 794-5500 x7091
Fax: (201) 703-4630
E-mail: jserapiglia@fairlawnschools.org

10NN. Approval to Accept Tuition Payment for 2021-2022 - Residency Case

WHEREAS, Fair Lawn Public Schools Board of Education ("Board" or "District"), located at 37-01 Fair Lawn Avenue, Fair Lawn, New Jersey, 07410, and Petitioner K.D. on behalf of her daughter, A.S. ("Petitioner" or "Parent"), whose residency within the District has not been proved by a preponderance of the evidence (the Board and Parents are collectively referred to as the "Parties") which entitles the District to tuition payments for the 2021-2022 school year for A.S.'s enrollment at Fair Lawn High School.

NOW, THEREFORE, Parties agree to settle the outstanding 2021-2022 School year payment for the lump sum of $3,000 from the Petitioner to the District. This tuition payment will be made to the District no later than September 1, 2022.

This is to certify that the resolution listed above is a true and accurate copy of such resolution as it appeared on June 23, 2022 Public Board Meeting Agenda.

John Serapiglia
Business Administrator/Board Secretary

211-22

OAL Dkt. No. EDU 05564-22
Agency Dkt. No. 164-6/22

New Jersey Commissioner of Education

Final Decision

T.L. on behalf of minor child, L.L.,

Petitioner,

v.

Board of Education of the Township of Cranford, Union County,

Respondent.

The record of this matter, the proposed Stipulation of Settlement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that the Agreement reference actions that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 15, 2022
Date of Mailing: August 18, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05564-22
AGENCY DKT. NO. 164-06/22

T.L. ON BEHALF OF MINOR CHILD L.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,
Respondent.

T.L., petitioner, pro se

Jennifer A. Osborne, Esq., for respondent (Cornell, Merlino, McKeever & Osborne, attorneys)

Record Closed: July 11, 2022 Decided: July 21, 2022

BEFORE **MATTHEW G. MILLER**, ALJ:

The parties amicably resolved this matter. Subsequently, counsel for respondent forwarded the attached Settlement Agreement, indicating the terms of agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures 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 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded

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

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

July 21, 2022
DATE

MATTHEW G. MILLER, ALJ

Date Received at Agency: 7-22-22

Date Mailed to Parties: 7-22-22

jb

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Fax: (908) 264-2045
Attorneys for Board of Education of the Township of Cranford

T.L., o/b/o minor child, L.L.,	: BEFORE THE STATE OF NEW JERSEY
Petitioner,	:
-v-	: OFFICE OF ADMINISTRATIVE LAW : Agency Dkt. No.: 164-06/22
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD,	: **STIPULATION OF SETTLEMENT**
Respondent.	:

WHEREAS, L.L. is a rising eighth grade student who is eligible for Special Education and Related Services under the category of Other Health Impaired in the Cranford Public School District; and

WHEREAS, the Board of Education of the Township of Cranford ("Respondent"/"Board"/ "District") is the local educational authority with the responsibility of providing a free appropriate public education to L.L.; and

WHEREAS, T.L. ("Petitioner"/"Parent") filed Petition of Appeal and request for Emergent Relief, by way of motion, on behalf of minor child, L.L.; and

WHEREAS, Petitioner and Respondent submitted papers in support of and in opposition to, respectively, Petitioner's motion; and

WHEREAS, the parties appeared on July 11, 2022 for a Zoom hearing before the Honorable Matthew Miller, A.L.J., and discussed the reasons why this matter does not satisfy the criteria for emergent relief; and

NOW THEREFORE, the parties having a desire to settle the above matter in an amicable way hereby agree as follows:

1. Petitioner shall be permitted to make a request for a hearing before the Board on District cases #2021-2022-38, #2021-2022-39, and #2021-2022-43. If Petitioner elects to make this request, the request must be made, in writing, on or before 11:59 p.m. on July 24, 2022. Any such request must be made to Robert Carfagno, School Business Administrator/Board Secretary, at carfagno@cranfordschools.org with a copy to Dr. Scott Rubin, Superintendent of Schools, at rubin@cranfordschools.org.

2. If a request for a hearing before the Board on any or all of District cases #2021-2022-38, #2021-2022-39, and/or #2021-2022-43 is made, the hearing shall be held on a date and time after the request is made, and at the convenience of the Board and Petitioner.

3. Petitioner agrees that other claims made by Petitioner through the above captioned action have been withdrawn.

4. This Agreement relates to a student matter and as such, the parties agree that the terms of this settlement are confidential.

5. This Agreement disposes of any and all cognizable claims that were raised in the captioned Petition of Appeal for Emergent Relief Application.

6. This Agreement shall be incorporated into an Order by the Honorable Matthew Miller, A.L.J.

ON BEHALF OF L.L.

Tracey Lester

Date: 7/21/2022

Tracey Lester, Parent

ON BEHALF OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD

Date: 7/ 2022

Dr. Scott Rubin, Superintendent of Schools

212-22E
OAL Dkt. No. EDU 06247-22
Agency Dkt. No. 196-7/22

New Jersey Commissioner of Education

Order on Emergent Relief

B.A. and R.R., on behalf of minor child, E.A.,

Petitioner,

v.

Board of Education of the West Essex Regional School District, Essex 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 petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *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 stated 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2022
Date of Mailing: August 19, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 06247-22
AGY REF NO. 197-7/22

B.A. AND R.R., ON BEHALF OF E.A,
Petitioners,

v.

WEST ESSEX REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

B.A., on behalf of minor child, **E.A.**, petitioners, pro se

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

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a pro se Petition of Appeal seeking Emergent Relief with the Office of Controversies and Disputes in the New Jersey Department of Education (DOE) on July 27, 2022.

Said motion seeks an order removing a disciplinary suspension imposed upon E.A.; compensatory education; a review of School Policies, procedures and staff training; and such other relief deemed appropriate by the Commissioner.

Respondent Board filed its Answer to the Petition, a brief in opposition to the request for emergent relief, and the Certification of Anthony V. Emering with Exhibits 1 through 8.

Oral argument via Zoom was held on August 2, 2022.

FACTUAL BACKGROUND

E.A. is a sixteen year old student attending West Essex High School. She will be a senior in the 2022/2023 school year.

On May 12, 2022, a substitute teacher observed E.A. inhaling from a vape device in a restroom. This fact is disputed by E.A. as related by her father, B.A., during oral argument on the motion for emergent relief.

The substitute teacher did not report her observations to the Administration until after the students had left for the day on May 12, 2022.

E.A. was asked to report to the administrative offices on May 13, 2022 and directed to complete a medical examination and urine drug test. Her stepfather, R.R., arrived at the school to pick up E.A. After some delay E.A. completed a drug test which resulted in a Negative Dilute result. The District treated this to be an attempt to render the test results inconclusive. She was given an out of school suspension for five days. E.A. was again tested on May 24, 2022, which resulted in a positive result for THC. Another test done on June 6, 2022 resulted in a negative result. E.A. returned to school on June 7, 2022.

There are material facts in dispute in the instant matter, which include the basic allegation that E.A. used a vape device in contravention of District Policy. The matter will require a plenary hearing.

LEGAL ANALYSIS AND CONCLUSION

Initially, it must be determined if Petitioners are entitled to seek emergent relief.

A party may only request emergent relief for the following reasons, in accordance with N.J.A.C. 6A:14-2.7:

1. Issues involving a break in the delivery of services;
2. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate education settings;
3. Issues concerning placement pending outcome of due process proceedings; and
4. Issues involving graduation or participation in graduation ceremonies.

As the present matter concerns a disciplinary action, petitioners are entitled to seek emergent relief.

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:3-1.6(b)).

The four factors ("the Factors"), include:

> 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.
>
> [N.J.A.C. 6A:3-1.6(b).]

The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

A review of the four factors is in order.

Factor One. E.A. by being suspended will suffer irreparable harm. Petitioners argue that E.A. will suffer irreparable harm as the suspension has adversely impacted her grades in Latin and another subject. Petitioners posit that a missed test in Latin resulted in a lower grade and that this will prevent E.A. from being accepted to a top college. Petitioners also posit that the suspension on her record will likewise prevent her from being accepted to a top college. This is mere conjecture. Nothing put forth establishes any irreparable harm to E.A.

Factor Two. The legal right underlying petitioner's claim is settled. Petitioners posit that the Board's policy (Regulation 5530) should not have been used regarding E.A. I disagree. E.A. was seen by a substitute teacher using a vape pen. This is clearly against Board policy. E.A., according to her father's statement at oral argument, disputes she used a vape device. This dispute as to a material fact renders Factor Two questionable.

Factor Three. The petitioner has a likelihood of prevailing on the merits of the underlying claim. Based upon the evidence produced thus far it is far from clear that Petitioners will prevail. The current evidence produced shows that E.A. violated Board policy by vaping, and further exacerbated the situation by not immediately complying with the testing requirements.

Factor Four. 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 will not be granted. This too seems unlikely at this point. The Board has a large stake in enforcing its policy. The facts, as known at this point, point clearly to E.A. having violated Board policy.

Based upon the above noted, I **CONCLUDE** that Petitioners have failed to meet any of the four prong test of Crowe v. DeGioia, and that the request for Emergent Relief should be **DENIED**.

ORDER

It is hereby **ORDERED** that the Petitioners' request for Emergent Relief is **DENIED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/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, 2022
DATE

THOMAS R. BETANCOURT, ALJ

db

APPENDIX

List of Moving Papers

For Petitioner:

Pro Se Petition of Appeal

Motion for Emergent Relief with attachments (Policy 5530; MRO Report; emails 5/15/22, 5/19/22, 5/20/22 and 6/1/22; letter dated 5/23/22 from Jeffrey Wasserman, Esq.

For Respondent:

Answer to Petition of Appeal and Affirmative Defenses

Brief in opposition to request for emergent relief date 8/1/22, with Exhibit A

Certification of Anthon V. Emering with Exhibits 1 through 8

213-22

New Jersey Commissioner of Education

Final Decision

Camden Vocational Education Association,

Petitioner,

v.

Board of Education of Camden County Technical Schools, Camden County,

Respondent.

Synopsis

The Camden Vocational Education Association (Association) contended that the respondent, Board of Education of Camden County Technical Schools (Board), improperly provides the financial literacy instruction required under *N.J.S.A.* 18A:35-4.34. Successful completion of this instruction is a graduation requirement. Pursuant to *N.J.A.C.* 6A:8-5.1, such requirement may be met through courses designed to meet the New Jersey Student Learning Standards (NJSLS) ("Option 1") **or** through individualized student learning opportunities that meet or exceed the NJSLS ("Option 2"). The Board determined to approve the teaching of financial literacy through Option 2. The Association argued that the Board's assignment of technical and vocational teachers to provide financial literacy lessons as part of other classroom instruction violates *N.J.S.A.* 18A:26-2, which requires teachers to possess valid and appropriate teaching certificates; the teachers assigned to instruct financial literacy under Option 2 do not hold certification to teach this subject matter as a standalone course.

The ALJ found, *inter alia,* that: Option 2 is an acceptable means for the Board to address the financial literacy requirement; an individual providing instruction in financial literacy pursuant to an Option 2 program is not required to hold the certification required to teach the subject as a standalone course; the Board's program is consistent with the requirements of Option 2 and is an appropriate means of providing financial literacy instruction; and the Board's offering of the program is not arbitrary, capricious, or unreasonable. Accordingly, the ALJ dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that the Board's program to teach financial literacy is appropriate even though it may not precisely fit into the categories of Option 2 student learning opportunities listed in *N.J.A.C.* 6A:8-5.1(a)(2)(i), which also specifically provides that student learning opportunities "include but are not limited to" the listed items. The Commissioner concluded, *inter alia*, that the type of interdisciplinary learning offered by the Board for financial literacy comports with the regulatory intent to allow districts flexibility to approve alternatives to traditional instruction; further, Option 2 does not require that student learning opportunities be facilitated by certificated teachers. 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.

213-22
OAL Dkt. No. EDU 00026-18
Agency Dkt. No. 274-11/17

New Jersey Commissioner of Education

Final Decision

Camden Vocational Education Association,

Petitioners,

v.

Camden County Technical Schools Board of Education, Camden County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

This matter involves the requirement that all districts provide financial literacy instruction. *N.J.S.A.* 18A:35-4.34. Pursuant to *N.J.A.C.* 6A:8-5.1, graduation requirements may be met through the awarding of credits[2] in courses designed to meet the New Jersey Student Learning Standards (NJSLS) (colloquially referred to as "Option 1") or through individualized student learning opportunities that meet or exceed the NJSLS, such as independent study, online learning, or structured learning experiences ("Option 2"). Here, the Board approved the teaching of financial literacy through the use of Option 2. Under this approval, teachers who

[1] The Board filed a reply to petitioner's exceptions, which was untimely pursuant to *N.J.A.C.* 1:1-18.4(d) and therefore was not considered herein.

[2] The number of credits is based on the amount of the time spent in class.

are certified to teach technical and vocational skills courses, such as welding and carpentry, provide financial literacy lessons as a part of their other classroom instruction; however, these teachers do not hold the certificate that would be required for them to teach financial literacy as a standalone course.

The Camden Vocational Education Association filed a petition of appeal, alleging that the Board's use of Option 2 in this manner does not qualify as an Option 2 program and violates *N.J.S.A.* 18A:26-2, which requires teachers to possess valid and appropriate teaching certificates to teach. Following a hearing, the Administrative Law Judge (ALJ) concluded that Option 2 is an acceptable means for the Board to address the financial literacy requirement. The ALJ further concluded that an individual providing instruction in financial literacy pursuant to an Option 2 program is not required to hold the certification required to teach it as a standalone course. Finally, the ALJ concluded that the Board's program is an appropriate method to provide financial literacy instruction, consistent with the requirements of Option 2, and that its program is not arbitrary, capricious, or unreasonable. Accordingly, the ALJ dismissed the petition of appeal.

In its exceptions, petitioner argues that Option 2 does not permit teaching staff members to provide classroom-based instruction in a subject area for which they are not properly certificated. Petitioner contends that the financial literacy classes taught by career teachers are not independent study, online learning, study abroad programs, student exchange programs, or a service learning experience, and thus they are not a proper application of Option 2. Petitioner also argues that the Board has violated the teachers' tenure and seniority rights

by involuntarily assigning them to teach a subject in which they can never become tenured or accrue seniority because they do not have the appropriate certification for the position.

Upon review, the Commissioner concurs with the ALJ that the Board's use of Option 2 to provide financial literacy instruction is appropriate. While the incorporation of financial literary lessons into technical and vocational courses may not precisely fit into the categories of Option 2 student learning opportunities listed in *N.J.A.C.* 6A:8-5.1(a)(2)(i), that provision specifically provides that student learning opportunities "include, but are not limited to" the listed items. The Commissioner concludes that the type of interdisciplinary learning offered by the Board for financial literacy comports with the regulatory intent to allow districts flexibility to approve alternatives to traditional instruction.

Furthermore, Option 2 does not require that student learning opportunities be facilitated by certificated teachers. In many cases, such as with internships, students are supervised by individuals who are not teachers at all. Accordingly, there is nothing inappropriate about Option 2 financial literacy lessons being incorporated into career courses by teachers who do not hold certificates in the areas that would authorize them to teach financial literacy as a standalone course.[3] The Commissioner notes that the Board still bears responsibility to ensure that students are meeting or exceeding the NJSLS and demonstrating competency, but there is no indication in the record that the Board is failing to meet those requirements.

[3] While petitioner argues that this manner of instruction conflicts with *N.J.S.A.* 18A:26-2 and *N.J.A.C.* 6A:9B-5, the Commissioner finds no such conflict because the requirements of Option 2 are distinct from those for traditional, credit-based instruction.

Regarding petitioner's arguments that the Board has violated their tenure and seniority rights, the Commissioner finds that these arguments are entirely speculative and not appropriate for adjudication at this time. The petition contains no facts demonstrating that the Board has taken any action which may implicate any teacher's tenure or seniority rights, such as a reduction in force. While the Commissioner was not provided with a transcript of the hearing, it also does not appear that any testimony indicated that the Board had taken such action.[4] Should the Board attempt to limit any of its employees' tenure or seniority rights due to the time they spend providing financial literacy instruction in their career courses, those employees are free to file a new petition of appeal based on that Board action.

Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[5]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 19, 2022
Date of Mailing: August 19, 2022

[4] Petitioner's post-hearing brief, which summarizes the testimony, does include a statement that one of the witnesses testified that he could not earn tenure or seniority teaching financial literacy. A witness does not have the authority to make a legal conclusion. Furthermore, this statement suffers from the same problem as petitioner's arguments in its exceptions – it is purely speculative and not based on any action by the Board.

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 00026-18

AGENCY DKT. NO. 274-11/17

CAMDEN VOCATIONAL EDUCATION ASSOCIATION, ON BEHALF OF A CLASS OF MEMBERS IT REPRESENTS, AND THE INDIVIDUAL PETITIONERS INCLUDING BRUCE BERGEN, WILLIAM CANTIELLO, TERRY LEE, RN, JEFFREY MERZ, JAMES MORTON, DOUG SELFRIDGE, CHARLES SIEDLECKI AND RICHARD ZADROGA,

Petitioners,

v.

CAMDEN COUNTY TECHNICAL SCHOOLS BOARD OF EDUCATION, COUNTY OF CAMDEN,

Respondent.

Keith Waldman, Esq., for petitioners (Selikoff & Cohen , P.A., attorneys)

David C. Patterson, Esq., for respondent (Maressa Patterson, LLC, attorneys)

Record Closed: May 18, 2019 Decided: June 2, 2022

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Petitioners Camden Vocational Education Association (CNEA) and a group of petitioners it represents seek a determination that the use by respondent Camden County Technical Schools Board of Education (Board or CCTS) of Option 2 to utilize teachers not certificated to teach financial literacy to do so violates the State's education laws and regulations. Respondent argues that its program is an appropriate use of Option 2 and that the teachers do not require the certificates petitioners claim.

PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) for a hearing on January 2, 2018, where it was filed as a contested matter. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was scheduled for a hearing on January 23, 2019. The matter was heard on that date and the record was held open to allow for post-hearing submissions after the parties received the transcript. The record was closed on May18, 2019.

FACTUAL DISCUSSION

All school districts in New Jersey are required to provide the teaching of Financial Literacy. Passing this class is a graduation requirement.

In the fall of 2017, respondent approved the teaching of Financial Literacy at its Pennsauken Campus by Career teachers using Option 2, a Regulation (N.J.A.C. 6A:8-5.1(a)2) adopted by the Department of Education allowing graduation requirements to be met through program completion of a range of experiences that enable students to pursue a variety of individualized learning opportunities. Previously, the course had been taught as a stand-alone class by teachers with a Teaching Business Certificate, which is not held by the teachers identified in the petition.

The preceding statements are not in dispute and are hereby **FOUND** as **FACT**.

Zadroga knows that the State does mandate financial literacy. He was told in September 2017 about the need for him to teach the class. There was one meeting for a few hours which he says constituted his "training" in the subject. He was not comfortable with the material. He spoke to his union representative and his principal to express his concerns. His principal said that was not up to him. No one has told Zadroga that he needs to obtain a financial literacy certificate.

Zadroga teaches the financial literacy portion in the classroom setting, reading from the instructional manual while the students write answers in their workbooks. He believes the classroom portion of his class time should be spent teaching and training in welding before the students go back to the workshop for hands-on work. He has read and reviewed and proceeded to discuss the regulation requirements for the Board of Education's business education and family consumer certification. (P-3.). He does not meet those requirements. He reviewed additional business education certifications. (P-4.) He had also seen these requirements before and believes he does not meet the requirements, as he does not have the math preparation requirements. He did similarly review the requirements for the family and consumer science certification noting again that he does not meet the requirements for the substantive math preparation. He has not applied for any of the certificates although based on the Option 2 requirements, he believes he needs one of them to teach financial literacy.

Zadroga reviewed the Financial Literacy Curriculum. (P-7.) He has seen it before. He noted his name on the last row—column five—business credits. He received experience as a previous or current owner or operator of a business. He does not believe that this qualifies him to teach financial literacy. In running his own business, he hired a bookkeeper who did the finances. He has no credits in accounting, business law, economics or finance. He does not believe he is qualified to teach financial literacy any more than he is qualified to teach math or carpentry.

On cross-examination Zadroga acknowledges that he understood how to run his business. He believes Option 2 requires outside of the school setting. He does not know how it presents in school settings. On redirect Zadroga states he is not certified to teach financial literacy even though he ran a business.

Charles Siedlecki

Charles Siedlecki testified on behalf of petitioners. He lives in Pittsgrove, New Jersey. He has been employed by the respondent for eighteen years. He is a member of the petitioning Association and is not a member of its executive board. He is a carpentry and construction tech teacher. Siedlecki reviewed his certification. (P-10.) He also has taught financial literacy since the 2017-2018 school year. He did not ask to teach financial literacy and notes that he does not have the proper certifications to do so. He reviewed the subject matter preparation noted in Exhibits P-3 through P-6. He does not have the required credits for the certificate and does not feel qualified to teach financial literacy. He did not go to school for it and he does not have the certifications. Siedlecki always assumed that his teachers were certified to teach him what they taught him. He is not qualified to teach financial literacy in his opinion according to the requirements.

Siedlecki is familiar with Option 2. He believes it applies to a cooperative setting for on-the-job training. He does not believe the implementation of teaching financial literacy is consistent with the intention of Option 2. He does not have to teach carpentry. He can teach other classes. His classroom is a carpentry shop. He has a homeroom class in the morning and after homeroom, they discuss the day, specifically, what they're going to do in the shop area. Teachers and students are issued a manual for financial literacy. Teachers were told they could ask for assistance.

Siedlecki does not feel comfortable teaching financial literacy. He raised his concern with his union representative. He asked in a meeting why a shop teacher would have to teach the class, since the Board employed teachers who meet the qualifications. He was told that the assistant superintendent said that they presented the plan to the State who said that it was okay to implement in this way. No one has told him he needs to obtain the certificate. He teaches financial literacy in his classroom right after homeroom. He teaches eleventh and twelfth graders. Financial literacy is supposed to be taught during eleventh grade. His twelfth grade students had financial literacy the prior year, so they have to participate in the class again because he cannot release students to work in the shop if he is not available to supervise them.

After Siedlecki reviewed the requirements and the courses that he has taken (P-7), he states that is not qualified to teach financial literacy. He did have previous experience in a business—a construction company—but he had a bookkeeper and accountant to handle financial matters. All he did was estimate material and labor needs for the job. His experience as a carpenter does not provide him with the tools he needs to teach financial literacy. He never is asked to teach math or a foreign language or welding as he is not certified for any of those subjects. He is not the only teacher that teaches financial literacy. Other teachers are there who are qualified.

On cross-examination he acknowledged that the Board of Education has approved the utilization of Option 2 for the teaching of financial literacy.

Doug Selfridge

Doug Selfridge also testified on behalf of petitioners. He lives in Turnersville, New Jersey, and has worked for the respondent for ten years. He only teaches social studies. Selfridge is familiar with CNEA. At the time of the hearing he was serving in his second year as the president of the Association. He spent some time describing the role of association president and then went on to discuss his familiarity with "Option 2." His understanding is that Option 2 is intended to facilitate a cooperative setting for alternate route students. It is not offered in social studies. Students are given a choice as to whether or not to take social studies.

Financial literacy was added to the curriculum pursuant to State mandate. To his understanding, he does not have the qualifications to teach financial literacy. Members of the Association came to him and raised concerns. He relayed those concerns to the assistant superintendent who assured him that Option 2 covers respondent's form of implementation. Selfridge asked to be provided with proof. He felt that what he was provided with did not suffice or satisfy him so he went to the NJEA. Sometimes teachers coordinate with other disciplines but they are not responsible for teaching the other area that they coordinate with.

Patricia Fitzgerald

Patricia Fitzgerald testified on behalf of respondent. She lives in Haddonfield, New Jersey. She has been employed by the respondent for thirty-three years. At the time of the hearing, she was in her sixth year as the superintendent of schools. The Camden Voc-Tech has two campuses but the issues raised in the present matter stem only from the Pennsauken campus. As superintendent she makes recommendations to the Board of Education as does the assistant superintendent.

Financial literacy is now required and needed to graduate. It was formerly offered as a two and a half credit class taught by a variety of certified teachers. The Board of Education ultimately approved the policy and teachers were left to implement it. In 2017 there was a change in how financial literacy was taught. She reviewed a document entitled "Financial Literacy Redesign". (R–1.) This plan was developed by the assistant superintendent. It discusses offering financial literacy through Option 2. It was a move to have career teachers teaching financial literacy.

In 2015 both Fitzgerald and the former assistant superintendent attended a workshop for technical schools. Representatives of the Department of Education were present. Career teachers presented on how they were fusing financial literacy with teaching in performing arts. The Department of Education endorsed what was discussed. The former assistant superintendent was very enthusiastic and her replacement, the current assistant superintendent, took the matter on and followed through. The proposal was presented to the Board. Fitzgerald reviewed the minutes of the September 20, 2017, Board of Education meeting (R-3) noting that item D was for the purpose of discussing the approval for revising curriculum for financial literacy and implementation. Fitzgerald indicated that the assistant superintendent was better situated than she to discuss implementation.

On cross-examination Fitzgerald discussed the difference between experiential learning and classroom learning. Experiential learning is a hands-on experience similar to workforce experience. She acknowledged that Option 2 can in fact be an experience-based program. She knows that some work-based education can occur in the shop and

can occur in a classroom setting. Other core curriculum can also be accessed through Option 2; particularly math, science and English. Regarding the Career program Teacher Spreadsheet (P–7), Fitzgerald states it was prepared by her secretary. She did not create it herself. Fitzgerald believes that Option 2 can be taught in a classroom setting as indicated by the agreement of the County executive superintendent. Respondent also received authority from the Department of Education.

On redirect she stated that she is not required to get authorization of the county superintendent to utilize Option 2. She is not required to get State authorization either. Option 2 has been implemented in social studies and has been utilized in other workplace apprenticeships.

Karen DiGiacobbe

Karen DiGiacobbe also testified for respondent. She has been employed by the respondent for thirty years. She is the assistant superintendent for curriculum and instruction and administrative grants. DiGiacobbe explained that the Option 2 regulation provides alternative programs for students to get required credits for graduation through work experiences. She reviewed a guide for the use of Option 2 (R-3) from the Department of Education website. The purpose is to maximize student achievement. DiGiacobbe believes Option 2 can be used inside the school setting and that that decision is up to the local board. In reading through the guidance documents, she felt Option 2 was a perfect fit for financial literacy. The plan involved embedded learning and structured learning. Entrepreneurship can also be embedded in one's progress. Items are more likely to be retained than when financial literacy used to be a standalone class. At that time, it was required to be taught by certified teachers.

DiGiacobbe reviewed a list of career teachers (P-7) and noted a mix of certifications among them. The use of career teachers is permitted under New Jersey Department of Education guidelines. She reviewed the clarification statement (R–4) and states that the financial literacy requirement can be met through Option 2 as is being done in the current situation. She also reviewed the NJ Student Learning Standards Standard 9 (R-5) which says the same thing and also says it may include but is not limited to independent study,

online learning and structured learning experiences. DiGiacobbe believes that their method is a structured learning experience. She states that Department of Education is aware that respondent addresses the financial literacy requirement in this manner. She knows this because she has had discussions with the Department. DiGiacobbe reviewed an email with Christopher Cox at the Department of Education (R-6) and notes that she has received no email, phone call or other communication that says they cannot teach financial literacy in the way that respondent is doing.

In the summer of 2016 DiGiacobbe met with the union president, Mr. Selfridge's predecessor. She has also spoken with the executive county superintendent and representatives from the Department of Education (DOE) and has received feedback from all parties. A DOE representative told her this could be a model for the State.

During the February 2017 faculty meeting the curriculum supervisor briefed the teachers on fusing financial literacy with career training for the 2017-2018 school year. They began to develop the curriculum. Teachers are given flexibility in how to instruct in financial literacy. DiGiacobbe reviewed the financial literacy curriculum (R-7) which was given to the teachers. She believes that their method comports with and is consistent with the standards that are issued. She reviewed the financial literacy student portfolio or workbook (R-8) and believes that teachers teach in accordance with it. She does not believe that any have asked for assistance. She notes that financial literacy is still taught in the same way and the method is also used at the Gloucester campus.

On cross-examination DiGiacobbe acknowledges that merely reading the book in the class setting is not what was intended by the program. Structured learning is work based—it is not an internship; it is not an apprenticeship. It is a form of service learning. This is the basis for the Department of Education's understanding of the program.

Upon consideration of the witness testimony and documents placed in evidence, and in addition to **FACTS** previously found, I further **FIND** that the individual petitioners are technical/vocational skills teachers who do not possess the certificates required to teach financial literacy as a standalone course. Respondent provided the individual petitioners a training workshop to prepare them to teach financial literacy within the

context of its Option 2 program. Zadroga's and Siedlecki's financial literacy instruction is delivered in the classroom portion of their workshop settings. Respondent did inform individuals with the NJDOE to apprise them of the program. The DOE issued guidance which clarified the provision of financial literacy instruction and addressed its use through Option 2. (R-4.)

CONCLUSIONS OF LAW

Effective with 2010-2011 grade nine class, district boards of education are required to develop, adopt, and implement local graduation requirements that include at least 2.5 credits in financial, economic, business, and entrepreneurial literacy. N.J.A.C. 6A:8-5.1(a)1v. The record reflects that in the fall of 2017, respondent approved the teaching of Financial Literacy at its Pennsauken Campus by Career teachers through the use of Option 2, a regulation (N.J.A.C. 6A:8-5.1(a)2) adopted by the Department of Education allowing graduation requirements to be met through program completion of a range of experiences that enable students to pursue a variety of individualized learning opportunities.

Petitioners asserts that respondent's use of Option 2 in this manner violates the State's education laws and regulations. Specifically, petitioners assert that pursuant to N.J.S.A. 18A:26-2, teachers must possess valid and appropriate teaching certificates to teach; that the Board's contention of what constitutes an appropriate Option 2 "service learning program" or "work-based program" is contrary to the education laws; and, that Option 2 is supposed to be an alternative to "seat time" instruction and respondent's instruction in financial literacy is undeniably "seat time."

Respondent argues that the manner by which the Camden County Technical Schools Board of Education has determined to teach Financial Literacy is an appropriate and acceptable method under Option 2 and that by the use of the Structured Learning Alternative in Option 2, the teachers who are teaching Financial Literacy are not required to have the Certifications identified by petitioners' two witnesses at the hearing.

N.J.A.C. 6A:8-5.1(a)2, commonly referred to as "Option Two" provides:

2. The 120-credit requirement set forth in (a)1 above may be met in whole or in part through program completion of a range of experiences that enable students to pursue a variety of individualized learning opportunities, as follows:

i. District boards of education shall establish a process to approve individualized student learning opportunities that meet or exceed the NJSLS.

(1) Individualized student learning opportunities in all NJSLS areas include, but are not limited to, the following:

(A) Independent study;

(B) Online learning;

(C) Study abroad programs;

(D) Student exchange programs; and

(E) Structured learning experiences, including, but not limited to, work-based programs, internships, apprenticeships, and service learning experiences.

(2) Individualized student learning opportunities based upon specific instructional objectives aimed at meeting or exceeding the NJSLS shall:

(A) Be based on student interest and career goals as reflected in the Personalized Student Learning Plans;

(B) Include demonstration of student competency;

(C) Be certified for completion based on the district process adopted according to (a)2ii below; and

(D) Be on file in the school district and subject to review by the Commissioner or his or her designee.

(3) Group programs based upon specific instructional objectives aimed at meeting or exceeding the NJSLS shall be permitted under this section and shall be approved in the same manner as other approved courses.

ii. District boards of education shall establish a process for granting of credits through successful completion of assessments that verify student achievement in meeting or exceeding the NJSLS at the high school level, including standards achieved by means of the individualized student learning opportunities enumerated at (a)2 above. Such programs or assessments may occur all or in part prior to a student's high school enrollment; no such locally administered assessments shall preclude or exempt student participation in applicable Statewide assessments at grades three through 12.

(1) District boards of education shall choose assessments that are aligned with or exceed the NJSLS and may include locally designed assessments.

(2) District boards of education shall choose from among the following assessment options to determine if students have achieved the level of language proficiency designated as

Novice-High as defined by the ACTFL and recognized as fulfilling the world languages requirement of the NJSLS:

(A) The STAMP online assessment;

(B) The OPI or MOPI; or

(C) Department-approved locally designed competency-based assessments;

iii. District boards of education shall establish a process to approve post-secondary learning opportunities that may consist of Advanced Placement (AP) courses, CLEP, or concurrent/dual enrollment at accredited higher education institutions.

(1) District boards of education shall award credit for successful completion of an approved, accredited college course that assures achievement of knowledge and skills that meets or exceeds the NJSLS.

Considering the foregoing, the regulation explicitly states that the graduation requirement may be met in whole or in part through the use of Option 2. No exclusion or exception is noted for the financial literacy requirement, and Department of Education guidance (R-4) specifically states that Option 2 may be utilized for completion of the financial literacy requirement. Accordingly, I **CONCLUDE** that Option 2 is an acceptable means for respondent to address the financial literacy requirement.

Additionally, based on the testimony of the witnesses and documents in the record, specifically guidance regarding the use of Option 2, it is clear that instruction pursuant to Option 2 is often delivered by individuals who are not certified teachers in the specific subject areas, or even any area. The fact that an instructor in an Option 2 setting may be certified as a teacher in a different subject area than those required by one to teach financial literacy as a standalone course does not render them ineligible to provide instruction in an Option 2 setting that an individual who is not a certified teacher would otherwise be able to. I **CONCLUDE** that an individual, including petitioners, who is providing instruction in financial literacy pursuant to an Option 2 program is not required to hold the certifications required to teach it as a standalone course. To the extent that petitioners argue that Option 2 is meant to be an alternative to seat time instruction, such argument relies heavily on a reiteration of their arguments that financial literacy must be taught as a standalone course. These arguments have already been addressed.

Finally, considering the credible testimony of Patricia Fitzgerald and particularly Karen DiGiacobbe along with the documents in the record, **I CONCLUDE** that respondent's Program to teach Financial Literacy as part of its Core Curriculum through the Career Teachers is an appropriate method consistent with the permitted requirements and stated objectives permitted by Option 2, and that its program is not arbitrary, capricious and unreasonable.

ORDER

Petitioners' assertion that respondent's implementation of the financial literacy graduation requirement through the use of Option 2 should be halted and deemed arbitrary capricious and unreasonable is **DENIED**. Petitioners' 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.

June 2, 2022
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: June 2, 2022

Date Mailed to Parties: June 2, 2022

EAP:as

APPENDIX

WITNESSES

For Petitioners:

Richard Zadroga

Charles Siedlecki

Doug Selfridge

For Respondent:

Patricia Fitzgerald

Karen DiGiacobbe

EXHIBITS

For Petitioners:

P-1 Richard Zadroga Teacher of Welding Certificate
P-2 NJ Student Learning Standards Standard 9:1 Personal Financial Literacy
P-3 Teacher of Comprehensive Business Standard Certificate
P-4 Teacher of Business: Accounting Certificate of Eligibility
P-5 Teacher of Business: Finance/Economics/Law Certificate of Eligibility
P-6 Comprehensive Family and Consumer Sciences Certificate of Eligibility with Advanced Standing
P-7 Spreadsheet: PC Career Program Teachers
P-8 Petitioner's First Set of Interrogatories
P-9 Answers to Interrogatories



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 06237-2022
AGENCY DKT. NO. 195-7/22

ROBERT CAUVIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioner Robert Cauvin (Detzky, Hunter and DeFillippo, LLC, attorneys)

Eric L. Harrison., Esq., for respondent Board of Education of the Township of North Brunswick, Middlesex County (Methfessel and Werbel, attorneys)

BEFORE **CARL V. BUCK, III,** ALJ:

STATEMENT OF THE CASE

By way of an application for emergent relief pursuant to N.J.A.C. 6A:3-1.6, petitioner Robert Cauvin (Cauvin or petitioner) challenges the termination of his employment as a tenured teacher of special education by the North Brunswick Board of Education (Board) and seeks immediate reemploy retroactive to May 3, 2022. Petitioner's termination was based upon information provided from the Office of Student

Protection (OSP) under the New Jersey Department of Education (DOE) which stated that petitioner had been permanently disqualified from serving in his position based upon an arrest in 1997 in North Brunswick Municipal Court for which he was found guilty. Petitioner challenges:

1. The lack of a Rice Notice required by N.J.S.A. 10:4-6 the Open Public Meetings Act "OPMA" prior to public meeting where the Board voted to terminate him; and

2. the lack of providing a tenure proceed prior to termination.

PROCEDURAL HISTORY AND FACTUAL FINDINGS

The following **FACTS** are not in dispute and accordingly, **I FIND:**

On or about October 15, 1997, petitioner was arrested. (P-Cert. 2.)[1] Thereafter, petitioner has had two positions in two separate school districts, both of which required successful background checks. (P- Resp. 2-3.) Petitioner's second position was with the Board where he taught as a special education teacher from 2003 until his termination. (P-Cert. 1.) On May 3, 2022, petitioner was provided a letter from Superintendent Janet Ciarrocca (Ciarrocca) which indicated he was terminated from his teaching position. (P-Mot. Ex. A.) Petitioner's medical benefits ended on May 22, 2022. Ibid.

The Board cites to email, dated May 3, 2022, in support of said termination from Scaringelli, Investigator with the OSP and sent to Ciarrocca, dated May 3, 2022. (P-Mot. Ex. A.) The email states that the OSP received documentation showing a conviction for a disqualifying crime or defense, and that "the applicant has been notified that he is permanently disqualified from serving in any position, paid or unpaid, with any educational

[1] Petitioner provides that he was arrested "for engaging in a consensual sexual act in [his] car that was parked in a very private area in North Brunswick." Pet'r's Resp. 2. Petitioner has not provided records of said arrest.

institution under the supervision of the Department of Education . . ." Ibid. The email asks the Board to advise the OSP of the status of the applicant's employment. Ibid.

The Board hand delivered a letter (Letter) to petitioner, dated May 3, 2022, which stated "as a result of a conviction stemming from an arrest in 1997, you are 'permanently disqualified from serving in any position, paid, or unpaid, with any education under the supervision of the Department of Education.'" The Letter further states petitioner is terminated "[a]s a result of the foregoing notification, and [his] disqualification from serving as a teacher." See P-Mot. Ex. B. The superintendent further stated she recommends the Board to retroactively approve same during its next meeting. Ibid. The public meeting notes on May 11, 2022, indicate that the Board adopted a resolution to approve the termination of [petitioner]. Id. at Ex. C.

ARGUMENTS OF THE PARTIES

Petitioner avers he is entitled to emergent relief because the Board:

1. Failed to provide a Rice notice in contravention of the requirements of the Open Public Records Act (OPMA)[2];
2. Breached its obligation to institute tenure proceedings in contravention of N.J.S.A. 18A:6-10 et seq., and because
3. Petitioner is experiencing the loss of his teaching salary and insurance benefits.

As part of the argument that the Board violated petitioner's tenure rights, petitioner contends that consistent with the New Jersey Supreme Court Decision in State v. O., 69 N.J. 574 (1976), that the private consensual acts between adults are not within the ambient of State criminal statutes, and thus the Board violated petitioner's rights when it

[2] See Rice v. Union County Regional High School Board of Educ., 155 N.J. Super. 64, 73, 382 A.2d 386 (App. Div. 1977.)

summarily terminated petitioner based upon his offense in 1976 without initiating tenure charge proceedings. (P-Mot. 1-2.)

The Board contends:

1. Petitioner's tenure rights were not violated because it was the Board was directed by the NJ DOE to terminate him because he was convicted a crime that permanently disqualified him from serving in any position with any educational institution under the supervision of the NJ DOE, and the Board has no authority to reject these findings;

2. Counsel's effort to effectively expunge a criminal conviction is not an application for the Board to consider; and

3. Rice notice was not required as no private discussion of petitioner's employment status occurred prior to the approval of his termination at a public hearing. (R-Brief 2-6.)

LEGAL ANALYSIS AND CONCLUSIONS

N.J.A.C. 6A:3-1.3(B) states: "A petitioner shall name as a party any person or entity indispensable to the hearing of a contested case. Failure to name an indispensable party may be grounds for dismissal of the petition pursuant to N.J.A.C. 6A:3-1.10."

Here, the OSP was not joined as a party. However, the Board's termination of the petitioner was due to an alleged disqualifying criminal offense from 1997 which was uncovered by the OSP. The Board argues it has no authority to reject the findings of the OSP by not carrying out its ministerial duties at the direction of OSP. Moreover, petitioner discusses that two prior background checks have been conducted on his behalf by the OSP for both his position with the Board, as well as a prior teaching position.

Given it is OSP who conducted relevant background checks and uncovered petitioner's criminal offense underlying the Board's termination of petitioner, and the OSP is part of the NJ DOE, **I FIND** the DOE is an indispensable party under N.J.A.C. 6A:3-1.10. As such, it would not be appropriate to move this application further without the involvement and input of the DOE.

However, even if I did not find that the DOE was an indispensable party, this application for emergent relief would fail under the standard set in Crowe v. De Gioia, 90 N.J. 126, 132-34 (1981.)

Pursuant to Crowe v. De Gioia, injunctive relief shall not be issued unless the following factors are met: (1) "when [it is] necessary to prevent irreparable harm"; (2) when plaintiff has a settled legal right to relief; (3) where plaintiff has shows "a reasonable probability of ultimate success on the merits", and (4) where a balancing of "the relative hardship to the parties in granting or denying relief" tilts in favor of the plaintiff. Crowe v. De Gioia, 90 N.J. 126, 132-34 (1981).

I. Petitioner has not proven irreparable harm.

Here, petitioner has not demonstrated irreparable harm. Regarding irreparable harm, harm is generally considered irreparable if in equity it cannot be addressed adequately by monetary damages. Crowe v. De Gioia, 90 N.J. at 132-33 (stating [n]either an unwarranted eviction or reduction to poverty can be compensated adequately by monetary damages after a distant plenary hearing). In certain circumstances, severe personal inconvenience may constitute irreparable injury. Id. at 133.

Petitioner has not proven irreparable harm beyond monetary damages. Petitioner indeed lost his job; however he is presently employed, and there is no demonstration that he presently lacks medical insurance through COBRA or otherwise. Petitioner's motion cites to the myriad of impacts the loss of his position and his insurances "will have" on his ability to pay his expenses. (P-Mot. 13.) Petitioner certifies that even with his current

waiter job, he finds it difficult to make his monthly payments which include his car insurance, health insurance, phone service, gas, and medical expenses. (P-Cert. at 3-4.) Petitioner does not cite to plausible irreparable harm that money damages would not solve in support of this motion. Moreover, petitioner is employed, and it is not clear from the record whether he would even have employment during the summer months through the Board's employ if he had not been terminated, or other factual information which may provide a non-monetary basis for relief.

Therefore, petitioner has not demonstrated irreparable harm. However, even if petitioner demonstrated irreparable harm, petitioner does not meet the other factors, and therefore his application for relief cannot be granted at this time.

II. Petitioner does not have a well-settled right to the relief he seeks.

Petitioner challenges his termination and seeks re-instatement and back pay. However, petitioner premises his requests on (1) lack of Rice notice, and (2) lack of a tenure hearing. However, these two arguments fail.

With regards to Rice notice, "The OPMA requires the meetings of public bodies to be conducted in open session and in view of the public." N.J.S.A. 10:4-12(a). The Act provides, in relevant part:

A public body may exclude the public only from that portion of a meeting at which the public body discusses any:

> . . . matter involving the employment, appointment, [or] termination of employment . . . of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that the matter or matters be discussed at a public meeting . . .
>
> [N.J.S.A. 10:4-12(b)(8).]

In Rice v. Union County Regional High School Board of Educ., 155 N.J. Super. 64, 73, 382 A.2d 386 (App. Div. 1977), the court tied the personnel exception to privacy interests, and held that employees must be given "reasonable notice" when a public entity intends to consider taking adverse employment action. Id. at 74.

However, if the employment is discussed in an open forum, a Rice notice is not required. In Kean Federation of Teachers v. Morell, the court found that while Rice provides employees with the right to move a private discussion into a public discussion, it does not apply when a public body votes on a summary resolution of personnel matters in a public discussion. 233, 233 N.J. 566, 586-87 (2018.)

Here, petitioner was put on notice that the Board intended to terminate him at the May 11, 2022, public meeting. See, R-Ex. B. Rather, as indicated by the respondent, Mr. Cauvin was terminated at the recommendation of the superintendent, and it was publicly voted on by the Board. (R-Br. 6.) Thus, the OPMA, N.J.S.A. 10:4-6, et. seq., was not violated because the meeting was not a private meeting.

Petitioner's argument regarding alleged entitlement to a tenure hearing also fails, as this was a termination based upon disqualification, which is governed by a different statute.

N.J.S.A. 18A:6-10 states:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or
>
> (b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, [or] teacher . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant

> to this sub article, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this sub article provided.

Respondent provides a email from Scaringelli, with the OSP to Ciarrocca, on May 3, 2022 which states that the OSP received a conviction for a disqualifying crime or defense, and that "the applicant has been notified that he is permanently disqualified from serving in any position, paid or unpaid, with any educational institution under the supervision of the Department of Education . . ." See P-Motion Ex. A. This email, while short, provided that petitioner committed a **disqualifying** event.

A disqualification is separate and apart from the tenure requirements. N.J.S.A. 18A:6-7.1 states "[a] 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 [crimes listed in this statute]."

Notably, section (g) states[3]:

> 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.); except that in the case of an individual employed by a board of education or a contracted service provider who is required to undergo a check upon employment with another board of education or contracted service provider, the individual shall be disqualified only for the following offenses:

[3]Notably, the effective date of this Statute was in 1998, which may be material if petitioner had evoked a right to challenge the background check pursuant to this chapter.

> **(1)** any offense enumerated in this section prior to the effective date of P.L.1998, c.31 (C.18A:6-7.1c et al.); and
>
> **(2)** any offense enumerated in this section which had not been enumerated in this section prior to the effective date of P.L.1998, c.31 (C.18A:6-7.1c et al.), if the person was convicted of that offense on or after the effective date of that act.

The evidence here does not clearly indicate that petitioner sought to contest the background check. Rather, petitioner argued that he was entitled to the relief sought pursuant to the lack of a Rice notice and a tenure proceeding. Petitioner cites to the New Jersey Supreme Court case State v. O., in what appears to be an argument that he should not have been convicted. However, petitioner does not contend that he **was not** convicted and states that the 1997 conviction was the result of a plea entered in that matter.

Moreover, this tribunal has not received clarity around exactly what he was charged with, or when his two purported background checks with the OSP for his two teaching positions occurred. Thus, there are issues of material fact that would need to be presented in the event that petitioner sought to challenge his background check conducted by OSP. Moreover, as OSP is not a party to this emergent application these issues cannot be addressed at present.

Therefore, petitioner has not demonstrated an entitlement of the relief he seeks.

III. Petitioner has not proven likelihood of ultimate success on the merits.

As indicated above, petitioner has not proven he would be meritorious on his claims that (1) he was entitled to a Rice notice, or (2) that he was entitled to a tenure hearing, which may entitle him to reinstatement of his position and backpay. As his termination decision was provided by the Superintendent and voted on in a public meeting, the Rice notice requirement is not necessarily pursuant to the OPC Act.

Moreover, petitioner has not proven entitlement to a tenure hearing, as the OSP noted a disqualifying event and petitioner did not clearly contest the criminal background check, nor did petitioner join the DOE in this motion.

Thus, petitioner has not provided a likelihood of ultimate success on the merits.

IV. Petitioner has not proven that a balancing of the relative hardships weighs in his favor.

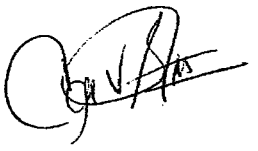
Petitioner failed to join an indispensable party, the DOE, in this matter. Given that the Board made their decision to terminate petitioner based upon OSP's finding of a disqualifying event, the DOE is an indispensable party whose must be involved in order to make an accurate balancing of all indispensable parties in this matter. Accordingly, the balancing of the relative hardships to not weigh in favor of either party.

Based upon the foregoing, and as all four of the Crowe v. De Gioia standards as codified in N.J.A.C. 6A:3-1.6 must be met in order for emergent relief to be granted, I **CONCLUDE** that the petitioner has failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting an order for emergent relief in this matter. This order on application for emergency relief shall remain in effect until the issuance of a decision on the merits of the matter.

ORDER

Accordingly, I **ORDER** that the petitioner's application for emergent relief be and hereby 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 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 4, 2021
DATE

CARL V. BUCK III, ALJ

CVB/tat

Date Received at Agency: Copy via email 8/4/22

Date Mailed to Parties: Via email 8/4/22

EXHIBITS

For petitioner:

Submissions

For respondent:

Submissions

222-22
OAL Dkt. No. EDU 06696-19
Agency Dkt. No. 71-4/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Springfield, Union County,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent, the Newark Board of Education, pursuant to *N.J.A.C.* 1:1-18.4 and the reply thereto from petitioner, the Springfield Board of Education, have been reviewed and considered.

This matter involves the question of which board of education is responsible for the educational costs of two siblings, M.P. and Jad. P., during the 2017-2018 and 2018-2019 school years. It is undisputed that the children and their mother were homeless during the 2016-2017 school year and that under *N.J.S.A.* 18A:7B-12(c), Springfield was responsible for the children's educational costs during the 2016-2017 school year. The Administrative Law Judge (ALJ) found that Newark was responsible for the children's transportation and tuition costs between September 2017 and December 2018. In reaching this conclusion, the ALJ found that the

children and their mother resided in Newark for over a year and therefore the financial obligation for their educational costs shifted from Springfield to Newark.

Upon a comprehensive review of the record, the Commissioner finds that this matter must be remanded to the Office of Administrative Law to address the inconsistent findings outlined in the Initial Decision. Most notably, there are inconsistent findings in regard to the children's educational costs during the 2018-2019 school year. The ALJ found that Newark must reimburse Springfield "$12,942.84 in tuition costs for the Rutgers Day School for M.P. for the period of November to December 2018." The ALJ also found that Newark must reimburse Springfield "$12,942.84 in tuition costs for the Rutgers Day School for M.P. for the period of September to October 2018." Additionally, the ALJ found that Newark must reimburse Springfield for transportation costs totaling $39,918.40[1] for transport of "Jad. P. to Washington Academy, and for M.P. to Rutgers Day School for the period of June 26, 2007 through December 31, 2018." (Initial Decision at 13-14)

Yet, the ALJ also found that, "Springfield discovered during the summer of 2018 that the P family was living in Dover, NJ. M.P. was enrolled in the Dover district. The transportation contract for M.P. was cancelled. It appeared that Jad. P. had dropped out of school." (*id.* at 13) Moreover, the ALJ concluded that "Jad. P. and M.P., together with their mother, A.I.P., resided at (a street address in) Newark, NJ, from June 30, 2016 until the summer of 2018." (*id.* at 18) The Initial Decision fails to explain why Newark is responsible for M.P.'s tuition and transportation costs from September through December of 2018 in light of the fact that the ALJ appears to find that the P family relocated to Dover during the summer of 2018. It is

[1] A review of the record appears to suggest that this amount actually totaled $37,918.40.

undisputed that M.P. was ultimately registered in the Dover School District, but it is not clear what address was used at the time of registration. The record only contains an email from A.I.P. indicating that the family was living with her fiancé in Dover as of the summer of 2018. Notably, it is also unclear as to whether transportation was provided for M.P. from the family's new Dover address or whether M.P. was picked up and dropped off at the Newark address. Therefore, it is not possible to ascertain who is responsible for the children's educational costs between September 2018 and December 2018.

Accordingly, this matter is hereby remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 7, 2022
Date of Mailing: September 12, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06696-19
AGENCY DKT. NO. 71-4/19

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD,
Petitioner,
vs.
BOARD OF EDUCATION OF THE CITY OF NEWARK,
Respondent.

Janelle Edwards-Stewart, Esq., and **Marie-Laurence Fabian**, Esq., co-counsel for Petitioner (Porzio, Bromberg & Newman, P.C., attorneys)

Teresa L. Moore, Esq., for Respondent, Newark Board of Education (Riker, Danzig, Scherer, Hyland & Perretti, LLP, attorneys)

Sabrina Styza, Esq., co-counsel for Respondent, Newark Board of Education

Record Closed: April 7, 2022 Decided: June 8, 2022

BEFORE: **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a petition, dated April 10, 2019, with the New Jersey Department of Education, Bureau of Controversies and Disputes, alleging that the Newark Board of Education is responsible for transportation and tuition costs for certain children that have attended school in Petitioner's district.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on May 15, 2019, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13, bearing OAL Docket No. EDU 06696-19.

A prehearing conference was held on June 5, 2019. A prehearing order, dated June 7, 2019, was entered by the undersigned.

The hearing was held on December 13, 2021, December 14, 2021 and January 24, 2022.

The record remained open for the parties to submit post hearing briefs, which were due thirty days after receipt of the hearing transcripts. Transcripts were received on March 11, 2022. Petitioner submitted their brief on April 6, 2022. Respondent submitted their brief on April 7, 2022. Whereupon the record closed on April 7, 2022.

ISSUES

SUMMARY OF RELEVANT TESTIMONY

Petitioner's Case

Tiffany Boehm testified as follows:

She is employed by the Springfield Board of Education and has been since 2007. Ms. Boehm is the Director of Student Support Services. She went on to describe her job duties, part of which is to oversee the placement of students out of District.

Ms. Boehm described the Board's policy regarding the education of homeless students. She is familiar with the P family, who had a residency issue during the 2015/2016 school year. There were four children in the P family: J.P.; Jas P.; Jad P.; and, M.P. J.P. had graduated.

The principal of the school that M.P. attended reported that she did not show up for school and they were having a difficult time reaching the parent. A resource officer did a welfare check and discovered the family did not live at their address anymore.

Jas P., who was attending the high school told her case manager that the family was residing in Newark. This was also during the 2015/2016 school year, towards the end of the 2015/2016 school year.

Ms. Boehm drafted a letter to the mother, A.I.P., but was not able to send it as she did not have a current address. She contacted the FACT (Families and Communities Together) worker who was assisting the family. The worker did not have a current address. The FACT worker advised that A.I.P. would not provide an address.

A.I.P. was contacted by phone. She informed the school that M.S. would be attending, and that the family was returning to Springfield.

A.I.P. came in with documents on either September 6th or 7th with a lease showing her returning to the same address she previously had in Springfield.

Ms. Boehm received an email from the FACT worker that informed her that the family was living in Newark at 134 Fabyan Place.

Another family was living at the residence A.I.P. provided a lease for. The P family was not living there.

A.I.P. then completed the required paperwork that the family was homeless, which are the McKinney Vento Act Student Resident Information Forms. There were three forms completed, for Jas P., Jad P. and M.P. What stood out to Ms. Boehm on these forms is that A.I.P. claimed being homeless from June 2016, yet provided a lease prior to completing the forms that she would be living in Springfield.

On the forms A.I.P. listed two current addresses: 134 Fabyan Place, Newark, NJ; and, 359 Nesbitt Terrace, Irvington, NJ. The only time Ms. Boehm saw the Irvington address was on the forms.

The three children, Jas, Jad and M, were special needs students. Jas was finishing her education at Jonathan Dayton High School. Jad was placed at Mary Dobbins School by the State and did not require transportation. The District was looking for an out of District placement for M.

As A.I.P. had informed the District the family was homeless, the District continued to provide education for the three children.

Jas and M required transportation, which was provided by the District. Jas was picked up at 134 Fabyan Place in Newark for transportation to the Jonathan Dayton High School in Springfield. M was picked up at the same address for transportation to the Gaudineer Middle School in Springfield. M was changing schools to an out of District placement and was to be transported from the Fabyan Place address to the Rutgers Day School in Piscataway.

The transportation company reported an incident via email where the bus arrived at the Fabyan Place address to transport M. M refused to get on the bus. A.I.P. came out of the house, but was not successful in getting M to go on the bus. M walked off and A.I.P. returned to the Fabyan Place house.

There was never a request by A.I.P. for the District to provide transportation from any other address, other than the Fabyan Place address.

At the end of the 2016/2017 school year Jad was exiting the program at Mary Dobbins and the District would be looking for another placement. Home instruction was offered pending placement and A.I.P. refused to allow home instruction.

Jas graduated from Jonathan Dayton High School at the end of the 2016/2017 school year.

At the end of the 2016/2017 school year the District's homeless liaison sent a letter to Newark to advise them it would be Newark's responsibility to educate the students. Ms. Boehm testified that, to her knowledge, no response was received. She then followed up with an email to Newark's homeless liaison at the start of the 2017/2018 school year. She received a response about one week later, indicating that A.I.P. spoke with Newark about registering her daughter. Ms. Boehm provided the requested information, including IEPs. There were no follow up from Newark. In November 2017 Newark's homeless liaison, Ana Osoria, advised that she met with A.I.P., and that it did not appear A.I.P. was living in Newark consistently for 365 days, and declined educational responsibility. Springfield then re-enrolled Jad and M as Newark was not taking responsibility. Ms. Boehm was unsure what transpired with Jad and M between September and November. Mom met with Ms. Pacheco, the Springfield homeless liaison. The Fabyan Place address was provided. Springfield secured placements for both M and Jad, with transportation from the Fabyan Place address. Prior to the placement for Jad and M, home instruction was offered, and was again declined.

Newark was again contacted to advise that Springfield maintained that Newark was the responsible district and that Springfield may seek reimbursement. Ms. Osoria responded that she would have the residency investigator look into it. This was April 2018.

Emails were continued to be exchanged with Ms. Osoria. The last email received was close to the end of the 2017/2018 school year wherein Ms. Osoria maintained that Newark is not the responsible district.

Springfield had a residency investigator look into the Fabyan Place address. He concluded that A.I.P. and M were residing therein. Regarding Jad no conclusion was reached as she was not regularly attending school. This was done through observation of the location.

In September of 2018, A.I.P. advised that the family moved to Dover and at some point Dover took responsibility for the students. This was in December 2018. By that time Jad had dropped out. Transportation and tuition for M switched to Dover.

Ms. Boehm reviewed the costs for tuition and transportation for the period Springfield maintains Newark was the responsible district. Those costs total $41,593.18 for tuition, and $37,918.40 for transportation.

James Post testified as follows:

He is employed by the Springfield Board of Education as the residency investigator. Prior to this he was a police officer with Newark for thirty years.

He described how he conducts a residency investigation, which includes surveillance "99.9 percent" of the time.

He was asked to do a residency investigation for the P family. His investigation included surveillance. He met with Janet Pacheco. He received a Power School report, which contains the child's photo, family member names, mother's name, current address and emergency contact information. He did surveillance of the Fabyan Place address on April 25, 2018. He arrived at 6:00 a.m. He saw M exit the residence and get on the school bus at approximately 7:45 a.m. Prior to that he saw some cars pull in and pull out with adult females. He did not know who the women were. He did see one of the women enter the house, and another women leave the house. He saw no children exit a car and enter the house. He remained until 9:00 a.m. He repeated the surveillance the next day. Again he arrived at 6:00 a.m. He approached the bus driver when the bus arrived. He identified himself to the driver, who told him he picks up M every day at this address. He remained again until 9:00 a.m. He never saw Jad during

his investigation. He again did surveillance the next day, starting at 6:00 a.m. Again M exited the home and got on the bus. Again he remained until 9:00 a.m. This was Friday. He returned on Saturday but saw no activity at all. He returned the following Monday and again saw M exit the house at 7:45 a.m. and enter the school bus. He concluded that the P family was residing at the Fabyan Place address. This was based on M exiting the house four consecutive school days, his conversation with the bus driver, that M never exited a vehicle to enter the house and the A.I.P. reported the Fabyan Place house as her address.

Mr. Post was recalled regarding the Power School paperwork he was provided and testified as follows:

He had received photographs of Jad and M. He also had photographs of Jas and J.P., who were not part of his investigation. He could not at this time locate the photograph of Jad. He was sure he had one when he started the investigation.

On the paperwork M's address is listed as 807 Mountain Avenue, Springfield, NJ. That was the prior address the family lived at prior to the Fabyan Place address in Newark. There is other paperwork in the Power School forms that have the Fabyan Place address. The handwriting on the paperwork is his.

There is also an address of 259 Nesbit Terrace in Irvington. He did not investigate this address as the investigation led him to the Fabyan Place address, and he concluded that was where the family resided.

Ana Osoria testified as follows:

She is employed by the Newark Board of Education as a Program Specialist-3. Prior to that she was a Specialist for Homeless Management from September 2013 to July 2020. It is the same job as before with a different title. She is the McKinney Vento liaison for the Newark School District. Ms. Osoria described her job duties and training received.

Ms. Osoria stated that for a person to be determined not to be homeless they must reside in the District for 365 consecutive days. She maintained that this was based on her McKinney Vento training. Any break in the 365 days resets the clock.

When she was advised by Springfield that the P family was living in Newark she contacted A.I.P. and was able to meet with her on November 14, 2017. Based on that conversation Ms. Osoria determined that the P family was not "fixed or regular" at the Newark address. She notified Springfield of her findings. Newark did not initiate a residency investigation.

An email dated June 27, 2017 was sent to Ms. Osoria's email, but was not reviewed by her until September 6, 2017. At that time she reached out to A.I.P. She did not meet with her until November 14, 2017. There was no contact with A.I.P. between the first telephone call on June 12, 2017 with her and the day she came in, which was November 14, 2017.

Initially Ms. Osoria intended to register the students in the Newark District. Her position changed after she spoke with A.I.P. in November. Her decision was based upon what A.I.P. told her. A.I.P. indicated to Ms. Osoria that she desired educational continuity.

Ms. Osoria reached out again to A.I.P. in 2018, the aim of which was to have her come in and bring supporting documents that she may have. She communicated this to Ms. Boehm. A meeting was scheduled for April 30, 2018 at 10:00 a.m., but A.I.P. did not attend. She advised Springfield thereafter via email that no further investigation was needed as the students were not Newark's responsibility.

Susan Giordino was called at the end of Respondent's case to testify as to certain documents:

She is employed by the Springfield Board of Education and is the secretary to the Director of Special Services. She helped process the student enrollment for M in the beginning of the 2016/2017 school year. A.I.P. came to the office to submit enrollment

paperwork. A.I.P. produced a lease, which seemed to Ms. Giordino to be suspect. She identified a copy of the lease.

Tiffany Boehm was recalled at the end of Respondent's case to testify as to certain documents:

Ms. Boehm reviewed release forms provided by Newark in order to send IEPs for M and Jad P. Newark was requesting the most recent IEP for both students. The address on the form was 134 Fabyan Place, Newark, NJ. A.I.P. was listed as the person completing the forms. This was November 14, 2017. On the same day she corresponded with Ms. Osaria who had determined that A.I.P. was not living in Newark. This was in an email.

Respondent's Case

Ana Osoria testified as follows:

Ms. Osoria reviewed her experience and work as she did on direct examination by Ms. Stewart when she testified as Petitioner's witness.

She reviewed scenarios that could lead to a person being displaced.

Ms. Osoria also reviewed her educational background.

She reviewed how she conducts an interview with a displaced family.

During the meeting with A.I.P. in November 2017 Ms. Osoria did not offer her any of the services or amenities she would normally offer displaced families as A.I.P. indicated she wanted to continue with Springfield.

Ms. Osoria was not advised by anyone from Springfield that an investigator was sent to the Fabyan Place address.

She did not have any contact with A.I.P. from the first telephone call in September 2017 until December 1, 2021. On that date they spoke via telephone. A.I.P. restated what she told Ms. Osoria in September 2017 was correct. There was another telephone call with A.I.P. on December 7, 2021, with Ms. Styza also on the call. On the same date she went to meet with A.I.P. at an address in Dover. She went with Newark Board of Education security and an investigator. The purpose of the visit was to see if her previous statements were consistent.

Timothy Gray testified as follows:

Mr. Gray is a partner with Capital Investigations. He went on to describe his experience as an investigator. He further explained the various types of investigations.

He was retained by Newark to do an investigation regarding Jad and M. He was asked to find if A.I.P. was primarily residing in Newark. He was provided with information about A.I.P. and performed a desk top search, which is a review of online data bases. There was no surveillance done. Based upon the data base search results he produces a profile. The search starts with a name and social security number. He stated that, based on the results, it appeared to him that A.I.P. was going back and forth from different addresses. He reviewed the various addresses revealed from the data base searches. The time frame he reviewed was during 2016 and 2017. He could not determine, with any sense of certainty, where A.I.P. lived during this time frame. She did not file a change of address form with the United States Postal Service.

Mr. Gray stated it would be fair to say that he has no idea whether A.I.P. lived at any of the addresses at all at any time.

FINDINGS OF FACT

1. A.I.P., and her children, Jas. P., Jad. P. and M.P., resided in the Township of Springfield, N.J. until approximately June of 2016.

2. As residents of Springfield the children were entitled to be educated in the Springfield public school system.

3. All three children, above noted, were students with special needs and had Individualized Education Programs (IEPs). (P-20)

4. A welfare check at the Springfield address of the P family by the Springfield Police revealed that they no longer resided at said address. A different family resided therein. (12/13/21 Tr. 26:12 to 27:24)

5. The Springfield Board of Education discovered that the P family was residing in Newark, NJ, through a worker with Families and Communities Together (FACT), however the worker was unable to provide a current address. (P-19)

6. In September 2016, after being contacted by the school social worker, A.I.P. came to the Florence M. Guadineer Middle School to re-register M.P., and provided a lease, dated September 1, 2016, for her prior Springfield address. (P-21)

7. The P family was not living at their previous address in Springfield. They were living with the childrens' grandmother in Newark, NJ, at 134 Fabyan Place.

8. The Springfield Police confirmed that the P family was not living at their previous address. A different family was living there. (12/13/21 Tr. 41:6-17)

9. A.I.P. filled out a McKinney Vento Act Student Information form for Jad. P., Jas. P. and M.P. A.I.P. claimed in the forms that the family was homeless since June 30, 2016, and were residing at 134 Fabyan Place, Newark, NJ. She also listed an Irvington address on the forms. (P-3)

10. Springfield BOE set up transportation from the 134 Fabyan Place, Newark, NJ address to Springfield for Jas. P. and M.P. so they could attend school. Transportation was not required for Jad. P. as she was in a residential facility. Transportation for Jas. P. and M.P. continued through the end of the 2016/2017 school year.

11. Transportation was arranged for M.P. to attend the extended school year program but was subsequently cancelled as M.P. refused to attend the program.

12. The transportation company informed Springfield via email that M.P. would not leave the porch of the 134 Fabyan Place, Newark, NJ address. They also advised that A.I.P. had exited the house after being contacted by telephone that M.P. would not get on the bus. (P-9)

13. During the 2016/2017 school year the only address used to pick up the children for transport to school was the 134 Fabyan Place, Newark, NJ address.

14. An email, dated June 27, 2017, was sent to the Newark Board of Education homeless liaison, Ana Osoria, to advise that the P family was living in Newark from May 2016. Said email provided the names of the children and the Newark address. (J-1)

15. Ms. Osoria did not respond to this email until September 12, 2017, after receiving a follow up email from Tiffany Boehm of Springfield, dated September 6, 2017. (J-2)

16. In response to Ms. Osoria's email of September 12, 2017, the IEPs for the three children were forwarded. (P-23)

17. By email dated November 14, 2017, Ms. Osoria advised Springfield that she met with A.I.P. and determined that A.I.P. did not reside in Newark for 365 days. This was based on representations made by A.I.P. Ms. Osoria determined that the children should be the responsibility of Springfield. (J-3)

18. Springfield then assumed responsibility for the children and arranged for placements and transportation from the 134 Fabyan Place, Newark, NJ address. Jad. P. was placed at Washington Academy, and M.P. was placed at Rutgers Day School. P-10 and P-11)

19. By letter dated April 10, 2018, Springfield advised Newark that it still held the position that Springfield was the responsible district for the 2017/2018 school year. (J-4)

20. Ms. Osoria responded, by email dated April 10, 2018, to said letter on behalf of Newark requesting documents to support Springfield's position and restating Newark's position. (J-5)

21. In response thereto, attendance and transportation records were provided by email dated April 23, 2018. (J-6)

22. Ms. Osoria responded, again reiterating Newark's position, which was based upon a conversation she had with A.I.P. Said email was also to update what had transpired. (J-7)

23. Springfield had their residency investigator investigate the residency situation for the P family. The investigator, James Post, set up surveillance at the 134 Fabyan Place, Newark, NJ address and discovered that M.P. was residing therein. He did not observe Jad. P. He prepared a report as to his findings. (P-4)

24. Newark's position regarding the residency of the P family was based entirely on what A.I.P. told Ms. Osoria without any supporting documentation.

25. Ms. Osoria testified that A.I.P. told her she wanted her children to continue to be educated in the Springfield district.

26. Ms. Osoria, after speaking via telephone with A.I.P. on April 27, 2018, arranged a meeting with her for April 30, 2018. A.I.P. did not attend the meeting. (J-7)

27. Springfield discovered during the summer of 2018 that the P family was living in Dover, NJ. M.P. was enrolled in the Dover district. The transportation contract for M.P. was cancelled. It appeared that Jad. P. had dropped out of school.

28. Newark Board of Education was the responsible district for the education of the P family children, Jad. P., Jas. P. and M.P. from the beginning of the 2017/2018 school year until the time the children became the responsibility of the Dover school district.

29. Springfield expended the sum of $15,707.50 in tuition for the Rutgers Day School for M.P. for the period of April to June 2018. (P-12)

30. Springfield expended the sum of $12,942.84 in tuition for the Rutgers Day School for M.P. for the period of September to October 2018. (P-13)

31. Springfield expended the sum of $12,942.84 in tuition for the Rutgers Day School for M.P. for the period of November to December 2018. (P-14)

32. Total tuition costs expended by Springfield for M.P. are $41,593,18.

33. Transportation costs paid by Springfield total $39,918.40 for Jad P. to Washington Academy, and for M.P. to Rutgers Day School, for the period of June 26, 2017 through December 31, 2018. (P-15 and P-15a)

34. Total amount of funds expended by Springfield that the Newark Board of Education is responsible for equal $79,511.58.

LEGAL ANALYSIS AND CONCLUSION

Right to a Free Public Education

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> 1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;
>
> 2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;
>
> . . .

> 3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;
>
> 4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;
>
> . . .
>
> 6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;
>
> . . .
>
> 8. Any other business record or document issued by a governmental entity.
>
> (b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.
>
> (c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

In the instant matter, it is clear that A.I.P. resided in Newark. The address given to Springfield was the Newark address. Springfield's investigator confirmed that A.I.P. resided in Newark. The only reasonable conclusion is that A.I.P resided in Newark. The investigation conducted by Newark was nothing more than internet search, with no on-site observation, as was the case with the Springfield investigation. In fact, the investigator for Springfield admitted he could not say whether or not A.I.P. lived at any

of the addresses set forth in his report. (2T172:16-25) He did not do surveillance, as the investigator for Springfield did.

Newark based its decision on residency entirely upon what A.I.P. told them. There was no independent confirmation. There were no documents provided. There was nothing other then hearsay statements provided by Ms. Osoria in her testimony as to what A.I.P. told her. There was not a shred of residuum evidence to support the hearsay statements.

Judicial rules of evidence do not apply to administrative agency proceedings, except for rules of privileges or where required by law. N.J.R.E.101(a)(3). DeBartolomeis v. Board of Review, 341 N.J. Super.80, 82 (App. Div. 2001). N.J.S.A. 52:14B-10(a) and N.J.A.C. 1:1-15.1(c).

Hearsay are statements other than ones made by the declarant while testifying at a hearing, offered into evidence to prove the truth of the matter asserted. N.J.R.E. 801(c). Hearsay is usually not admissible because it is deemed untrustworthy and unreliable (N.J.R.E. 802) unless it falls within an exception enumerated in N.J.R.E 803 or 804. However, hearsay is admissible in an administrative proceeding such as this one subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. Weston v. State, 60 N.J. 36 (1972).

[A] fact-finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it. [Id. at 51]

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide

assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(c). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a).

In accordance with the residuum rule, I accepted the hearsay evidence. However, no competent evidence was presented to corroborate the hearsay evidence. Accordingly, no weight can be given to the same.

Further, Newark's position that an individual must reside for 365 consecutive days to not be considered homeless finds no support in the law.

N.J.S.A. 18A:7B-12(c) states: 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. For the purpose of this amendatory and supplementary act, "homeless" shall mean an individual who temporarily lacks a fixed, regular and adequate residence.

As A.I.P. claimed homelessness for the 2016/2017 school year, Springfield acted appropriately and registered children, notwithstanding their new address in Newark.

N.J.S.A. 18A:38-1(d) 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.

The preponderance of the credible evidence shows that A.I.P., M.P. and Jad. P. resided at 134 Fabyan Place, Newark, NJ for more than one year. Accordingly, they became the responsibility of the Newark school district for the 2017/2018 school year.

N.J.A.C. 6A:22-6.3 states in pertinent part: a) Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

Springfield expended the sum of $41,593.18 in tuition costs, and the sum of $39,918.40 in transportation costs from the time that Newark was the responsible district for the education of M.P. and Jad. P. The total sums expended by Springfield were $79,511.58.

Based upon the foregoing, I further **CONCLUDE** that Jad. P. and M.P., together with their mother, A.I.P., resided at 134 Fabyan Place, Newark, NJ, from June 30, 2016 until the summer of 2018; and, Newark became the responsible school district for the 2017/2018 school year after the family resided therein for more than one year.

ORDER

Based upon the foregoing it is **ORDERED** that the Newark Board of Education reimburse the Springfield Board of Education the sum of $79,511.58.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 8, 2022

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Witnesses

For Petitioner:

Tiffany Boehm
James Post
Ana Osoria
Susan Giordino

For Respondent:

Ana Osoria
Timothy Gray

List of Exhibits

For Petitioner:

P-1 letter from Tiffany Boehm to A.I.P. (parent), dated 6/27/16

P-2 Email from Kara King to Tiffany Boehm, dated 9/16/16

P-3 McKinney Vento Act Student Resident Information forms

P-4 Email report from James Post to Jannett Pacheco, Petitioner's Former Director of Human Resources, dated 5/13/18

P-5 Request for Coordinated Special Education Transportation form with regard to Jas.P. for the time period ASAP through June 23, 2016, dated 9/22/16

P-6 Request for Coordinated Special Education Transportation form with regard to M.P. for the time period ASAP through June 23, 2016, dated 9/20/16

P-7 Request for Coordinated Special Education Transportation form with regard to M.P. for the time period ASAP through June 22, 2017, dated 12/2016

P-8 Request for Coordinated Special Education Transportation form with regard to M.P. for the time period July 5, 2017, through August 15, 2017, dated 8/15/17

P-9 Emails from Diana Blajsa from UCESC to Sue Lies, Petitioner's Transportation Coordinator, dated 6/9/17

P-10 Request for Coordinated Special Education Transportation form with regard to Jad.P. for the time period April 2, 2018 through June 21, 2018, dated 3/26/18

P-11 Request for Coordinated Special Education Transportation form with regard to M.P. for the time period April 11, 2018 through June 21, 2018, dated 6/1/17

P-12 Vendor History Printout for April, May and June 2018

P-13 Vendor History Printout for September and October 2018

P-14 Springfield Board of Education Purchase Order 901230

P-15 Springfield Board of Education District Billing Reports

P-17 Power School Documents

P-18 emails between Tiffany Boehm and parent dated 11/28 and 29/2021

P-19 email between Tiffany Boehm and FACT worker

P-20 IEPs

P-21 Lease submitted by parent to Springfield

P-23 email dated 9/17/17 from Tiffany Boehm's secretary, Jessica

For Respondent:

R-1 Residency Investigation

R-2 McKinney Vento training manual

R-3 McKinney Vento questionnaire

Joint Exhibits:

J-1 Email from Ellyn Atherton to Ana Osoria with the subject "Homeless Students Living in Newark" dated 6/27/17

J-2 Emails from Tiffany Boehm to Ana Osoria dated 9/6-12/17

J-3 Emails from Ana Osoria to Tiffany Boehm dated 11/14/17

J-4 letter from Tiffany Boehm to Ana Osoria dated 4/10/18

J-5 Email from Ana Osoria to Tiffany Boehm dated 4/10/18

J-6 Email from Tiffany Boehm to Ana Osoria with attachments dated 4/23/18

J-7 Email from Ana Osoria to Tiffany Boehm dated 5/15/18

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

September 6, 2022

Steven R. Cohen, Esq. and Daniel R. Dowdy, Esq.
Selikoff & Cohen, P.A.
700 East Gate Drive, Suite 502
Mount Laurel, NJ 08054

James N. Barletti, Esq.
Gold, Albanese, Barletti & Locascio
48 South Street
Morristown, NJ 07960

Re: ***Ronald Donnerstag, et al. v. Melissa Borawski, Central Regional Board of Education, Ocean County, SEC Dkt. No. C10-22, Agency Dkt. No. 215-8/22***

Dear Counsel:

I have considered the papers filed in connection with the requests for interlocutory review of the School Ethics Commission's August 23, 2022 decision filed by the Complainants and the Respondent in the above-captioned matter.

Upon full consideration 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, the requests for interlocutory review are hereby denied.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JKH
c: Director, School Ethics Commission

223-22L

224-22

New Jersey Commissioner of Education

Final Decision

Rebecca Adams-Paul,

Complainant,

v.

Daniel Dilks, Board of Education of the Township of Tabernacle, Burlington County,

Respondent.

Synopsis

Petitioner, a member of the teaching staff in the Tabernacle School District, alleged that respondent, a member of the Tabernacle Board of Education, violated multiple sections of the School Ethics Act, *N.J.S.A.* 18A:12-24.1, when he sent an email in which he commented on complainant's conduct while her conduct was under review by district administration. The School Ethics Commission (SEC) determined that the respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(j) of the Code of Ethics for School Board Members and recommended a penalty of reprimand.

The case was forwarded to the Commissioner for final determination of the appropriate penalty in this matter. Upon review, the Commissioner concurred with the penalty recommendation of the SEC. Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

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

224-22
SEC Dkt No. C18-21
OAL Dkt. No. EEC 08798-21
Agency Dkt. No. 197-7/22

New Jersey Commissioner of Education

Final Decision

Rebecca Adams-Paul,

Complainant,

v.

Daniel Dilks, Board of Education of the Township of Tabernacle, Burlington County,

Respondent.

The Commissioner has reviewed the record of this matter and the July 26, 2022 decision of the School Ethics Commission (Commission). The Commission found that respondent Daniel Dilks, a member of the Tabernacle Board of Education, violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(j) of the Code of Ethics for School Board Members (Code). The Commission recommended a penalty of reprimand for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, for the reasons thoroughly detailed in the Initial Decision of the Administrative Law Judge and the decision of the Commission, the Commissioner concurs with

the penalty recommended by the Commission for respondent's violation of the Code in connection with an email in which he commented on complainant's conduct while her conduct was under review by district administration.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 12, 2022
Date of Mailing: September 12, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-08798-2021
SEC Docket No.: C18-21
Final Decision

Rebecca Adams-Paul,
Complainant

v.

Daniel Dilks,
Tabernacle Board of Education, Burlington County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on June 7, 2021, by Rebecca Adams-Paul (Complainant), alleging that Daniel Dilks (Respondent), a member of the Tabernacle Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*[1] The Complaint avers that Respondent violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members (Code) in Count 1, violated *N.J.S.A.* 18A:12-24.1(f) of the Code in Count 4, violated *N.J.S.A.* 18A:12-24.1(g) of the Code in Count 6, *N.J.S.A.* 18A:12-24.1(i) of the Code in Count 2 and Count 5, and violated *N.J.S.A.* 18A:12-24.1(j) of the Code in Count 3.

At its meeting on September 21, 2021, and following a review and discussion of the parties' pleadings at a previous meeting, the Commission adopted a decision granting Respondent's Motion to Dismiss in Lieu of Answer (Motion to Dismiss) as to the violations of *N.J.S.A.* 18A:12-24.1(f) (Count 4), *N.J.S.A.* 18A:12-24.1(g) (Count 6), and *N.J.S.A.* 18A:12-24.1(i) (Count 2 and Count 5), and denying the Motion to Dismiss as to the violations of *N.J.S.A.* 18A:12-24.1(e) (Count 1) and *N.J.S.A.* 18A:12-24.1(j) (Count 3). The Commission also adopted a decision finding the Complaint not frivolous and denying Respondent's request for sanctions.

Based on its findings, the Commission also directed Respondent to file an Answer to Complaint (Answer) as to the remaining allegations in the Complaint (*N.J.S.A.* 18A:12-24.1(e) (Count 1) and *N.J.S.A.* 18A:12-24.1(j) (Count 3)), and advised the parties that, following receipt of Respondent's Answer, the within matter would be transmitted to the Office of Administrative Law (OAL).

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[1] By correspondence dated June 8, 2021, Complainant was notified that the Complaint was deficient, and required amendment before the School Ethics Commission (Commission) could accept her filing. On June 9, 2021, Complainant cured all defects and filed an Amended Complaint (Complaint) that was deemed compliant with the requirements detailed in *N.J.A.C.* 6A:28-6.3.

The above-captioned matter was filed with the OAL on October 21, 2021, to be heard as a contested case, and was assigned to the Honorable David M. Fritch, Administrative Law Judge (ALJ Fritch). *Initial Decision* at 1-2. While at the OAL, Complainant filed a Motion for Summary Decision on February 11, 2022, and Respondent filed a response brief and Cross-Motion for Summary Decision on February 28, 2022. *Id.* at 2. On March 14, 2022, Complainant filed a response to Respondent's Cross-Motion for Summary Decision. *Id.* at 2-3. Because neither party requested oral argument nor filed further submissions, the record on the cross-motions closed on March 14, 2022. *Id.* at 3.

On April 28, 2022, ALJ Fritch issued an *Initial Decision* detailing his findings of fact and legal conclusions on the parties' Cross-Motions for Summary Decision. The Commission acknowledged receipt of ALJ Fritch's *Initial Decision* on the date it was issued (April 28, 2022); therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was June 13, 2022.[2] Prior to June 13, 2022, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions (if any). Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until July 28, 2022.

At its meeting on June 28, 2022, the Commission considered the full record in this matter. Thereafter, and at its meeting on July 26, 2022, the Commission voted to adopt the findings of fact from ALJ Fritch's *Initial Decision*; to adopt the legal conclusion that, based on the competent and credible evidence, Complainant met her burden to prove violations of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(j); and to adopt the recommended penalty of reprimand.

II. Initial Decision

In the *Initial Decision*, ALJ Fritch found that the following facts are undisputed and, therefore, serve as the ***findings of fact*** for his decision:

1. Respondent is a Board member, and has a child enrolled in the Tabernacle School District (District).

2. Complainant is employed by the Board as a teaching staff member.

3. At a Board meeting on February 16, 2021, the Superintendent spoke about shifting to full-time, in-person instruction five days per week.

4. At the February 16, 2021, Board meeting, Complainant spoke during public comment regarding health and safety concerns related to COVID-19. More specifically, the minutes provide the following summary of Complainant's statement, "... teachers understand the importance of being back in school. Cannot overlook the CDC guidelines. Health guidelines

[2] Forty-five (45) days after April 28, 2022, was, technically, Sunday, June 12, 2022; by rule, the deadline is therefore extended until the next business day.

should remain in the forefront. Criticism on social media are [sic] installing fear. Spoke in support of assistants."

5. Another parent (Ms. O'Hara) who was in favor of the District returning to full-time, in-person instruction also provided a public statement.

6. On February 17, 2021, Respondent received an email from a parent who forwarded screen shots from Complainant's Facebook page (July 23, 2020), indicating that she (Complainant) was traveling to Cancun, Mexico, as well as a posting from March 13, 2020, which "tagged" Complainant "in a photo of four Corona beers." The email also addressed Complainant's comments at the Board meeting (on February 16, 2021), claiming those comments were "disingenuous" and "very contradictory of actions they have taken outside of the school over the past year."

7. On February 17, 2021, Respondent emailed the Superintendent and forwarded the February 17, 2021, email he received (from the parent) regarding "specific concerns about what is now perceived to be the disingenuous nature of certain comments from staff about the health, safety, willingness, or ability to bring more kids back" at the Board meeting in "contradiction in what was stated and what the reality had been for these individuals, outside of the educational setting of our district" based on their images "posted on social media" about "vacations and taking flights out of the country, during the peak infectivity periods" and having "celebratory beer, in a local bar" on a date that "corresponds to the last full day of instruction last year." Respondent further added that he anticipated that the Superintendent "would be having discussion with [his] administrative team on this matter, and then collectively determine how to address from there."

8. On May 7, 2021, Ms. O'Hara sent an email to the Board (including Respondent), using their Board email addresses, which stated, in part: " ... many of the teachers just don't want to do what is in the best interest of the kids by putting them in school 5 full days this year ... I'd like to bring to your attention another situation concerning a specific teacher who feels entitled enough to taunt the very people who pay her salary ... This specific teacher decided to pull on the heart strings of everyone on the Jan[uary] [Board] meeting by saying that she and many other teachers had stress and anxiety about coming back to school ... It's the same teacher who was so scared to be back in school, yet supposedly didn't have any anxiety about getting on a plane and going to Mexico for vacation (in the very beginning of the pandemic) ... Same one who supposedly had drinks in the bar with some co-workers ... ."

9. Respondent acknowledges that the "specific teacher" referred to in Ms. O'Hara's email is Complainant.

10. The posts that Ms. O'Hara referred to (in her email) were Complainant's Facebook posts dated July 23, 2020 and March 13, 2020. These were the same posts that were attached to the February 17, 2021, email that Respondent received (from a parent) and then forwarded to the Superintendent.

11. During this same time, Complainant made a post on her personal Facebook page stating, in part: "I haven't been active on here in a while for a reason ... Community members have screenshots of past Facebook posts from a year and more ago from my page that have been sent to my [Board] and [S]uperintendent ... So, I had a drink in a bar outside of school hours with friends before [COVID] was a thing. I also went to Mexico last summer. ... Too bad I have tenure so you can't get rid of me that easily! So sad how pathetic and hateful some people are ... ."

12. On May 7, 2021, Respondent replied to Ms. O'Hara's email (via his Board email account), in relevant part: "... As a parent of a child in this [D]istrict, I too am appalled at the flippant and hypocritical communication put forth by certain [D]istrict staff ... As a [Board] member, I am equally frustrated, but I also recognize that any action taken by staff is ultimately the responsibility of the Superintendent/administration. I have also received these reports into my [Board] account, and being duty bound, have previously provided them to the admin team for their attention and follow up. This will be for [the Superintendent] to investigate and resolve ... my expectation would be that you would receive an appropriate response from [the Superintendent]."

13. Respondent acknowledges that, in his email to Ms. O'Hara, he was referring to Complainant and Facebook posts and statements she made.

Id. at 3-8.

In the "Legal Discussion" section of his *Initial Decision*, ALJ Fritch ***concludes*** that, based on the standards set forth in *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 523 (1995), the above-captioned matter is appropriate/ripe for summary disposition because, "The facts, as set forth by the parties in their respective motions, are supported by tangible, undisputed evidence, and there does not appear to be any dispute of the material facts on the record regarding the material facts at issue ...." *Id.* at 10.

The remaining contentions in the Complaint are enumerated in Count 3, and include alleged violations of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(j). These provisions of the Code provide:

> 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.
>
> j. 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.

Pursuant to *N.J.A.C.* 6A:28-6.4(a), violations of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(j) need to be supported by certain factual evidence, namely:

5. Factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(e) shall include evidence that Respondent made personal promises or took action beyond the scope of his duties such that, by its nature, had the potential to compromise the board.

10. Factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(j) shall include evidence that the respondent(s) acted on or attempted to resolve a complaint, or conducted an investigation or inquiry related to a complaint:

i. Prior to referral to the chief administrative officer; or

ii. At a time or place other than a public meeting and prior to the failure of an administrative solution.

Regarding the violation of *N.J.S.A.* 18A:12-24.1(e), ALJ Fritch ***concludes*** that Respondent's May 7, 2021, email to Ms. O'Hara "constituted an action taken by [Respondent] in his capacity as a member of the ... Board." *Id.* at 14. In support of this conclusion, ALJ Fritch notes that Respondent was responding to an email from a District parent that was addressed to the Superintendent and to Board members; the email was sent to Respondent's Board email address; the email (from Ms. O'Hara) was seeking a response from the Board and the administration, not the input of Board members as fellow parents; Ms. O'Hara's email asked questions about an issue "within the Board/administration's direct purview; and although Respondent attempted to "employ qualifiers by prefacing sections of his response," those "disclaimers are ineffective in attempting to disclaim [Respondent's] email response as anything other than a response given in his capacity as a Board member." *Id.* at 11-14.

As to whether Respondent's actions had the potential to compromise the Board, ALJ Fritch additionally ***concludes*** that Respondent's "email comments, made in his capacity as a Board member, in response to a complaint about actions of a District employee, when those actions were under investigation by the school administration, which had not yet taken action on those complaints, was an action beyond the scope of his Board duties that had the potential to compromise the Board in violation of *N.J.S.A.* 18A:12-24.1(e)." *Id.* at 15-16. In support of this conclusion, ALJ Fritch notes that, although the administration was aware of the issues expressed in Ms. O'Hara's communication, "it is uncontested that the issue had not been resolved by the school administration by the time [Respondent] sent his email response to [Ms.] O'Hara on May 7, 2021"; despite Respondent's knowledge, based on the contents of his response to Ms. O'Hara, that the issues raised in her (Ms. O'Hara's) email were pending with the administration, "he nonetheless took action on [Ms.] O'Hara's email in his capacity as a Board member"; the response to Ms. O'Hara did not just inform her that the Superintendent would be addressing her complaint, it also "made a number of conclusory statements regarding the issues raised," including characterizing Complainant's communications as "flippant and hypocritical," "inflammatory," and "not in line with the code of conduct we all, as parents, try to instill in our children," and as "being the source of embarrassment in the District"; the response "contained a number of statements as a Board member expressly condemning" Complainant's communications, even though same was still being reviewed by the administration; the response commits to Ms. O'Hara receiving an "appropriate response" from the Superintendent; and the

"qualifier that [the Superintendent's] response will be 'appropriate' when read in light of [Respondent's] clear view of [Complainant's] communications ... clearly indicate that [Respondent] is expecting that [the Superintendent's] eventual 'appropriate' response will not likely to [(sic)] be favorable for [Complainant] despite the investigation into the conduct in question still being an ongoing one." *Id.* at 14-15. In short, Respondent's response to Ms. O'Hara "potentially compromised the Board by expressing, in writing, the unequivocal judgment of a sitting Board member on a matter that was still pending administrative investigation and action." *Id.* at 15.

Regarding the violation of *N.J.S.A.* 18A:12-24.1(j), ALJ Fritch ***concludes*** that Respondent acted on Ms. O'Hara's complaint by sending a response to her on May 7, 2021. *Id.* at 17. The basis for ALJ Fritch's determination is that, "The email that [Respondent] sent in response to [Ms.] O'Hara's complaint, however, was not merely forwarding the complaint to the ... administration for action, it was a response to the parent expressing [Respondent's] views on the matter and noting that he expected the administration to provide an 'appropriate response' to [Ms.] O'Hara." *Id.*

ALJ Fritch additionally ***concludes*** that Respondent's May 7, 2021, response to Ms. O'Hara constituted action at a time or place other than a public board meeting and prior to the failure of an administrative solution. *Id.* at 17-18. In support of this conclusion, ALJ Fritch notes that while the Superintendent was copied on Ms. O'Hara's email, "there is no indication that [Ms. O'Hara's] email complaint was specifically referred to [the] Superintendent ... for action prior to [Respondent's] email to [Ms.] O'Hara on May 7, 2021," and, even if the Superintendent was aware of the issue concerning Complainant's communication, before Ms. O'Hara's email was received, "it is undisputed that the administration had not taken action on this matter" at the time Respondent's response was sent, or that an administrative solution had failed. As such, ALJ Fritch ***concludes*** Complainant met her burden to prove, by a preponderance of the competent and credible evidence, that Respondent violated *N.J.S.A.* 18A:12-24.1(j). *Id.*

Turning to the issue of penalty, ALJ Fritch notes that Complainant "seeks to recommend a penalty of 'no less than six months if Respondent is at any time a member of the Board and censure if he is not a member of the Board." *Id.* at 18. However, based on a review of the circumstances in which the Commission has recommended "serious penalties," ALJ Fritch ***concludes*** that, because "this is the first violation by ... [R]espondent"; "the communication in question was a one-time act and did not improperly convey any confidential or otherwise inaccurate information about [Complainant] which would justify more serious sanctions"; and was a "one-time discreet act which inappropriately conveyed the [R]espondent's personal opinions in his capacity as a Board member in an email to a concerned parent on a matter involving a Board employee that was pending investigation and action by the [D]istrict's administration," a penalty of ***reprimand*** is appropriate. *Id.* at 18-19.

III. Exceptions

Neither Complainant nor Respondent filed Exceptions to the *Initial Decision.*

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission **adopts** ALJ Fritch's findings of fact, and **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(j).

In finding a violation of *N.J.S.A.* 18A:12-24.1(e), ALJ Fritch correctly determined that, given the means through which he received the complaint, and regardless of his attempt to qualify the capacity in which he was responding to Ms. O'Hara's email, Respondent's email response to Ms. O'Hara on May 7, 2021, "constituted an action taken by [Respondent] in his capacity as a member of the ... Board." Moreover, because Respondent offered his personal opinion (in his capacity as a Board member) on a matter that was being reviewed by the administration, and characterized Complainant's conduct in a way which seemed to suggest that the Superintendent would, like Ms. O'Hara and Respondent, regard Complainant's behavior as inappropriate, his email response to Ms. O'Hara on May 7, 2021, also had the potential to compromise the Board.

In addition, the Commission agrees that by responding to Ms. O'Hara's email at a time when the subject of her (Ms. O'Hara's) complaint was actively pending with the administration and a final determination had not yet been rendered, Respondent acted on Ms. O'Hara's complaint at a time or place other than a public board meeting and prior to the failure of an administrative solution in violation of *N.J.S.A.* 18A:12-24.1(j).

V. Decision

The Commission **adopts** the findings of fact from the *Initial Decision*, **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(j), and agrees that the violations of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(j) are supported by a preponderance of the competent and credible evidence.

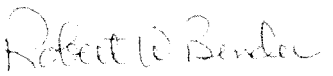
VI. Penalty

For the reasons relied upon by ALJ Fritch in his *Initial Decision*, namely that "this is the first violation by ... [R]espondent"; "the communication in question was a one-time act and did not improperly convey any confidential or otherwise inaccurate information about [Complainant] which would justify more serious sanctions"; and was a "one-time discreet act which inappropriately conveyed the [R]espondent's personal opinions in his capacity as a Board member in an email to a concerned parent on a matter involving a Board employee that was pending investigation and action by the [D]istrict's administration," the Commission **adopts** the recommended penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (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 brief on appeal.



Robert W. Bender, Chairperson

Mailing Date: July 26, 2022

Resolution Adopting Decision in Connection with C18-21

Whereas, on or about October 21, 2021, the School Ethics Commission (Commission) transmitted the above-captioned matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, at the OAL, both Complainant and Respondent filed Motions for Summary Decision; and

Whereas, the Honorable David M. Fritch, Administrative Law Judge (ALJ Fritch) issued an *Initial Decision* dated April 28, 2022; and

Whereas, in his *Initial Decision*, ALJ Fritch issued findings of fact and found that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(j); and

Whereas, neither Complainant nor Respondent filed Exceptions to ALJ Fritch's *Initial Decision*; and

Whereas, at its meeting on June 28, 2022, the Commission reviewed and discussed the record; and

Whereas, at its meeting on June 28, 2022, the Commission discussed adopting the findings of fact from the *Initial Decision*, adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(j), and adopting the recommended penalty of reprimand; and

Whereas, at its meeting on July 26, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on June 28, 2022; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its meeting July 26, 2022.

Kathryn A. Whalen, Esq.
Director, School Ethics Commission

225-22

New Jersey Commissioner of Education

Final Decision

In the Matter of Denise Sanders,
Board of Education of the Township of
Teaneck, Bergen County.

Synopsis

The School Ethics Commission (SEC) found that respondent Denise Sanders, a member of the Teaneck Board of Education, violated *N.J.S.A.* 18A:12-24(b) of the Code of Ethics for School Board Members (Code). The SEC recommended a penalty of reprimand for this violation.

The case was forwarded to the Commissioner for final determination of the appropriate penalty in this matter. Upon review, the Commissioner concurred with the penalty recommended by the SEC for respondent's violation of the Code in connection with her failure to recuse herself from matters regarding the compensation of the district's superintendent when her daughter was employed as a per diem substitute teacher by the district. Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

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

225-22
SEC Dkt No. C60-19
OAL Dkt. No. EEC 04898-20
Agency Dkt. No. 198-7/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Denise Sanders,
Board of Education of the Township of
Teaneck, Bergen County.

The Commissioner has reviewed the record of this matter and the July 26, 2022 decision of the School Ethics Commission (Commission). The Commission found that respondent Denise Sanders, a member of the Teaneck Board of Education, violated *N.J.S.A.* 18A:12-24(b) of the Code of Ethics for School Board Members (Code). The Commission recommended a penalty of reprimand for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, for the reasons thoroughly detailed in the decision of the Commission, the Commissioner concurs with the penalty recommended by the Commission for respondent's violation of the Code in connection with her failure to recuse herself from matters regarding the compensation of the district's superintendent when her daughter was employed as a per diem substitute teacher by the district.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 12, 2022
Date of Mailing: September 12, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-04898-20
SEC Docket No.: C60-19
Final Decision

I/M/O Denise Sanders,
Teaneck Board of Education, Bergen County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on September 26, 2019, by Gerald T. Reiner, Jr. (Complainant) alleging that Denise Sanders (Respondent), a member of the Teaneck Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq*. More specifically, the Complaint averred that Respondent violated *N.J.S.A.* 18A:12-24(c) in Count 1 and Count 2; violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), *N.J.S.A.* 18A:12-24.1(e), and *N.J.S.A.* 18A:12-24.1(f) in Count 3; and violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c) in Count 4.

After the Complaint was served, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. As part of his response to the Motion to Dismiss and allegation of frivolous filing, Complainant agreed to voluntarily withdraw the allegations in Count 1.

At its meeting on January 21, 2020, and following a review and discussion of the parties' pleadings at a previous meeting, the Commission adopted a decision granting the Motion to Dismiss as to the allegations in Count 2 and Count 3 (the allegations in Count 1 were voluntarily withdrawn by Complainant); denying the Motion to Dismiss as to the allegations in Count 4; finding the Complaint not frivolous and denying Respondent's request for sanctions; and directing Respondent to file an Answer to Complaint (Answer) for the remaining allegations. On February 11, 2020, Respondent filed an Answer as directed.

Thereafter, and at its meeting on April 21, 2020, the Commission adopted a decision finding probable cause for the remaining allegations in the Complaint. Following its finding of probable cause, the Commission filed the above-captioned matter with the Office of Administrative Law (OAL) as a contested matter, and, pursuant to *N.J.A.C.* 6A:28-10.7(b), the attorney for the Commission (Petitioner) was charged with prosecuting the allegations in the Complaint which the Commission found probable cause to credit.

At the OAL, the above-captioned matter was assigned to the Honorable Kimberly A. Moss, Administrative Law Judge (ALJ Moss). *Initial Decision* at 1. ALJ Moss conducted a hearing on November 8, 2021, and the parties submitted closing briefs on May 16, 2022; thereafter, the record closed. *Id.* at 2.

On May 23, 2022, ALJ Moss issued an *Initial Decision* detailing her findings of fact and legal conclusions. The Commission acknowledged receipt of ALJ Moss's *Initial Decision* on the date it was issued (May 23, 2022); therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was July 7, 2022. Prior to July 7, 2022, the Commission requested a forty-five (45) day extension of time to issue its decision so as to allow the Commission, which only meets monthly, the opportunity to receive and review the full record, including the parties' Exceptions (if any). Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until August 22, 2022.[1]

At its meeting on June 28, 2022, the Commission considered the full record in this matter. Thereafter, and at its meeting on July 26, 2022, the Commission voted to adopt the findings of fact from ALJ Moss's *Initial Decision*; to adopt the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b); to adopt the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c); and to modify the *Initial Decision* to include a penalty of reprimand.

II. Initial Decision

Based on the witness testimony and documentary evidence submitted, ALJ Moss issued the following findings of fact: Respondent became a Board member in 2016; the Board has a nepotism policy which exempts per diem substitute employees from the policy; on October 10, 2018, Respondent's child was approved by the Board to become a per diem substitute for the 2018-2019 school year; on August 21, 2019, Respondent's child was renewed as a per diem substitute for the 2019-2020 school year; and on August 26, 2020, Respondent's child was again renewed as a per diem substitute for the 2020-2021 school year. *Id.* at 7-8.

Furthermore, substitute teachers can choose the assignments they want to take; substitute teachers report to the Human Resources Department, and not to the Superintendent; the Superintendent is responsible for everyone in the Teaneck School District (District); Respondent's child does not live with Respondent, and is not financially dependent on Respondent; Respondent spoke with Board counsel about her child's employment as a per diem substitute, and was told that her child "was eligible to work as a substitute teacher, because substitute teachers are per diem and not employees and exempt from the nepotism policy; and Respondent abstained from voting when renewal of substitute teachers was voted on by the Board. *Id.* at 8.

Moreover, Board members receive yearly training; ethics is part of that training; Respondent participated in those training sessions; Respondent was present in executive session on June 12, 2019, when the Superintendent's evaluation was discussed; at its meeting on June 26, 2019, the Board approved the Superintendent's merit goals, and Respondent voted on the motion (affirmatively); if the merit goals are achieved, the Superintendent receives a fifteen percent (15%) bonus; during executive session on June 26, 2019, the contract and evaluation of the Superintendent was discussed; at the Board's meetings on September 11, 2019, and

[1] Technically, forty-five (45) days after May 23, 2022, was Sunday, August 21, 2022; by rule, the deadline was extended until the next business day, which was Monday, August 22, 2022.

September 18, 2019, there were executive session discussions concerning merit goals for the Superintendent, and Respondent participated in those discussions; and Respondent never discussed her child's employment with the Superintendent. *Id.* at 9.

With the above in mind, ALJ Moss found that Respondent's child is not a member of her (Respondent's) immediate family because her child does not live with her (Respondent), and is not financially dependent on Respondent. *Id.* at 11. Because her child is not an immediate family member (as that term is defined in *N.J.S.A.* 18A:12-23), ALJ Moss concludes Respondent did not violate *N.J.S.A.* 18A:12-24(c). *Id.*

However, ALJ Moss further *concludes* Respondent did violate *N.J.S.A.* 18A:12-24(b) because, although a per diem substitute can decide when and where to work and technically reports to the Human Resources Department, "the Superintendent is the individual who is responsible for the District and therefore is responsible for the per diem substitute teachers." *Id.* In this case, Respondent voted to approve the Superintendent's merit goals at the June 26, 2019, Board meeting, and discussed the Superintendent's merit goals at the September 11, 2019, and September 18, 2019, Board meetings (in executive session). *Id.* If the merit goals are achieved, the Superintendent receives a fifteen percent (15%) bonus. *Id.* Taken together, "A reasonable person could believe that by [Respondent] voting on the merit goals which can include a fifteen percent bonus for the Superintendent, [Respondent] believed that her [child] would continue to be a per diem substitute teacher in the District." *Id.* at 11-12. Consequently, Respondent violated *N.J.S.A* 18A:12-24(b) because "voting and discussing the merit goals of the Superintendent could be seen to have a pecuniary interest for her [child]." *Id.* at 12.

Based on the foregoing, ALJ Moss dismissed the alleged violation of *N.J.S.A.* 18A:12-24(c), and sustained the violation of *N.J.S.A.* 18A:12-24(b). However, ALJ Moss did not recommend a penalty for Respondent's violation of *N.J.S.A.* 18A:12-24(b).

III. Exceptions

Petitioner's Exceptions

In its Exceptions filed on June 6, 2022, Petitioner (counsel for the Commission) argues that the *Initial Decision* should be modified to impose a penalty for Respondent's conduct and, more specifically, for the violation of *N.J.S.A.* 18A:12-24(b). Although ALJ Moss "properly found that Respondent violated" *N.J.S.A.* 18A:12-24(b), she "failed to indicate whether Respondent should face a penalty, and if so what type of penalty she should face based on the violation." According to Petitioner, the absence of a recommended penalty renders the *Initial Decision* incomplete as it "failed to properly dispose of all issues" as required by *N.J.A.C.* 1:1-18.3.

As for the penalty, Petitioner argues that Respondent must be censured for her conduct. In this case, Respondent "engaged in conduct which could reasonably be seen as an attempt to gain a personal benefit for her [child]." Per Petitioner, Respondent "was fully aware of her ethical and statutory obligations, given her trainings." Moreover, this case is analogous so *I/M/O Anderson*, High Point Regional Board of Education, Sussex County, Docket No. 45-19, in which

Respondent was reprimanded based on a one-time vote approving the attainment of merit goals by the Superintendent. Importantly, and unlike in *I/M/O Anderson*, Respondent here "violated the Act on not one, but multiple occasions, during multiple meetings," and was not new to the Board or unfamiliar with her requirements; as such, and because Respondent's actions constitute a serious violation of the public trust, a penalty of censure is appropriate.

For the foregoing reasons, Petitioner argues the *Initial Decision* should be modified to include a recommendation for censure.

Response to Petitioner's Exceptions

In her response to Petitioner's Exceptions, which were also filed on June 6, 2022, Respondent asserts Petitioner's "expanded interpretation of *N.J.S.A.* 18A:12-29(c) lacks merit as the requirements set forth in the statute apply to the findings of the Commission and not that of the [ALJ]." Respondent further asserts that she was "misguided as to her ethical and statutory obligations" and, therefore a reprimand, not a censure, is appropriate.

Respondent testified that she consulted with a representative from the New Jersey School Boards Association (NJSBA), prior to June 12, 2019, and this individual "advised [Respondent] that substitutes are not employees of the district and that any decision she would be required to make as a board member or trustee would not be affected by her [child's] appointment as a per diem substitute." Respondent further testified that she consulted with Board counsel before her child was hired as a per diem substitute, who advised Respondent, "as a per diem substitute teacher her [child] would 'not have the same regulations as an employee.'"

Despite Petitioner's argument, Respondent maintains ALJ Moss was not required to recommend a penalty to the Commission in her *Initial Decision.* Moreover, despite Petitioner's contention that Respondent should have been aware of her ethical and statutory obligations as a result of the trainings she received, Respondent consulted with the NJSBA and Board counsel, who both advised she was not required to recuse herself in matters related to the Superintendent because her child was a per diem substitute teacher and, therefore, not an employee of the District. Citing *Cheng v. Rhodas*, West New York Board of Education, Hudson County, Docket No. C58-14, as well as *I/M/O Carmine Cimino*, Little Egg Harbor Township Board of Education, Ocean County, Docket No. C31-14, Respondent notes, a "penalty greater than reprimand would constitute an egregious miscarriage of justice" as Respondent relied, to her detriment, on the advice of others. Therefore, Respondent asserts, if a penalty is necessary, "it should be no greater than a reprimand."

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission **adopts** ALJ Moss's findings of fact; **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b); and **adopts** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c).

Because, as determined by ALJ Moss, Respondent's child does not reside in her (Respondent's) household and is not financially dependent on Respondent, the Commission agrees that a violation of *N.J.S.A.* 18A:12-24(c) - which requires a school official to act in a matter where she, *a member of her immediate family*, or a business organization in which she has an interest, has a direct or indirect financial involvement, or to act in a matter where she or *a member of her immediate family* has a personal involvement – is not supported by the record. Had Respondent's child fell within the parameters of the term "member of immediate family," a violation of *N.J.S.A.* 18A:12-24(c) would have been sustainable.

As for the violation of *N.J.S.A.* 18A:12-24(b), the Commission agrees with ALJ Moss that a reasonable person could believe that by discussing and voting to approve a significant financial payment/bonus for the individual (the Superintendent) who is ultimately responsible for the oversight and supervision of everyone who works in the District, including her own child, Respondent "believed that her [child] would continue to be a per diem substitute teacher in the District." *Id.* at 11-12. By discussing and voting on the Superintendent's merit goals, the Commission wholeheartedly agrees that Respondent's action "could be seen to have a pecuniary interest for her [child]." *Id.* at 12.

V. Decision

For the foregoing reasons, the Commission **adopts** the findings of fact from the *Initial Decision*, **adopts** the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b), and **adopts** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c).

VI. Penalty

Although ALJ Moss found a violation of *N.J.S.A.* 18A:12-24(b), the *Initial Decision* did not recommend a penalty for Respondent's ethical violation. Pursuant to *N.J.A.C.* 1:1-18.3(c), a written initial decision "shall" contain, among other things, a "disposition" of the contested matter. *N.J.A.C.* 1:1-18.3(c). Because ALJ Moss found a violation of the Act, the Commission agrees with Petitioner that the failure to include a recommended penalty for the violation does not fully dispose of the contested case.

Although the Commission could remand the above-captioned matter so that a penalty could be recommended, the Commission instead elects to ***modify*** the *Initial Decision* to include a penalty of reprimand for the violation of *N.J.S.A.* 18A:12-24(b). The Commission's decision to modify the *Initial Decision*, as opposed to remanding the above-captioned matter, is because the record provides a sufficient basis upon which the Commission can recommend a penalty.

Based on the record, it is clear that Respondent received yearly training(s) (from NJSBA) in her capacity as a Board member and that, despite receipt of such training(s), she was present for and/or participated in several discussions regarding the Superintendent, and voted in the affirmative on matters which resulted in the Superintendent receiving significant financial remuneration (a bonus). *Id.* at 2-9. However, Respondent also testified that she consulted with a representative from NJSBA and Board counsel about her involvement in matters related to the

Superintendent while her child was employed in the District, and she was advised, by both NJSBA's representative and Board counsel, that she did not have a conflict of interest.

Absent Respondent's good faith efforts to seek guidance and advice from NJSBA and Board counsel, and because Respondent repeatedly failed to recuse herself from such matters on multiple occasions, the Commission would have censured Respondent for her conduct. However, because she relied, albeit to her detriment, on the advice provided by NJSBA and Board counsel, the Commission finds that a penalty of **reprimand** is appropriate.

In adopting a violation of *N.J.S.A.* 18A:12-24(b) and recommending a penalty of reprimand, the Commission must emphasize and underscore the fact that although (as in this case) a board of education may be able to *hire* a relative or member of a school official's immediate family because he/she is excluded from the scope of the school district's nepotism policy; the relative or member of the school official's immediate family was grandfathered (i.e., because the employment of the relative or member of the school official's immediate family *preceded* a school official's election, appointment, or employment); and/or the board of education sought and received approval from the executive county superintendent for the *hiring,* school officials can *still* violate the Act if they do not recuse themselves from **any and all matters** in which they have a conflict of interest because of their relative or immediate family member's employment in the school district. In *Advisory Opinion A24-17*, the Commission specifically addresses the matters from which school officials must recuse themselves because of their familial relationships.

Accordingly, and for the reasons set forth above, Commission modifies the *Initial Decision* to include a recommended penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner for review of the Commission's recommended sanctions. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the Commission and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the

Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (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 brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: July 26, 2022

Resolution Adopting Decision in Connection with C60-19

Whereas, on or about April 21, 2020, the School Ethics Commission (Commission) transmitted the above-captioned matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, following a hearing, the Honorable Kimberly A. Moss, Administrative Law Judge (ALJ Moss) issued an *Initial Decision* dated May 23, 2022; and

Whereas, in her *Initial Decision*, ALJ Moss issued findings of fact and found that Respondent violated *N.J.S.A.* 18A:12-24(b), but did not violate *N.J.S.A.* 18A:12-24(c); and

Whereas, Petitioner filed Exceptions to the *Initial Decision*, and Respondent filed a response to Petitioner's Exceptions;

Whereas, at its meeting on June 28, 2022, the Commission reviewed and discussed the full record in the above-captioned matter; and

Whereas, at its meeting on June 28, 2022, the Commission discussed adopting the findings of fact from ALJ Moss's *Initial Decision*; adopting the legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24(b); adopting the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c); and modifying the *Initial Decision* to include a penalty of reprimand; and

Whereas, at its meeting on July 26, 2022, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on June 28, 2022; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its meeting July 26, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq.
Director, School Ethics Commission

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

September 12, 2022

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Amna Toor, DAG
Department of Law and Public Safety
Division of Law
P.O. Box 112
Trenton, NJ 08625

Re: ***NAACP New Jersey State Conference, Latino Action Network, SPAN Parent Advocacy Network, Save Our Schools NJ, Building One America, Latino Coalition of New Jersey, and Network for Public Education v. New Jersey Department of Education, Agency Dkt. No. 200-10/21, EDU 01222-22***

Dear Counsel:

I have considered the papers filed in connection with the New Jersey Public Charter Schools Association and A.S's request for interlocutory review of Administrative Law Judge Susan M. Scarola's August 19, 2022 decision denying their motion to intervene in the above-captioned matter.

Upon full consideration 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, the request for interlocutory review is hereby denied.

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JS
c: State Law Library
Honorable Susan M. Scarola, ALJ

227-22L

228-22

New Jersey Commissioner of Education

Final Decision

Maria Azzaro, The New Jersey Education Association, and Mellk O'Neill,

Petitioner,

v.

Board of Education of the City of Trenton, Mercer County

Respondent.

Synopsis

This matter stems from a successful defense against an Order to Show Cause (OTSC) issued in 2007 to petitioner Maria Azzaro by the New Jersey State Board of Examiners (SBE). Following hearings in the original matter, which occurred between 2012 and 2018 at the Office of Administrative Law (OAL), an Initial Decision dismissing the OTSC was issued by an ALJ in 2019 and adopted by the SBE in February 2020. The matter then closed. Subsequently, petitioners filed the within matter seeking reimbursement from the Trenton Board of Education (Board) under *N.J.S.A.* 18A:16-6 for costs and fees associated with defending against the OTSC. The parties filed cross motions for summary judgment.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact here, and the matter is ripe for summary decision; under *N.J.S.A.* 18A:16-6, a board of education employee may be indemnified for attorney's fees and costs incurred defending civil actions that arise in the course and scope of their employment duties; *N.J.S.A.* 18A:16-6 does not impose an affirmative duty on the employee to notify a board of education at the outset of the underlying litigation; the Board's argument that the petitioners waived the right to indemnification when they did not notify it of the OTSC at the outset and did not request that it provide Azzaro with a defense or indemnify her, is without merit as it is clear from the record that the Board possessed sufficient information such that it was on notice of the charges against Azzaro. The ALJ concluded that petitioners were entitled to indemnification for the costs and fees incurred in defending Azzarro in the SBE proceedings. Accordingly, the ALJ granted the petitioners' motion for summary decision and ordered the Board to reimburse petitioners in the amount of $430,800 in fees and $5,361.60 in costs.

Upon review, the Commissioner disagreed with the ALJ that petitioners are entitled to indemnification, citing to *Edison v. Mezzacca*, 147 *N.J. Super.* 9 (App. Div. 1977) for the proposition that an employee seeking indemnification does not have the absolute right to counsel of their own choosing at municipal expense. The Commissioner found that, consistent with the Appellate Division's holding in *Edison*, Azzaro had no right to be represented by Mellk O'Neill at the Board's expense without the express agreement of the Board. Further, the Commissioner noted that petitioners failed to notify the Board of their request for indemnification until more than a decade of legal bills had accumulated, from a law firm which the Board had no hand in selecting. Accordingly, the Board's motion for summary decision was granted, and the petition was dismissed

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

228-22
OAL Dkt. No. EDU 09699-20
Agency Dkt. No. 121-5/20

New Jersey Commissioner of Education

Final Decision

Maria Azzaro, The New Jersey Education Association, and Mellk O'Neill,

Petitioners,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto, have been reviewed and considered.

In 2007, the State Board of Examiners (SBE) of the New Jersey Department of Education issued an Order to Show Cause (OTSC) why petitioner Maria Azzaro's teaching, specialist, and principal certifications should not be revoked or suspended. The proceedings were based on allegations pertaining to scheduling and grading practices at the school where Azzaro was employed. After years of proceedings, the SBE dismissed the OTSC, and Azzaro's certificates were not suspended or revoked. Azzaro, along with the law firm of Mellk O'Neill, who had represented her during the SBE proceedings, and the New Jersey Education Association (NJEA), who had retained Mellk O'Neill on Azzaro's behalf, filed a petition of appeal, seeking

indemnification from the Trenton Board of Education (Board) for the legal fees and costs of her defense. Following cross-motions for summary decision, the Administrative Law Judge (ALJ) concluded that petitioners were entitled to indemnification for the fees and costs of defending Azzarro in the SBE proceedings. The ALJ reviewed the bills submitted by petitioners and, after making some adjustments to the number of hours billed and hourly rates, ordered the Board to reimburse petitioners in the amount of $430,800 in fees and $5,361.60 in costs.

In its exceptions, the Board argues that New Jersey case law requires that an indemnitee must give timely notice to the indemnitor and, absent such notice, cannot demand reimbursement for expenses that the indemnitor had no opportunity to control. The Board notes that its current insurance coverage has a significantly lower limit than the policy that was in place when the SBE proceedings began, such that the Board is prejudiced by the lack of notice that petitioners would seek indemnification. The Board further contends that the hourly rate awarded by the ALJ is not reasonable, and the bills submitted by petitioners lack sufficient detail to properly calculate the fee total.

In reply, petitioners argue that the Board's arguments regarding its insurance coverage are outside the record and therefore improperly included in exceptions. Petitioners contend that the ALJ correctly concluded that the indemnification statute does not require employees to notify a board of education at the outset of litigation. According to petitioners, the Board only had an obligation to indemnify Azzaro once the charges against her were dismissed. Petitioners further state their belief that if the Board controlled the litigation, it would have done so with the aim of minimizing expense, rather than exonerating Azzaro, such that it was imperative for Azzaro to have independent counsel. Finally, petitioners argue that the ALJ appropriately calculated the reasonable fees and costs of Azzaro's defense.

Upon review, the Commissioner disagrees with the ALJ that petitioners are entitled to indemnification. In *Edison v. Mezzacca*, 147 *N.J. Super.* 9 (App. Div. 1977), the Appellate Division held that an employee seeing indemnification "does not have the absolute right to counsel of his own choosing at municipal expense." *Id.* at 14. The Appellate Division specifically noted that a right to absolute reimbursement was provided for only when the municipality's obligation was conditional on the outcome of the litigation. *Ibid.* However, there was no right of reimbursement when "the obligation to provide for the defense arose at the inception of the proceeding . . . and was independent of the outcome of the proceeding." *Id.* at 15.

Here, petitioner's right to indemnification is governed by *N.J.S.A.* 18A:16-6, which contains no requirement that the employee be successful in the litigation to be indemnified. The relevant language in *N.J.S.A.* 18A:16-6 can be contrasted with *N.J.S.A.* 18A:16-6.1, which provides for indemnification in criminal actions only when the proceedings are dismissed or result in a final disposition favorable to the employee. Here, there is no dispute that SBE proceedings are an administrative action, not a criminal action. Therefore, although petitioners' claim arises out of a different indemnification statute than the one at issue in *Edison*, it nonetheless bears the same characteristics, in that it arose at the inception of the proceedings and was independent of the outcome of the proceedings.

Petitioners failed to notify the Board of their request for indemnification until more than a decade of legal bills had accumulated. Those bills were generated by a law firm which the Board had no hand in choosing. Consistent with the Appellate Division's holding in *Edison*,

Azzaro had no right to be represented by Mellk O'Neill at the Board's expense without the express agreement of the Board.[1]

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2022
Date of Mailing: September 14, 2022

[1] The Commissioner does not find petitioners' arguments regarding the Board's conflict – that it would prioritize a low-cost defense over a vigorous one that would result in the dismissal of the SBE OTSC – availing. In *Edison*, the Appellate Division noted that an employee does have the right to object to the appointment of an attorney perceived to have a conflict of interest. *Edison, supra*, 147 *N.J.* at 16. However, having failed to give the Board the opportunity to appoint an attorney for Azzaro, petitioners cannot now object to any hypothetical appointment. The time for resolution of any disagreements between Azzaro or the NJEA and the Board regarding the appropriate counsel to represent Azzaro was at the commencement of the proceedings, which is yet another reason notice to the Board in advance of an indemnification request is required.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09699-20
AGENCY DKT. NO. 121-50/20

MARIA AZZARO, THE NEW JERSEY EDUCATION ASSOCIATION AND MELLK O'NEILL,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Edward A. Cridge, Esq., for petitioners (Mellk Cridge, LLC, attorneys)

Rita F. Barone, Esq. for respondent (Flanagan, Barone, O'Brien, attorneys)

Record Closed: April 6, 2022 Decided: June 15, 2022

BEFORE **JUDITH LIEBERMAN**, ALJ

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On June 11, 2007, the SBE filed an OSC in which it directed Azzaro to show cause why her Teacher, Specialist and Principal Certifications should not be revoked or suspended as a result of problems that occurred at a school within the Trenton School District during the 2003-2004 school year. Pet. Exh. A. The OSC was transmitted to the Office of Administrative Law (OAL) on August 13, 2007. It was initially assigned to Administrative Law Judge (ALJ) Anna Viscomi. On or about February 23, 2012, it was transferred to Hon. Edward J. Delanoy, Presiding Administrative Law Judge, after ALJ Viscomi was appointed to the Superior Court. The hearing was conducted during twenty-four days between July 2012, and May 2018. The record remained open after the hearing for the receipt of transcripts and post-hearing submissions, and the record closed on April 29, 2019.

On September 12, 2019, Judge Delanoy issued an Initial Decision dismissing the OSC with respect to Azzaro. Pet. Exh. D. On February 28, 2020, the SBE adopted Judge Delanoy's Initial Decision and ordered the dismissal of the OSC issued to Azzaro. Pet. Exh. E. The SBE's determination was not appealed and the matter was closed.

On or about May 19, 2020, petitioners filed a petition in which they seek payment by respondent of the reasonable costs and attorneys' fees incurred in the successful defense of the OSC issued to Azzaro. Pet. Exh. F.

Petitioners and respondent filed cross-motions for summary decision. They assert that summary decision is appropriate because there is not a genuine issue of material fact. Oral argument on the motions was heard on March 31, 2022. Respondent was asked to submit additional information. Its submission was received on April 5, 2022. Petitioners submitted a letter in response on April 6, 2022, and the record closed that day.

Parties' Arguments

Petitioners contend:

1. Reimbursement pursuant to N.J.S.A. 18A:16-6 is required because the allegations against Azzaro arose from her employment with respondent and that she was found to have been acting within the scope of her duties.

2. Reimbursement is required notwithstanding the fact that the NJEA paid for her representation.

3. Reimbursement shall be of the billable time expended in the defense of Azzaro at a reasonable rate, not the discounted union rate paid by NJEA.

4. $450 per hour is the reasonable rate that should be applied here.

5. Azzaro was not required to demand an initial defense from respondent.

6. Petitioners' demand, $485,550 in legal fees and $5,518.75 in costs, is reasonable given the scope, length and complexity of the matter, counsels' expertise in this specialized area of the law, and a completely successful outcome. The hourly rate upon which this demand is based is reasonable and comparable to that charged by similarly situated counsel.

Respondent contends:

1. The initial matter against Azzaro was brought by the SBE, not the Board. While the matter was pending, petitioners did not notify the Board that Azzaro sought a defense or provide notice that they would seek indemnity if the Board did not provide a defense. This failure deprived the Board of an opportunity to control the defense and its costs, as an indemnitor. Given this failure, and the resultant prejudice suffered by the Board, petitioners are not entitled to payment by the Board, pursuant to indemnification requirements imposed by New Jersey courts.

2. Because the Board should have been permitted to control the defense and set its own costs and fees, it is required to merely pay the minimum, reasonable cost and fees when counsel is selected independently.

3. Petitioners' requested costs and legal fees are excessive, unreasonable and unnecessary. The controlling statute does not provide that the Board is responsible for a market rate. Further, the billing statements here include redundant and unnecessary menial tasks; the requested hourly rate is inappropriate on its face; is well beyond the highest rate that was charged; and excessive compared to what the Board or its insurer would have paid had it been given an opportunity to provide Azzaro's defense.[1]

FACTUAL DISCUSSION

The following, taken from the parties' briefs, certifications and documents, is undisputed and, therefore, I **FIND** the following as **FACT**:

1. The allegations in the OSC were made by the SBE. They were not made at the request of the Board.

2. Petitioners were not advised that the Board would take disciplinary action against Azzaro.

3. The Board did not take disciplinary action against Azzaro.

4. The allegations in the OSC arose from Azzaro's employment with the Board.

[1] Respondent also argued, in a post-hearing submission, that it is further prejudiced by petitioners' delay in seeking indemnification because its current insurance policy limits coverage to 10 percent of the amount of the coverage that was provided by the insurance policy at the time the OSC was initiated. Thus, the Board "was prohibited from defraying the costs using insurance and has been significantly prejudiced." April 5, 2022, Barone letter at 2. This issue was neither included in the pleadings, addressed in briefs nor raised during oral argument. It will thus not be addressed here.

5. The OSC against Azzaro was dismissed in its entirety.

6. Azzaro acted within the scope of her duties as a Board employee during all relevant times.

7. Azzaro's counsel was paid by the NJEA, the union of which she was a member, at a reduced hourly rate to which counsel and the NJEA agreed.

8. Petitioners did not notify the Board of the OSC.

9. Petitioners did not request that the Board provide Azzaro's defense or indemnify her for her defense.

10. Petitioners did not seek reimbursement of the costs of Azzaro's defense until after the OSC was dismissed.

11. There was no Board policy or employment manual that required an employee to notify the Board of an action issued against them by the State Board of Examiners.[2]

I also **FIND** the following as **FACT** because it is taken from the September 12, 2019, Initial Decision dismissing the OSC against Azzaro.[3] In addition to Azzaro, the

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[2] April 5, 2022, Barone letter at 2.

[3] Official notice is taken of the facts as set forth in the Initial Decision and a related matter before the OAL that are addressed below. N.J.A.C. 1:1-15.2(a) provides, "Official notice may be taken of judicially noticeable facts as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence." N.J.R.E. 201provides:

> (a) *Notice of Law.* --Law which may be judicially noticed includes the decisional, constitutional and public statutory law, rules of court, and private legislative acts and resolutions of the United States, this state, and every other state, territory and jurisdiction of the United States as well as ordinances, regulations and determinations of all governmental subdivisions and agencies thereof. Judicial notice may also be taken of the law of foreign countries.
>
> (b) *Notice of Facts.* --The court may judicially notice a fact, including:
>
> . . .

Initial Decision addressed Orders to Show Cause issued by the SBE against Board employees Melvin Cummings and Priscilla Dawson.[4] Azzaro was represented by the firm Wills, O'Neill & Mellk.[5]

During the 2004-2005 school year, Azzaro was the vice principal and then the acting principal and guidance counselor coordinator for Trenton Central High School (TCHS); Dawson was the principal of TCHS; and Cummings was vice principal of the Sherman School. Initial Decision at 6, 7, 9.

The DOE Office of Fiscal Accountability and Compliance (OFAC) investigated scheduling and grading practices at the Sherman School during the 2004-2005 school year. Initial Decision at 2. During the school year, the Trenton School District ran a ninth-grade repeater program housed at Sherman. Initial Decision at 2. The District was required to follow the standard educational guidelines for curriculum and awarding of academic credit. Ibid. The investigation found that Azzaro, Dawson and Cummings were involved in the following acts or omissions, which were incorporated into the OSC:

- At least five students had attained sufficient credit for promotion to tenth grade at the end of the 2003-2004 academic year, but were incorrectly assigned to the ninth-grade repeater program at the Sherman School.

- Twenty-nine Sherman students repeated courses that they had successfully completed prior to their assignment to Sherman and were awarded credit for repeating courses. Trenton would not transport students to classes off-site, nor could instructional staff come on-site due to space restrictions.

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(4) records of the court in which the action is pending and of any other court of this state or federal court sitting for this state.

[4] The three matters were consolidated by Judge Viscomi. In addition to Azzaro, Dawson and Cummings, James Lytle was named as a respondent in the OSC. He was the superintendent of Trenton's schools during the 2004–2005 school year. His case was resolved by the parties prior to issuance of the Initial Decision dismissing the OSC. Initial Decision at *10.

[5] The name of the firm has since changed.

- Numerous students assigned to Sherman were awarded credit for courses that did not meet Department of Education Curriculum standards.

- Students were being awarded credit for tenth grade physical education when they had twice repeated ninth grade physical education. Students who repeated other courses were also given credit for honors courses and/or eleventh-grade courses.

- Full course credit was awarded for a three-week independent study program, even though course credit should only be awarded for courses that provide forty minutes of instruction during a 180-day school year. Azzaro and others approved the program, but it was not approved by the Board.

- Seventy-nine students of a sample of 100 had an excessive rate of absenteeism.

- Student academic records at Sherman were altered to indicate the successful completion of courses not offered at Sherman.

[Initial Decision at 2-3].

I also **FIND** as **FACT** that the Initial Decision on the OSC referenced a tenure charge filed against Dawson by the Trenton Board of Education on December 5, 2007: In re Tenure Hearing of Dawson, Sch. Dist. of Trenton, Mercer Cty., EDU 10447-07, Initial Decision (September 8, 2009), adopted, Comm'r (December 4, 2009), http://njlaw.rutgers.edu/collections/oal/. The tenure matter was heard by Judge Viscomi. In her decision, Judge Viscomi detailed the procedural history of the tenure matter. She noted that she had been assigned "four previously filed certificates' matters relating to the alleged conduct herein and involving this respondent and three other former assistant vice principals and school superintendent[.]" Id. at *1. After an April 15, 2008, pre-hearing conference with the parties, Judge Viscomi rejected an application to consolidate the tenure matter against Dawson with the already consolidated OSC matter. Ibid.

The charges against Dawson concerned the Sherman School repeater program during the 2004-2005 school year. The allegations included the inappropriate assignment of students in the program; failure to enable students to attend courses and obtain credits needed to obtain a high school diploma; students were assigned to classes that they had already passed; and students who were eligible for the tenth grade were enrolled in the ninth grade. In addition to several other witnesses offered by the Board, Azzaro and Cummings testified at the hearing. Judge Viscomi found, and the DOE Commissioner agreed, that the Board did not sustain any of its charges against Dawson.

During oral argument on this application for legal fees and costs, the Board's counsel acknowledged that the Board was aware of the OSC.

LEGAL ANALYSIS AND CONCLUSION

The provisions of N.J.A.C. 1:1-12.5, which governs motions for summary decision, mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. N.J.A.C. 1:1-12.5 permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "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). An adverse party does not bear an obligation to oppose the motion, but to survive summary decision, there must be "a genuine issue which can only be determined in an evidentiary proceeding." Ibid. The non-existence of one entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. Here, the parties do not assert that material issues of fact exist and none have been found. Accordingly, this matter is ripe for summary decision.

"Under the civil indemnification statute, N.J.S.A. 18A:16-6, a board of education employee may be indemnified for attorney's fees and costs incurred defending civil

actions arising out of an act or omission that took place in the course and scope of employment duties." L.A. v. Board of Education, City of Trenton of Mercer County, 221 N.J. 192, 201-202 (2015). N.J.S.A. 18A:16-6 provides:

> 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; provided that
>
> a. no employee shall be entitled to be held harmless or have his defense costs defrayed in a disciplinary proceeding instituted against him by the board or when the employee is appealing an action taken by the board; and
>
> b. indemnification for exemplary or punitive damages shall not be mandated and shall be governed by the standards and procedures set forth in N.J.S. 59:10-4.
>
> Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

In Bower v. Bd. of Educ., 149 N.J. 416 (1997), the Supreme Court addressed the statutory prerequisite. It held 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. See also Waters v. Bd. of Educ. of Toms River, 2011 N.J. Super. Unpub. LEXIS 3083, *12 (December 22, 2011) ("In the context of the defense of a civil action, the outcome of the litigation is irrelevant, the statute protects both successful and unsuccessful litigants as long as" the cause of action arose out of the performance of the employee's duties and occurred in the

performance of the duties)(citing Lonky v. Bd. of Educ. of Bayonne, OAL Dkt. No. EDU 07205-05, final decision, (July 7, 2008) (slip op. at 3), http://lawlibrary.rutgers.edu/oal/search.shtml).[6] In Lonky, the ALJ observed that, because N.J.S.A. 18A:16-6 does not require a disposition in favor of the employee, "there is an entitlement to indemnification if the sole criteria for satisfying the statute has been met by showing that the employee was performing the job she was hired for when the act occurred." EDU 07205-05 at *3-4.

This is in contrast to N.J.S.A. 18A:16-6.1, the statute that provides for indemnification of education employees charged with criminal or quasi-criminal actions. It provides:

> Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals. No employee shall be entitled to be held harmless or have his defense costs defrayed as a result of a criminal or quasi-criminal complaint filed against the employee by or on behalf of the board of education.
>
> Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.
>
> [N.J.S.A. 18A:16-6.1(emphasis added).]

This statute expressly conditions indemnification upon dismissal of the charges or a "result in a final disposition in favor" of the employee. The Commissioner of Education explained:

[6] Unpublished Appellate Division and administrative decisions are not precedential. They are offered in this Initial Decision because they provide relevant guidance.

> By its very terms, central to qualifying for protection afforded under [N.J.S.A. 18A:16-6] is that the conduct triggering the legal action against him or her must have 1) arisen out of the performance of his/her duties, and 2) occurred in the course of performing those duties. In the context of a civil action, the outcome of the litigation is irrelevant, the statute protects both successful and unsuccessful litigants as long as the above two criteria are satisfied. However, in the context of a criminal or quasi-criminal charge made against a school employee, in addition to the above referenced criteria, N.J.S.A. 18A:16-6.1 imposes a third criteria as a prerequisite to indemnification, i.e., the legal action must result in a final disposition in favor of the school employee.
>
> [Lonky (Final Decision) at *2-3(emphasis in original).]

The Board contends that petitioners waived the right to indemnification because they did not notify it of the OSC at the start of the matter and request that it provide Azzaro with a defense or indemnify her. There is a dearth of case law providing guidance on this issue. A thorough search has revealed no cases in which a Board employee or their representatives failed to notify the board of education, or the board was otherwise unaware, at the outset of litigation. Indeed, petitioners advised during oral argument that they are not aware of a case in which an employee or their representative did not communicate with the board of education at the early stage of the underlying litigation.

The statute contains no language concerning notice to the board of education. As noted by the Supreme Court, "'Our paramount goal in interpreting a statute is to give effect to the Legislature's intent.'" New Jersey Div. of Child Protection and Permanency v. Y.N, 220 N.J. 165, 178 (2014)(quoting Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 572 (2012)).

> The starting point of all statutory interpretation must be the language used in the enactment. Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop. Liab. Ins. Guar. Ass'n, 215 N.J. 522, 536, 74 A.3d 860 (2013); see also N.J.S.A. 1:1-1 (stating that words of statute are customarily construed according to their "generally accepted meaning"). "If the statutory language is clear and unambiguous, and reveals the Legislature's intent,

> we need look no further." Farmers Mut., supra, 215 N.J. at 536, 74 A.3d 860. Only when faithful adherence to the words of the statute leads to more than one plausible interpretation or to an absurd result or to a result at odds with the objective of the overall legislative scheme do we look to extrinsic sources, such as legislative history. Ibid.; DiProspero v. Penn, 183 N.J. 477, 492-93, 874 A.2d 1039 (2005).
>
> [Ibid.]

See also Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 244 N.J. 75, 99 (2020)("The words chosen by the Legislature have meaning and each is entitled to receive its plain meaning"); Paff v. Galloway Township, 229 N.J. 340, 353 (2017) ("We must presume that the Legislature intended the words that it chose and the plain and ordinary meaning ascribed to those words"); Kaminskas v. Office of the Attorney General, 236 N.J. 415, 422-423 (2019)("If the Legislature's intent is clear from the statutory language and its context with related provisions, we apply the law as written. We turn to extrinsic tools to discern legislative intent only when the statute is ambiguous, the plain language leads to a result inconsistent with any legitimate public policy objective, or it is at odds with a general statutory scheme")(internal quotation marks and citations omitted)).

Unlike N.J.S.A. 18A:16-6, other legislative enactments that provide for indemnification of public employees clearly require notice of the underlying action to the entity that is charged with the duty to indemnify. For example, N.J.S.A. 59:10A-1 provides:

> Except as provided in section 2[7] hereof, the Attorney General shall, upon a request of an employee or former employee of

[7] The Attorney General may refuse to provide for the defense of an action referred to in section 1 if he determines that:

> a. the act or omission was not within the scope of employment; or
> b. the act or the failure to act was because of actual fraud, willful misconduct or actual malice; or
> c. the defense of the action or proceeding by the Attorney General would create a conflict of interest between the State and the employee or former employee.

> the State, provide for the defense of any action brought against such State employee or former State employee on account of an act or omission in the scope of his employment. For the purposes of this section, the Attorney General's duty to defend shall extend to a cross-action, counterclaim or cross-complaint against an employee or former employee.
>
> [emphasis added.]

The Legislative intent here should reasonably be understood to impose a duty upon the Attorney General at the start of the underlying matter when a request has been properly made. Given that the Legislature has expressly required notice in this distinct context, it can reasonably be understood that it opted to not include a notice requirement in the statute at issue here.

Nonetheless, the Board argues that petitioners' failure to provide notice of the OSC and their representation "deprived [it] of their opportunity to control, engage in, or aid the defense of Azzaro." Resp. Br. at 9. In support of this argument, it relies upon S.I. Indus. V. AM. Motorists Ins. Co., 128 N.J. 188, 199-201 (1992), which address an insurer's duty to defend in the absence of notice:

> We stress that the duty to defend is triggered by facts known to the insurer. Although the insurer cannot ignore known information simply because it is not included in the complaint, the insurer has no duty to investigate possible ramifications of the underlying suit that could trigger coverage. Rather, the insured being sued is responsible for promptly conveying to its insurance company the information that it believes will trigger coverage. If it conveys that information properly and promptly, it will be reimbursed for previously-expended defense costs. Cf. Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 390(1970) (where insurer did not undertake defense initially, duty to defend translated into duty to reimburse insured). However, if the insured does not properly forward the information to the insurance company, the insured cannot demand reimbursement from the insurer for defense costs the insurer had no opportunity to control.
>
> . . .

> Accordingly, when the insured's delay in providing relevant information prevents the insurer from assuming control of the defense, the insurance company is liable only for that portion of the defense costs arising after it was informed of the facts triggering the duty to defend.

Respondent also relies upon Grossman v. Rockaway Twp., 2019 N.J. Super. Unpub. LEXIS 3596 (Law Div. February 7, 2019), in which parents of a student who took her life filed a wrongful death complaint against the child's school's board of education (BOE) and its employees. In a later complaint seeking indemnification pursuant to N.J.S.A. 18A:16-6, an employee argued that she was entitled to choose her own counsel and that the statute requires the BOE to defray the fees and costs of her defense. The School Alliance Insurance Fund, the insurer and an intervenor, filed a declaratory judgment action seeking a determination that, pursuant to the statute and its contract with the BOE, it was obligated to defend the named employee and thus was the only party entitled to select their counsel. The employee, instead, wished to proceed with her selected counsel.

In an unpublished decision, the trial court noted that, at the time of its decision, there was no case that interpreted the statutory requirement that a BOE "defray all costs of defending such actions, including reasonable counsel fees and expenses." Nor was there a decision that "deals with this precise issue." Id. at *7. For guidance. it referred to Edison v. Mezzacca, 147 N.J. Super. 9 (App. Div. 1977), in which the Appellate Division addressed whether police officers against whom a citizen's civil complaint was filed could select their own counsel, independent of their municipal employer. The controlling statute concerning representation and payment of fees and costs provided:

> Whenever a member or officer of a municipal police department or force is a defendant in any action or legal proceeding arising out of or incidental to the performance of his duties, the governing body of the municipality shall provide said member or officer with necessary means for the defense of such action or proceeding, but not for his defense in a disciplinary proceeding instituted against him by the municipality or in a criminal proceeding instituted as a result

> of a complaint on behalf of the municipality. If any such disciplinary or criminal proceeding instituted by or on complaint of the municipality shall be dismissed or finally determined in favor of the member or officer, he shall be reimbursed for the expense of his defense.
>
> [N.J.S.A. 40A:14-155.]

The Edison court observed, "When a statute speaks in term of reimbursement, it focuses on costs already incurred and contemplates governmental liability for expenditures, reasonable in amount, for services rendered by counsel of the employee's own choice." Id. at 4. The statute provided for reimbursement when an officer successfully defended against disciplinary or criminal proceedings that were instituted by the municipality. "Obviously, this would include the reasonable fees of counsel selected by the officer, for the municipality could have no say in the choice of counsel to defend against charges made by it." Id. at 5. The court distinguished the reimbursement provision from the remainder of the statute:

> However, in dealing with the defense of actions other than those initiated by the municipality, the statute does not speak of reimbursement; it requires the municipality "[to] provide said . . . officer with necessary means for the defense . . . ." We conclude that this means that the municipality must provide competent counsel, its own or outside counsel, or it may approve counsel requested by the officer, but the employee does not have the absolute right to counsel of his own choosing at municipal expense. Were this not so, there would have been no need to distinguish between the right to reimbursement provided for in the last sentence of N.J.S.A. 40A:14-155 and the portion relevant to the present appeal; both obligations could easily have been couched in terms of reimbursement. Instead, the Legislature provided for reimbursement only where the municipality's obligation was conditional on the outcome and arose after the fact; no right of reimbursement was provided for where, as here, the obligation to provide for the defense arose at the inception of the proceeding against the officer and was independent of the outcome of the proceeding.
>
> We, therefore, conclude that the municipality's obligation under N.J.S.A. 40A:14-155 does not require it to pay counsel

> chosen by a police officer without the prior agreement of the municipality to do so.
>
> . . .
>
> Although obligated to provide for an officer's defense, the municipality should have some control over costs, and at least be in a position to know in advance what those costs will be. See State v. Horton, 34 N.J. 518, 534 (1961). It cannot do this if required to accept the officer's choice of attorney at his or a court's assessment of a reasonable fee for his services.
>
> [Id. at 14-15.]

The trial court in Goodman, relying largely upon Edison, held:

> [T]he BOE's obligations pursuant to N.J.S.A. 18A:16-6 arise at the inception of the proceeding against the employee and is independent of the outcome of the proceeding, unless exemplary or punitive damages are imposed. The BOE "shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal." N.J.S.A. 18A:16-6. This Court concludes that this language means that the BOE shall provide competent counsel or it may approve counsel selected by the BOE employee, but the employee does not have the absolute right to counsel of his or her own choosing at the BOE's expense. Were this not so, the legislature would not have included the insurance provisions in the last clause of the statute. The Court notes further that there are public policy principles at play. As a matter of practicality it stands to reason that when a public entity is sued and its employees have counsel there are inherent questions with respect to a cohesive strategy and coherent defense.
>
> Accordingly, this Court concludes that the BOE's obligations pursuant to N.J.S.A. 18A:16-6 do not require it to pay counsel fees as to Counsel chosen by an employee of the BOE without the permission of the BOE.
>
> [Id. at *11.]

Grossman relied upon the municipal police officers' defense and indemnification statute, which is not fully analogous to the one at issue here. The police officers' statute imposes an affirmative duty upon their employers to "provide said member or officer with necessary means for the defense" of "any action or legal proceeding [other than criminal or disciplinary] arising out of or incidental to the performance of his duties[.]" The trial court analogized N.J.S.A. 18A:16-6 to this provision notwithstanding its dissimilar language.

Unlike the police officers' statute, N.J.S.A. 18A:16-6 does not mandate provision of a defense. It requires boards of education to defray all costs, including reasonable counsel fees and expenses. The use of "defray" indicates that the Legislature contemplated reimbursement as an option under all circumstances. "Defray" is defined as "to bear or pay all or part of (the costs, expenses, etc.)." Defray Definition & Meaning | Dictionary.com. Further understanding of the Legislature's intent is found in its statement to an amendment to the statute:

> This committee bill expands the indemnification presently provided under the statutes to school board members and school board employees. Currently school board members and employees are indemnified in civil actions and in criminal proceedings if the criminal proceeding results in a final disposition in favor of the board member or employee. The bill expands indemnification to administrative and quasi-criminal actions and other legal proceedings and again stipulates that in the case of a quasi-criminal action indemnification shall only be extended if the proceeding results in a final disposition in favor of the board member or employee. In the case of school board employees, the bill further stipulates that an employee shall not be entitled to indemnification in a disciplinary proceeding instituted against the employee by the board of education or when the employee is appealing an action taken by the board. Similarly, an employee shall not be entitled to indemnification in any criminal or quasi-criminal complaint filed against him by the board of education.
>
> The bill further provides that indemnification for exemplary or punitive damages is not mandated and shall be governed by the standards and procedures set forth at N.J.S.59:10-4. That

> section of law provides for indemnification in the case of exemplary or punitive damages at the discretion of a local public entity only if the actions on which the damages were based did not constitute actual fraud, actual malice, willful misconduct or an intentional error.
>
> [P.L. 2001, c. 178, sec. 2, eff. July 26, 2001; 2000 Bill Text NJ A.B. 1755.]

In its statement, the Legislature referred only to a board's obligation to "indemnify" its employees. "Indemnify" is defined as "to compensate for damage or loss sustained, expense incurred, etc.; to guard or secure against anticipated loss; give security against (future damage or liability)." Indemnify Definition & Meaning | Dictionary.com. Neither the definition of "indemnify" nor "defray" indicates that the obligation is to be satisfied at a particular time and both contemplate reimbursement, e.g., payment to be made after a cost or expense has been incurred. It can thus be concluded that the Legislature intended "defray" to be understood in the same way as "indemnify," and thus authorized reimbursement. It must also be noted that the circumstances presented in Grossman are different from this matter in a significant way: the board of education's insurance company offered to provide representation to the employee and the employee refused.

Nonetheless, petitioners contend that they could not request that the Board defend or indemnify Azzaro until the OSC was resolved in her favor because the Board's obligation to indemnify was "triggered" not by the issuance of the OSC but, rather, by the dismissal of the OSC. Pet. Opp. Br. at 4. That is, they could not have known whether Azzaro was entitled to indemnification until it was found that the alleged acts or omissions arose out of and in the course of the performance of the duties of her employment. This required a finding in her favor at the close of the hearing on the OSC. Petitioners further argue that any potential conflict between Azzaro's interest and that of the Board could not be identified and addressed until that time. Thus, an "internal conflict" between Azzaro and the Board precluded appointment of counsel by the Board. As the allegations against Azzaro in the OSC included "serious unbecoming conduct" and "engaging in a cover up," they "fell outside the scope of her duties and responsibilities." Id. at 5-6. If those charges

had been sustained, the Board would have had no N.J.S.A. 18A:16-6 reimbursement obligation.

In support of this argument, petitioners cite to a line of cases involving a school security guard who was charged criminally with having engaged in unlawful sexual conduct with two minor students. Separate indictments were issued for the charges concerning each of the victims. The security guard pled guilty to some of the charges contained in one of the indictments. The remaining charges in that indictment were dismissed and the second indictment was dismissed in its entirety. The security guard made no admissions regarding the allegations contained in the second indictment. He did, however, admit to engaging in conversations of a sexual nature with the two students, both of whom were "minors and under [his] supervision and that he engaged in an inappropriate touching of at least one of those minors during the course of that day." L.A. v. Board of Educ. of City of Trenton, Mercer County, 221 N.J. 192, 196 (2015). Afterward, a civil complaint against the security guard and the school board was filed on behalf of the second victim. The Board answered the complaint on its own behalf and took no position with respect to the charges against the security guard, who was assigned counsel through the NJEA. The civil complaint was settled without an admission of wrongdoing by the Board or the guard. The guard and his counsel sought reimbursement of legal fees and costs, pursuant to N.J.S.A. 18A:16-6. The ALJ who heard the case did not conduct an evidentiary hearing. Rather, in response to a summary decision motion, he found that there was no proof that the guard acted outside the scope of his duties because the underlying matter was settled without a finding or admission of guilt. The DOE Commissioner agreed and the Appellate Division reversed. The Supreme Court found that disposition of the matter without an evidentiary hearing was inappropriate:

> The ALJ based his determination that L.A. was acting within the scope of his employment responsibilities solely on the fact that L.A. had "not been adjudicated in any prior forum to have committed any criminal act regarding K.O." In so doing, the ALJ failed to consider the extent of any factual overlap between the offenses alleged in the [first] indictment, which L.A. admitted to, and the offenses alleged in the [second]

> indictment. Nor did the ALJ consider L.A.'s admission during his plea colloquy that he spoke inappropriately to [the second victim], or the evidence referred to in the IAIU[8] report substantiating [the second indictment's] allegations.
>
> We note that the IAIU report, being investigative in nature, is distinguishable from an adjudicatory finding. In re R.P., 333 N.J. Super. 105, 116-17, 754 A.2d 615 (App. Div.2000). However, the report could have been offered into evidence at a hearing with the testimony of the DCF investigator, which would have afforded L.A. "an opportunity to cross-examine the investigator and other witnesses [offered] and to present evidence to rebut the charge." Id. at 117, 754 A.2d 615.
>
> Thus, unlike Bower, supra, where dismissal of the criminal indictment and the lack of any additional evidence "clearly satisf[ied] Bower's burden of proof under the statute" to show that he was acting within the scope of his employment, 149 N.J. at 434, 694 A.2d 543, here L.A.'s admission during his plea colloquy and the IAIU report supporting K.O.'s allegations show that there are issues of fact in dispute that are material to determining whether L.A. committed the acts alleged by K.O. in the civil action.
>
> [Id. at 204-205.]

On remand, and after a hearing, the ALJ found and the Commissioner agreed that the security guard "was not acting within the scope of his duties when he touched [the student] inappropriately. Therefore, he has not met the burden required to support indemnification under the statute." L.A. and the Horace Mann Insurance Company v. Board of Education of the City of Trenton, Mercer County, OAL DKT. NO. EDU 06498-15 (on remand EDU 10410-11)(Adopted, Comm'r, December 19, 2016). Consequently, he was not entitled to indemnification for the costs and fees expended in the defense and settlement of the civil lawsuit.

Here, petitioners suggest that the outcome of the OSC here, as in L.A., could possibly have not been favorable for Azzaro and that the Board's interest would be

[8] New Jersey Department of Children and Families, Institutional Abuse Investigation Unit.

contrary to Azzaro's. It's "interest would be in disposing of the case as cursorily as possible, either by pressuring Ms. Azzaro to 'throw in the towel' and surrender her teaching certificates . . . or by providing her with a skeleton defense. An attorney, engaged by the Board to provide her with a defense, however, could not ethically seek such a result." Pet. Opp. Br. at 6. Therefore, petitioners argue, they could not have requested defense or indemnification from the Board until after the OSC was dismissed.

L.A. is not analogous here. It did not address when a board of education employee or their counsel shall communicate with the board of education about a lawsuit or expressly request defense or indemnification. Rather, in L.A., there was clear communication and understanding about the lawsuit, as the Board was a named defendant and had clearly opted to not represent the security guard. There can be no question that all parties were on notice of the lawsuit and the possibility that N.J.S.A. 18A:16-6 would later come into play.

In fact, boards of education and other employers have managed to confront the issue of how to proceed with respect to representation of their employees, and of potential conflicts of interest, prior to the final disposition of the underlying matter. In several cases, boards of education have refused, at the outset of the underlying litigation, to provide a defense based upon its interpretation of the charges against its employees. See e.g., Matthews v. Board of Educ. of the Union County Voc. Tech. Sch., 2014 N.J. Super. Unpub. LEXIS 1915 (App. Div., August 6, 2014)(board's insurer denied to defend and indemnify at the start of the underlying proceeding because the complaint alleged an intentional act, which it did not cover).

Furthermore, the question of whether an alleged wrongdoing arose out of or in the course of the performance of the employees' duties has been addressed during the later indemnification proceeding. For example, in Waters v. Board of Education of Toms River, 2011 N. J. Supra. Unpub. LEXIS 3083 (App. Div. December 22, 2011), a school employee and his board of education (BOE) were named as defendants in a civil lawsuit filed by a student. The employee, through the NJEA, requested that the BOE provide him a

defense. The BOE refused and the NJEA provided coverage through an insurer with which it contracted. The lawsuit was settled with respect to the employee without a finding of liability. The employee and the insurance company brought an action pursuant to N.J.S.A. 18A:16–6 for reimbursement of the settlement and attorney's fees and costs. Although the lawsuit was based on a student's allegations of inappropriate sexual comments by the teacher, the Appellate Division found, "As a teacher, Waters held, at all relevant times, an 'office, position or employment under the jurisdiction of any Board of Education.' The allegations must necessarily be understood to have arisen solely because of and in the course of Waters' employment as a teacher." Id. at *13(quoting Bower v. Bd. of Educ. of E. Orange,149 N.J. 416, 431 (1997)). Having found that the statute applied, the Appellate Division wrote that "the school board must protect its employees by providing legal counsel, liability insurance, reimbursement for legal counsel, or reimbursement for liability insurance." Id. at *16-17. See also Lonky v. Bd. of Educ. of the City of Bayonne, Hudson County, OAL. DKT. NO. EDU07205-07 (Adopted, Comm'r, July 7, 2008).

Moreover, in Edison, the Appellate Division addressed the possibility of conflict between an employer and the employee who is the subject of a lawsuit. It stated that the employee has the "right to object to the appointment of an attorney perceived by them to be in a position of a conflict of interest" and it recognized the propriety of an order requiring the municipality "to retain outside counsel who would, when selected, owe sole allegiance to the [represented police] officers." 147 N.J. Super. at 17.

Based upon the cases that have applied N.J.S.A. 18A:16-6, petitioners' contention that they were precluded from communicating with the Board is not supported by the statute or the cases that have interpreted it.

Nonetheless, as noted above, N.J.S.A. 18A:16-6 does not impose an affirmative duty on the employee to notify a board of education at the outset of the underlying litigation. The cases that have applied the statute have not definitely imposed this requirement. To the extent this been addressed in the context of insurance contracts,

those cases have recognized that the insurer's knowledge of underlying litigation is material. See S.I. Indus. v. Am. Motorists Ins. Co., 128 N.J. 188 (1992). Here, it is undisputed that the Board had ample notice of the OSC, as documented in Judge Delanoy and Judge Viscomi's Initial Decisions. The parties and allegations of the OSC against Azzaro, Dawson and Cummings were significantly similar to those in the Board's disciplinary action against Dawson. They were filed close in time and it is clear that the Board was aware of the OSC, as consolidation of it with the tenure case was discussed. Even if petitioners were obligated to notify the Board at the outset of the OSC, the Board in fact possessed sufficient information such that it was on notice of the charges against Azzaro.[9] Accordingly, I **CONCLUDE** that petitioners are entitled to indemnification of the costs of defending Azzaro in response to the OSC.

Petitioners seek legal fees in the amount of $485,550 (1,079 billable hours at $450 per hour), and costs and expenses in the amount of $5,518.75. Pet. Exh. J, K. With respect to whether reimbursement should be at the discounted rate that was paid by NJEA or at the higher rate sought by petitioners, the Commissioner of Education has found that a non-discounted, reasonable rate was appropriate. In Salaam v. Board of Education of the City of Irvington, Essex County, 2014 N.J. Super. Unpub. LEXIS 268, No. A-5592-11T4, (App. Div. 2014), a criminal charge was filed, in 2008, against an employee of the Irvington School Board ("Irvington"). The charge concerned conduct related to the employee's work duties. Because the employee was a member of the NJEA, he was represented by an attorney through the NJEA Legal Services Program ("Program"). By agreement with the Program, the attorney charged $142 per hour rather than his normal rate of $250 per hour. The NJEA paid the attorney the reduced rate for all the legal services he provided to the employee at the reduced rate. The charge was dismissed in 2009. In 2010, the employee requested reimbursement from Irvington for the cost of his defense, including counsel fees and expenses. Irvington did not respond

[9] Indeed, counsel acknowledged during oral argument that the Board was aware of the OSC. Query whether the Board could have filed a declaratory action seeking a declaration that it was authorized to make determinations concerning Azzaro's defense or indemnification, as the insurer did in Goodman.

to the request. The employee subsequently petitioned the DOE Commissioner for reimbursement pursuant to N.J.S.A. 18A:16-6.1, and the higher rate was awarded.

The Appellate Division agreed that the higher rate was appropriate:

> We reject the Board's argument that the Commissioner erred in awarding a higher hourly rate than that allowed by the NJEA legal services program through which Salaam procured Smith's representation. The NJEA legal fund allowed payment of Smith's fees at a "volume discount rate" of $142 to $145 per hour. However, as noted, N.J.S.A. 18A:16-6.1 mandates the reimbursement of "reasonable" counsel fees. As the ALJ aptly stated, the fact that a third party finances the defense does not relieve the Board of its statutory obligation to pay those reasonable fees. We agree with the ALJ that the purposes and policies of the statute are advanced by allowing a school employee to rely upon his union's insurance policy as a means to fund his legal representation, and thereby "protect himself from the potentially ruinous defense costs," which in turn "cannot inure to the benefit of the Board." [Id. at *12-13.]

The starting point to determine a reasonable attorney fee is the "lodestar," which is "derived by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." Walker v. Giuffre, 209 N.J. 124, 130 (2012) (citing Rendine v. Pantzer, 141 N.J. 292 (1995)). This requires a determination of the hours that were "reasonably" expended on the matter. Id. at 335. The court should exclude hours that were unreasonably expended. "Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary." Rendine, 141 N.J. at 335 (quoting Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)).

In Rode v. Dellarciprete, the court stated that a fee application must include "fairly definite information as the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e.g., senior partners, junior partners, associates." 892 F.2d at 1190 ((citing Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d.

Cir. 1973)). Although "[i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney[,] without some fairly definite information as to the hours devoted to various general activities . . . and the hours spent by various classes of attorneys . . . the court cannot know the nature of the services for which compensation is sought." Rendine, 141 N.J. at 337(citing Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d. Cir. 1973)).

The court "may exclude hours from the lodestar calculation if in its view the hours expended exceed those that competent counsel reasonably would have expended to achieve a comparable result, in the context of the damages prospectively recoverable, the interests to be vindicated and the underlying statutory objectives." Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal citations and quotations omitted). Furthermore, a judge may exclude hours that are "vague" or "improper." N.M. v. A.S., 2018 N.J. Super. Unpub. LEXIS 588, *10 (App. Div. 2018).

"Block billing" is a method by which each lawyer and legal assistant enters their total daily time working on a case, rather than itemizing the time expended on each task specifically. Ibid. (internal citations omitted). Although a substantial number of vague entries may cause reason to exclude hours, block billing may be upheld as reasonable "if the listed activities reasonably correspond to the number of hours billed." FTC v. Circa Direct LLC, 912 F. Supp. 2d 165, 177 (D.N.J. 2012) (internal citations omitted). An appropriate approach is to look at the entire block, compare the listed activities with the time spent, and determine whether the hours reasonably correspond to all activities performed. N.M. v. A.S., 2018 N.J. Super. Unpub. LEXIS 588, at *13 (App. Div. 2018).

As noted previously, this matter here has an extensive procedural history. The case was transferred to the OAL in August of 2007; the hearings occurred in 2012, 2013, 2014 and 2018; and the Initial Decision was issued on September 12, 2019. The law firm's bills for this entire time are "block billed": the bills list the tasks completed, and, below the list, include the total hours for all tasks completed in the aggregate, rather than

indicating the time spent on each task. The bills do not indicate which attorney worked on the case. Rather, the bills all indicate the "Principal Attorney" completed the hours of work.

A careful review of all of the bills reveals that the billing statements include tasks that, in the aggregate, reasonably correspond to the reported hours. Indeed, the firm slightly underestimated the number of hours requested, based upon the bills provided. The bills reasonably correspond to an exceptionally lengthy litigation that spanned over a decade, involved a substantial record and a twenty-four day hearing.

The Board takes issue with portions of the bill, including the regular use of the statement "and necessarily related services" and billing for "attendance to photocopying." See Resp. Br. at 3. However, despite the vagueness of the phrase "necessarily related services," this phrase is positioned at the end of the lists of other tasks that, as noted, correspond to the hours requested in the respective billing statements. Thus, despite the use of that phrase, the hours requested are reasonable in light the actions taken in the case.

With regard to the billing for photocopying, the firm included "attendance to photocopying of documents in preparation for meeting" in a bill dated June of 2007. This bill includes a total of 22.55 hours; however, it does not specify the time spent on each task. Given photocopying is an administrative task that should not be billed at the same rate as a partner of a law firm, a downward adjustment on this bill is warranted. Given a consideration of the various other tasks completed in the June 2007 bill, I find it reasonable to exclude two hours from this bill.

In sum, due to the substantial length of the litigation and the nature of the issues presented, **I GRANT** renumeration of 1,077 hours expended.

The question remains whether the hourly rate sought by petitioners is reasonable. The hourly rate should be calculated according to the "prevailing market rates in the

relevant community" and thus "the court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Rendine, 141 N.J. at 337(citing Rode v. Dellarciprete, 892 F.2d at 1183). "The party seeking to recover attorney's fees has the initial burden of producing sufficient evidence of what constitutes a reasonable market rate for the essential character and complexity of the legal services rendered in order to make out a prima facie case." Lanni v. N.J., 259 F.3d 146 149 (3d Cir. 2001). If an adequate showing has been made, the burden shifts to the other party who must rebut the reasonableness with actual evidence. Smith v. Phila. House. Auth., 107 F.3d 223, 225 (3d Cir. 1997).

A reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community. Rendine, 141 N.J. at 335(internal citation and quotation omitted). The Rules of Professional Conduct (RPC) 1.5(a) requires several factors in consideration of a reasonable fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
> (8) whether the fee is fixed or contingent.
>
> [RPC 1.5(a).]

The "trial court should satisfy itself that the assigned hourly rates are fair, realistic, and accurate, or should make appropriate adjustments." Rendine, 141 N.J. at 337. To

take into account delay of payment, the hourly rate at which compensation should be awarded should be based on current rate at the time of the fee petition rather than the rate when the services were actually performed. See Rendine, 141 N.J. at 337; See also Lanni v. N.J. , 259F.3d 146, 149–150 (3d Cir. 2001).

Once the lodestar has been established, discretion may come into play and a court may adjust the award for a variety of reasons. See Public Interest Research Group of N.J. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995).[10] One instance includes cases where the attorney's compensation is entirely or substantially contingent upon a successful outcome, the court may increase the fee "to reflect the risk of nonpayment." Rendine, 141 N.J. at 337. In determining the appropriateness of an enhancement, a trial court must "determine whether a case was taken on a contingent basis, whether the attorney was able to mitigate the risk of nonpayment in any way, and whether other economic risks were aggravated by the contingency of payment." Id. at 339.

Here, petitioner's counsel requests the rate of $450 for all counsel given that (1) the case was "gigantic", (2) the case was complex, and (3) the attorneys are highly experienced and specialized. See Pet. Br. at 13. Billing statements included services rendered from May of 2007 to August of 2020. Petitioners assert that thousands of pages of discovery were exchanged; the case involved issues of admissibility, reliability of student records and discovery processes of confidential information; and that extensive motion practice was utilized. Pet. Br. at 16–19. Also, the underlying issues were complex, as they involved ascertaining what had happened to students during their high school careers based on disparate records. This was made more complicated in part because Trenton School District changed technology in 2004–2005. Id. at 19. Despite this, the firm achieved a favorable disposition for petitioner, as the case was dismissed in its

[10] Such factors include. "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of alternative employment; (5) the customary fee for similar work; (6) the nature of the fee payment arrangement; (7) time limitations imposed by the client or circumstances; (8) the amount involved and results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the attorney-client relationship; and (12) fee awards in similar cases." Id. at 1185 n.8 (internal citation omitted). However, many of these are subsumed in the lodestar calculation. Id.

entirety. It is undisputed that the NJEA paid the law firm between $129 and $182 per hour.

Petitioners supplied certifications from the three attorneys who represented Azzaro. They detail their experience as attorneys, particularly in this specific area of the law, and their successes. Arnold M. Mellk, Esq. has practiced for over fifty years and has extensive experience representing educators, including licensure hearings initiated by the SBE. He has handled several cases that resulted in reported decisions including in the Third Circuit and New Jersey Supreme Courts. Pet Exh. G. Gidian R. Mellk, Esq. has practiced approximately twenty-three years, during which she exclusively represented public employees "in connection with adversarial action taken against them" by government entities. Pet. Exh. H at ¶2. Edward A. Cridge, Esq. has fifteen years' experience, during which he largely represented public employees. Pet. Exh. I. Each attorney has been involved with several prior cases that applied N.J.S.A. 18A:16-6 and -6.1, including some that are cited here. Pet. Exh. G, H, I.

Petitioners also submitted the certification of Steven R. Cohen, Esq., a partner in the firm Selikoff and Cohen who has practiced law since 1977. Pet. Exh. D. Mr. Cohen certified that he "devote[s] a significant portion of [his] practice to the representation of public-sector labor unions and their employees." Id. at ¶1. He served as the chair of the New Jersey State Bar Association's labor and employment section and is currently a member of its executive committee. Id. at ¶2. In addition to other matters, he has handled "hundreds" of matters involving teachers, including tenure hearings and orders to show cause brought by the SBE. Id. at ¶5. He is also a member of the National Employment Lawyers Association-New Jersey, which equips him with knowledge of the "actual rates charged by member attorneys, who are comparable in experience and skill" to Arnold Mellk. Id. at ¶8. Mr. Cohen certified that he has known Arnold Mellk in a "professional capacity for more than forty years and [is] fully familiar with his background, experience, and skill level" and is aware that he is "very highly regarded" in the labor and employment Law community. Id. at ¶6.

Mr. Cohen certified that the prevailing market rate for an attorney of Arnold Mellk's caliber, who has handled a case as complex as this one, is "significantly" higher than $450 per hour. Id. at ¶7. Also, an hourly rate of $400 per hour for senior associates with more than fifteen years of experience comports with the prevailing market rate for complex litigation "of the nature contemplated by this action." Id. at ¶9.

The hourly rates referenced by Cohen are consistent with the fees authorized by New Jersey courts. In FTC v. Circa Direct LLC, 912 F. Supp. 2d 165 (D. NJ 2012), which involved a complaint alleging deceptive trade practices filed by the Federal Trade Commission, the District Court approved $400 per hour for those attorneys with over fifteen years' experience, $350 per hour for the attorney with over twelve years' experience; and $225 per hour for the attorneys who had between two and three years' experience. In assessing the proper rate, the court examined rates that had previously been approved in the southern New Jersey area and found that "[c]ourts have approved rates between $115 and $750 for matters litigated in this vicinage for attorneys, depending on the attorney's experience and skill[.]" Id. at 175. In Williams v. Asbury Park Bd. of Educ., the court upheld a $450 rate for plaintiff's counsel in an LAD case who had twenty years of experience handling discrimination cases. 2015 N.J. Super Unpub. LEXIS 2422, at *9 (App. Div. 2015). In Winyard v. 21st Century Leasing Corp., No.'s A-2714-12T3 and A-3384-12T3 (N.J. App. Div. Jan 21, 2015) (slip op. at 7), the Appellate Division affirmed the trial court's legal fee award to the plaintiff in a settled law division case, where the defendant filed suit against a plaintiff who purchased a motor vehicle from defendant and obtained his license plates and immediately stopped payment on the check; defendant dismissed its complaint without prejudice. The court affirmed an award of $275 per hour for an associate who had been admitted for about six years, and $475 for a partner who had been admitted to practice law since 1977.

Here, however, the bills submitted by the firm are deficient to the extent they do not differentiate which attorneys billed which hours. Exh. J. Rather, all invoices identify only the "principal attorney" and not the other attorneys. This is at odds with counsels' certifications in which they represented that all three attorneys, each with a different level

of experience, worked on this case. Pet. Br. at 19–22. This makes it impossible to ascertain which of the three attorneys performed each billed service. Given that attorneys with various levels of experience are entitled to significantly different rates, it would be inappropriate to award the highest hourly rate for all billed services. Accordingly, a reduction of the proposed hourly rate is warranted.

Attorney Cridge is the least experienced of the attorneys who worked on the matter. He currently has fifteen years of experience, largely in this and related areas. As indicated by Cohen and supported by case law, a rate of $400 per hour is reasonable based upon the current market rate for an attorney with his experience. Without an adequate guide to determine the work that was performed by each attorney, it is appropriate to apply an hourly rate of $400 for all of the work performed by the attorneys. This rate is reasonable based upon the market rate for a case of this nature at present and the circumstances of this case. This rate is a significant increase from the amount provided the NJEA.

Petitioners argue that an "Rendine enhancement" should be applied given that this case was "entirely or substantially contingent on a special income." As discussed above, under N.J.S.A. 18A:16-6, recoupment of attorneys' fees is not contingent upon a favorable result. Rather, the Board must "defray all costs" which includes reasonable legal fees and costs regardless of the result. Even though a subsequent analysis of the context in which the allegations arose may be required, petitioners did not accept the risk that an attorney who is paid on a fully contingent basis would have accepted. Petitioner has not met the burden of proving that this case warrants a departure from the lodestar rate analysis. Thus, no enhancement will be applied to this case.

Therefore, given the market rate for attorneys in this field, the qualifications of the attorneys, the complex nature of the case, and the billing documents provided by counsel, I **CONCLUDE** that all but two of the requested hours (1,077) shall be provided at a rate of $400, for a total of $430,800.

Petitioner also requests costs in the amount of $5,518.75. N.J.S.A. 18A:16-6 mandates that the Board of Education defray all costs, including reasonable counsel fees and costs. Most of the costs demonstrated by petitioners appear to be reasonable and warranted, with a couple of exceptions. Indeed, a detailed review of the invoices and bills provided reveals that the costs enumerated in the invoices in Exh. J and the documentation in Exh. K exceed the requested amount.

However, the following billed costs will be excluded from that total. The invoice from November of 2007 includes a request for $16.20 for travel where no travel was indicated in the billing statement. Exh. J. Thus, the costs shall be reduced by $16.20. Moreover, petitioner submits an invoice ("Conference Detail") dated November 5, 2008, as the last page of Exh. K which states the amount due is $140.95. It is unclear whether the figures from the final invoice in Exh. K were included in a billing statement in Exh. J. It is also unclear which portions of the Conference Detail invoice belong to the present case, or which portions thereof apply. Exh. K. Thus, the Conference Detail amount of $140.95 will be deducted from the costs awarded. Accordingly, I **CONCLUDE** that petitioners shall be reimbursed for costs in the amount of $5,361.60.

ORDER

For the foregoing reasons, I **ORDER** that petitioners are entitled reimbursement of their bills at the rate of $400 per hour for 1,077 hours, and of $5,361.60 in costs.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 15, 2022
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

mph

APPENDIX

List of Exhibits

For petitioners:

- P-A Excerpt of transcript of May 9, 2018, Order to Show Cause hearing
- P-B Office of Fiscal Accountability and Compliance Report of Investigation
- P-C Order to Show Cause
- P-D Initial Decision, EDE 6297-07, 6463-07, 6464-07
- P-E February 28, 2020, State Board of Examiners Final Decision
- P-F Petition
- P-G Certification of Arnold M. Mellk, Esq.
- P-H Certification of Gidian R. Mellk, Esq.

P-I Certification of Edward A. Cridge, Esq.

P-J Legal services billing records

P-K Bills for costs

P-L November 19, 2011, email with interrogatory

P-M Billing records prepared by other attorneys

P-N July 11, 2012, Order, Waters v. Board of Education, MER-L-1071-12

P-O Certification of Steven R. Cohen, Esq.

For respondent:

R-A June 11, 2007, Order to Show Cause

R-B May 18, 2020, Petition

R-C Petitioners' billable records

R-D Petitioners' responses to discovery requests

R-E Lawless v. TA Assocs., L.P., 2015 N.J. Super. Unpub. LEXIS 2967

R-F Grossman v. Rockaway Twp., 2019 N.J. Super. Unpub. LEXIS 3596

R-G Salaam v. Bd. of Educ. of Irvington, Essex Cty., 2014 N.J. Super. Unpub. Lexis 268

R-H Trenton Board of Education insurance policies

229-22E
OAL Dkt. No. EDU 07409-22
Agency Dkt. No. 216-8/22

New Jersey Commissioner of Education

Order on Emergent Relief

Eric Simkin,

Petitioner,

v.

Board of Education of the Township of Voorhees, Camden 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 petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *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 stated 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.

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2022
Date of Mailing: September 14, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 07409-22
AGENCY DKT. NO. 216-8/22

ERIC SIMKIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,
Respondent.

Eric Simkin, petitioner, pro se

Jeffrey P. Catalano, Esq., for respondent (Parker McCay, P.A, attorneys)

Record Closed: September 1, 2022 Decided: September 6, 2022

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioner, Eric Simkin, filed an emergent motion to challenge how the respondent, Board of Education of the Township of Voorhees, Camden County, (the Board), filled the vacancy caused by the resignation of Board Member, Rachel Van Aken, on February 24, 2022.

The respondent opposed the relief requested and asserted that petitioner's motion is legally defective as none of his arguments provide a basis to grant emergent relief.

PROCEDURAL HISTORY

On August 26, 2022, the Department of Education, Office of Controversies and Disputes transmitted petitioner's Motion for Emergent Relief to the Office of Administrative Law (OAL) to be heard as a contested case. The matter was assigned to the undersigned for oral argument on the emergency request, which was held through Zoom technology, consistent with the OAL COVID-19 Emergency provisions, on September 1, 2022.

FACTUAL DISCUSSION

On February 24, 2022, a vacancy on the Board was created by the resignation of Rachel Van Aken. The Board sought to fill this seat for the remainder of her term which would end in November 2022. The Board was unsuccessful in two attempts during meetings on March 16, 2022, and on April 11, 2022, to fill the vacancy. (Response, par. 4-5, p.2.) Of the six applicants, the two candidates who received the most votes were Dr. Alabado and Ms. Ketover. (Response, Ex. B.)

By email, dated April 12, 2022, the Board's Solicitor advised Executive County Superintendent, Daryl Minus-Vincent, that the deadline for the Board to appoint a candidate to fill the vacancy expired on April 30, 2022. (Response, Ex. B.) As a result, the Board instructed its Solicitor to submit the information about the two leading candidates to the Executive County Superintendent with a request that he fill the vacancy. Ibid.

At its June 15, 2022 meeting, the Board voted to appoint Ms. Ketover to fill the vacancy until the November 2022 election, by a vote of five to three. (Response, par. 10, p.2.) On June 21, 2022, the Board Solicitor sent an email to the new Executive County Superintendent, Carmen Rodriguez, to advise him of the Board's actions, in rescinding

its prior vote, and voting to fill the vacancy to bring the Board back to its full nine members. (Response, Ex. C.)

Ms. Ketover was sworn in as a Board member at the August 29, 2022, Board meeting. (Response, par. 8, p. 4.)

In his motion, petitioner challenges the Board's actions in rescinding its prior vote, and voting to appoint Ms. Ketover after the expiration of the sixty-five days under N.J.S.A. 18A:12-15(a), which states:

> Vacancies in the membership of the board shall be filled as follows:
>
> a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member because of lack of qualifications, or is not filled within 65 days following its occurrence.

The petitioner seeks relief to nullify the agenda and the action taken at the June 15, 2022, Board meeting; to require the Camden County Superintendent fill the vacancy; and to impose sanctions for the alleged improper appointment. (Motion, p.4.)

The respondent opposes the relief requested and asserts that the petitioner's application is legally defective as none of his arguments in the petition provide a basis to grant the requested emergent relief.

LEGAL ANALYSIS AND CONCLUSION

The standards which must be met by the moving party in an application for emergent relief 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.

"Irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). However, pecuniary damages may sometimes be inadequate because of the nature of the injury, or the right affected. Crowe, 90 N.J. at 133. For example, in Crowe, the Court determined neither an unwarranted eviction nor reduction to poverty could be compensated adequately by monetary damages awarded after a distant hearing. Ibid.

The petitioner argued that he will suffer irreparable harm because he is "a Stakeholder and resident" and the "school system is an attraction" that will suffer if the Board does not follow "by-laws, statutes, and laws." (Motion, p.5.) He also argued that the "NJ Learning Standards are a highly controversial topic and concern to many families everywhere, including Voorhees Township." Ibid.

Petitioner has failed to identify any harm, let alone any irreparable harm, he will suffer if his motion for emergent relief is not granted. For instance, petitioner's arguments invoked his concern about the school's curriculum without showing how the curriculum would harm his own children or the children in the school district. He also claimed harm by what he perceived as the political polarization of some members of the Board. Additionally, petitioner's argument presupposes that the Board's action in filling this vacancy after sixty-five days impacted the Board's vote to approve the 2022-2023 Curriculum without demonstrating how those actions were related. Respondent submitted without contradiction that the motion to approve the curriculum passed with seven members voting yes and one member abstaining. (Response, p. 5.) Thus, the motion would have passed even if Ms. Ketover had not been seated.

Petitioner has also failed to show how he has been or will be irreparably harmed by the Board's alleged violation of the law governing school board vacancies, N.J.S. A. 18A:12-15(a). Petitioner appeared to argue that a violation of the sixty-five days for the Board to fill a vacancy constitutes irreparable harm per se. While it may be true that, for example, "[w]here injunctions are creatures of statute, all that need be proven is a statutory violation," Matawan Reg'l Teachers Ass'n v. Matawan-Aberdeen Reg'l Bd. of Educ., 212 N.J. Super. 328 (Ch. Div. 1986) (citation omitted), petitioner has not pointed to any statutory provision for injunctive relief that would control this situation.

For the foregoing reasons, I **CONCLUDE** that petitioner has failed to demonstrate that he will suffer irreparable harm if emergent relief is not granted.

To grant a motion for emergent relief in advance of a plenary hearing, a judge must be satisfied that "[t]he legal right underlying petitioner's claim is settled." N.J.A.C. 6A:3-1.6(b)(2).

In the present matter, petitioner claims that the Board violated State law and its own procedures by acting outside of the sixty-five-day period when it filled the vacancy caused by Van Aken's resignation at its June 15, 2022, Board meeting. I **CONCLUDE** that the legal right underlying petitioners' claim is only settled in that the plain language of N.J.S.A.18 A:12-15(a) states that "[v]acancies in the membership of the board shall be filled" by the county superintendent when they are "not filled within 65 days following the occurrence." Accordingly, I **CONCLUDE** that petitioner has met this requirement.

However, to obtain emergent relief, a petitioner must also demonstrate a likelihood that he will prevail on the merits of the underlying claim. Petitioner has not shown any entitlement to injunctive relief, or that he is likely to prevail on the merits of unseating this board member. When the Board could not fill the vacancy within sixty-five days, notification was sent through the Board's Solicitor asking the Executive County Superintendent to fill the vacancy. (Response, Ex. B.) As to the Board's action which occurred at its June 15, 2022, meeting, the Board Solicitor again notified the Executive County Superintendent. (Response, Ex. C.) Despite being made fully aware of the

situation, respondent argued that "the Executive County Superintendent has yet to advise the Board that he or she found fault with the Board's actions." (Response p. 6.) Respondent further argued that "their lack of action combined with the Board's desire to finish the year with a full complement of Board members creates a reasonable inference that the Executive County Superintendent would not prevent the Board from sorting out the issue on their own." Ibid.

It has not been shown here that the Board's vote to fill this vacancy was arbitrary, capricious, or unreasonable. It appears likely that such determination would require further fact-finding provided at a plenary hearing, which may include testimony and ability to cross-examine potential witnesses.

Therefore, I **CONCLUDE** that petitioner has not demonstrated a likelihood of succeeding on the underlying petition. It is stressed that this analysis does not represent a conclusion that either party is more or less likely to prevail at hearing, but only articulates that certain questions are not settled to a point that petitioner is deemed, for purposes of emergent relief, sufficiently likely to succeed at a hearing.

As to the fourth and final prong, each party argues that they will suffer greater harm if they do not prevail on the question of emergent relief. When the equities and interests of the parties are balanced, petitioner will not suffer greater harm than the Board will suffer if the requested relief is not granted. I am not satisfied that petitioner was able to demonstrate any harm to him caused by the Board's appointment of Ms. Ketover to hold the vacant seat until the seat is up for reelection in November 2022. Under these circumstances, the Board's interest in conducting its business with a full Board, after keeping the Executive County Superintendent fully apprised, outweighs petitioner's interest in stopping the Board from fulfilling its work. Accordingly, I **CONCLUDE** that the balance of equities argument favors respondent, and that petitioner has failed to satisfy this prong.

Based on the above discussion, I **CONCLUDE** that petitioner by only satisfying one of the four prongs of the Crowe test, has not met the standards for emergent relief.

ORDER

For the foregoing reasons, it is **ORDERED** that petitioner's request for emergent relief is **DENIED**.

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

Kathleen M. Calemmo

September 6, 2022
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Sent to Parties: _____

KMC/jns

APPENDIX OF MOTION PROCEEDING

August 25, 2022: Petitioner's Motion for Emergent Relief

August 30, 2022: Respondent's Response Letter Brief

230-22E
OAL Dkt. No. EDU 03414-22
Agency Dkt. No. 95-4/22

New Jersey Commissioner of Education

Order on Emergent Relief

Board of Education of the Township of
North Bergen, Hudson County,

Petitioner,

v.

Maria Castellitto,

Respondent.

The record of this emergent matter 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, the North Bergen Board of Education, has demonstrated entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order, granting the Board's application for emergent relief, is adopted. Respondent Maria Castellitto is ordered to appear for all necessary mental and physical examinations within 60 days. This case shall continue at the Office of Administrative Law with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2022
Date of Mailing: September 14, 2022

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

GRANTING EMERGENT RELIEF

OAL DKT. NO. EDU 03414-22

AGENCY DKT. NO. 95-4/22

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,

Petitioner,

v.

MARIA CASTELLITTO,

Respondent.

Jason M. Ryglicki, Esq., for petitioner (Ryglicki & Gillman, P.C., attorneys)

M. C., respondent appearing pro se

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the Township of North Bergen, Hudson County, ("Petitioner" or "District") filed a Petition with the New Jersey Department of Education ("DOE"), seeking Emergent Relief to compel Maria Castellitto ("Respondent" or "M.C."),

an employee/teacher of the petitioner, to undergo a mental and physical examination. The contested matter was transferred to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:6A-12.1, where it was filed on May 2, 2022, to be heard on an emergent basis.

The Emergent Hearing was scheduled for May 6, 2022, via Zoom. Respondent failed to appear for the Zoom hearing. Counsel for petitioner, Jason M. Ryglicki, did appear for said hearing. It became apparent at that time that respondent would not be appearing for the hearing because she suffers from an inability or unwillingness to adopt to technology, including a fear that she was being watched through her computer by unknown parties and that those she spoke with through the telephone and by way of video conference were imposters. Respondent also had been placed on medical leave since November 18, 2021 and cannot return to a classroom until the appropriate mental and physical examinations are performed. Attempts were made to reach respondent at her last known telephone number and by way of email to no avail. In light of same, it was agreed to by Mr. Ryglicki, Esq. that the matter should not be heard on May 6, 2022 date as an emergent and that the respondent be given an opportunity to appear for an in-person hearing.

The matter was re-scheduled for an in-person hearing on June 6, 2022. On said date, petitioner appeared by way of counsel, Mr. Ryglicki, however, notice was sent to the wrong address for respondent, and she did not appear. Once again attempts were made to reach respondent by phone and email to no avail. In consideration for the concerns of all involved in this matter, Mr. Ryglicki had a wellness check conducted to ensure the well-being and safety of respondent. On June 6, 2022, the Edgewater Police Department conducted the wellness check and determined that respondent seemed well. See, Certification of Jason M. Ryglicki, Esq. attached as Attachment A. The matter was rescheduled for July 12, 2022 as a telephone hearing. Once again, respondent failed to appear for the telephone hearing.

The matter will be decided as an application for Emergent Relief, irrespective, of the above detailed timeline.

FACTUAL DISCUSSION AND FINDINGS OF FACT

At the June 6, 2022 hearing, counsel for respondent read into the record "The Facts Common to All Counts" which were set forth in the Petition for Emergent Relief. The Petition for Emergent Relief to Compel a Mental and Physical Examination is attached hereto as Attachment B. The facts are undisputed, and I therefore **FIND** them to be the **FACTS** of the case.

LEGAL ANALYSIS AND CONCLUSION

A Motion for Emergent Relief filed with the Commissioner of Education shall be subject to a review under Crowe v. DeGioia, 90 N.J. 126, 132-134 (1983), N.J.A.C. 6A:3-1.6. Specifically, there are four prongs the Commissioner must consider when emergent relief is sought: (1) it is necessary to prevent irreparable harm, (2) the legal right underlying the application is unsettled, (3) the applicant has made a preliminary showing of a reasonable probability of ultimate success on the merits, and (4) the relative hardship to the parties in granting or denying the application. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1983).

In the case at hand, M.C. has been employed by the North Bergen Board of Education for nearly twenty years and she has been on medical leave since November 18, 2021, following an examination by the District's psychiatrist, due to her on-going behaviors. According to the District, without consideration as to her prior efficiency and ability in her employment, the past two years have been especially challenging. As clearly set forth in the facts placed on the record and attached hereto as Attachment B, the behavior ranges from an inability or unwillingness to adopt technology which was required to be utilized during the COVID-19 pandemic, including a fear that she was being watched through her computer by unknown parties, believing the people she

spoke with telephonically and by way of video conference were imposters, etc... Her behaviors have necessitated medical intervention on at least two (2) prior occasions and have interfered with her ability to effectively educate her students. Respondent has gone as far as to deny the requirement to modify tests as required by an Individualized Educational Program ("IEP") as required by Federal law. Meanwhile, since November 18, 2021, she has been employed by the District and has failed to comply with the District's resolution mandating that she undergoes physical and mental testing to assess whether she would be capable of returning to the classroom. The District argues that failure to have these tests completed in a timely fashion will continue to impinge on the District's constitutional duty to provide a thorough and efficient education. Further, over the past several months, the District has accrued significant costs associated with M.C.'s medical leave and will continue to accrue additional cost on a daily basis into the foreseeable future. Respondent's on-going refusal to get evaluated has and will continue to cause irreparable harm.

N.J.S.A 18A:16-2 states that a Board of Education "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 burden to challenge any such judgment of the board lies with the challenger of said judgment. Bd. of Edu. of Lyndhurst v. Blevis, OAL Docket No. 01711-07 at 5. To satisfy any issues related to due process, the statute requires "that the teacher or employee be provided with a statement outlining the reasons the board . . . is ordering said teacher or employee to submit to the fitness for duty examination, . . . [and an] opportunity for a hearing, if such a hearing is requested. Further, a teacher or employee has a right to appeal from an adverse decision to the State Board of Education under N.J.S.A. 18A:6-27." Id. (citing Curcio v. Collingswood Bd. of Educ., 2006 U.S. Dist. LEXIS 46648, 2 006 WL 1806455 at * 10 (slip op.) (D.N.J. 2006); Kochman v. Keansburg Board of Education, 124 N.J. Super. 203, 213-14, 305 A.2d 807 (Ch. Div. 1973). The right of a Board to order such evaluation has been found constitutional in both Federal and State Courts. See, Hoffman v. Jannarone, 401 F.

Supp. 1095 (D.N.J. 1975) (rev'd in part); Gish v. Board of Ed. of Borough of Paramus, Bergen County, 145 N.J. Super., 96, 104-105, 366 A.2d 1337 (App. Div. 1976).

In this case, M.C. refused to be tested after being afforded her procedural right to be heard in a preliminary hearing. M.C. failed to appear at said meeting despite adequate notice. Furthermore, the District argue that M.C.'s refusal has never been supported by any rationale or other reasonable basis for such denial, and she has never appealed nor indicated her intent to appeal the determination of the Board. As shown above, the legal rights of petitioner to seek this evaluation is settled law and the District is likely to succeed based on that settled right, and the facts specific to this case. Therefore, the District clearly has satisfied the second and third prong of the Crow v. DeGioia test.

While the District acknowledges that ordering M.C. to undergo evaluations touches her constitutional rights. It is well settled that "the interest of the State of New Jersey to protect its youth outweighs the individual constitutional rights of the teacher or employee in question." See, Hoffman v. Jannarone, 401 F. Supp. 1095 (D.N.J. 1975) (rev'd in part); Gish v. Board of Ed. of Borough of Paramus, Bergen County, 145 N.J. Super., 96, 104-105, 366 A.2d 1337 (App. Div. 1976). While M.C. is subject to an undeniable hardship, the hardships faced by the Board relate to their constitutional obligation to provide a thorough and efficient education to their students, as well as the ongoing costs accrued by the District at the expense of the taxpayers of the Township and State. Therefore, in weighing the relative hardships, it is clear that the hardships faced by the Board of Education outweigh the hardships of the respondent, thereby satisfying the fourth prong under DeGioia.

For the reasons set forth above, I **CONCLUDE** that respondent's request for emergent relief is warranted, and that the petitioner be ordered to undergo physical and mental evaluation, as set forth more fully on the record and in the petition. (Attachment B).

ORDER

It is hereby **ORDERED** that petitioner's request to compel respondent to appear for a mental and physical examination is hereby **GRANTED**. it is further **ORDERED** that the respondent is to appear for all necessary mental and physical examinations within sixty days.

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.

September 2, 2022

DATE

ELISSA MIZZONE TESTA, ALJ

sej

APPENDIX

List of Moving Papers

For Petitioner:

Letter Brief

Petitioner for Emergent Relief (Attachment B)

Wellness Check Certification of Counsel (Attachment A)

For Respondent:

None

232-22
Agency Dkt. No. 88-4/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of Jurah Peele, School District of the City of Linden, Union County.

For the Petitioner, Joseph A. Garcia, Esq.

No appearance by or on behalf of Respondent, Jurah Peele

This matter was opened before the Commissioner of Education on April 21, 2022, through tenure charges of unbecoming conduct and abandonment of position certified by Dr. Marnie Hazelton, Superintendent of the Linden School District ("District"), together with supporting evidence against respondent, Jurah Peele, a tenured custodian in the District's employ. The District provided respondent with written notice of such certification at the respondent's current known address, via regular mail.

On April 25, 2022, the Commissioner directed the respondent via regular mail to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would result in the charges being deemed admitted. No reply to the tenure charges has been received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent was employed by the District as a tenured custodian. The Statement of Evidence indicates that the respondent refused to comply with Executive Order No. 253 which required all school personnel to either submit proof of Covid-19 vaccination or take a weekly Covid-19 test. As a result of his refusal to comply with Executive Order No. 253, the respondent has not returned to work since October 28, 2021.

Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against him at the District level and before the Commissioner, the Commissioner finds that the District's charge of unbecoming conduct has been proven and overwhelmingly warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from his tenured position with the Linden Public School District.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2022
Date of Mailing: September 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

233-22

New Jersey Commissioner of Education

Final Decision

Laurie Weber,

Petitioner,

v.

Board of Education of the Village of Ridgewood, Bergen County,

Respondent.

Synopsis

Petitioner alleged that the respondent Board is providing child care services through the Infant Toddler Development Center (ITDC) to children who are younger than school age, in contravention of *N.J.S.A.* 18A:20-34(f). Further, petitioner requested, *inter alia*, that the ITDC cease operations or join the New Jersey Department of Families and Children's (DCF) pilot program for school district full-time child care centers. The Board filed a motion to dismiss, arguing that its intended participation in the DCF pilot program satisfied petitioner's demands for relief in this matter.

The ALJ found, *inter alia*, that: the ITDC program is operated in one of the Board's school buildings and provides full-time fee-based child care services to residents of the District and non-residents for children aged six weeks to four years, including children of the District's staff; ITDC staff are employees of the District and under the Board's operation; the IDTC is open and accepts non-school age children from within and outside the District before, during, and after the usual school operating hours; DCF stated in a letter to the Board that the ITDC is assured admission into its new pilot program, allowing it to provide child care services to younger children, and that the ITDC can continue to operate under a temporary license pending the pilot program's launch, subject to compliance with DCF regulations. Accordingly, the ALJ determined that the within petition is moot and should be dismissed.

Upon review, the Commissioner disagreed with the ALJ's determination that the petition is moot and found instead that – although the Board is eligible to participate in the DCF pilot program and has been assured of admission once the Board complies with DCF's Manual of Requirements for Child Care Centers (*N.J.A.C.* 3A:52), the Commissioner has no ability to ensure the Board's compliance with DCF regulations. Until the Board is officially enrolled by DCF into the pilot program and complies with all applicable DCF regulations, ITDC is operating in violation of *N.J.S.A.* 18A:20-34(f). Accordingly, the Initial Decision of the OAL was rejected and the Board's motion to dismiss was denied. The Board must complete its enrollment in the DCF pilot program by June 30, 2023 or cease ITDC operations.

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

233-22
OAL Dkt. No. EDU 06165-21
Agency Dkt. No. 114-7/21

New Jersey Commissioner of Education

Final Decision

Laurie Weber,

Petitioner,

v.

Board of Education of the Village of Ridgewood, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

In this matter, petitioner alleges that the Board is providing child care services through the Infant Toddler Development Center (ITDC) to children who are younger than school age, in contravention of *N.J.S.A.* 18A:20-34(f). Following a motion to dismiss by the Board, the Administrative Law Judge (ALJ) concluded that the petition is moot because the New Jersey Department of Children and Families (DCF) stated in a letter to the Board that the ITDC is assured admission into a pilot program allowing it to provide child care services to younger children, and that the ITDC can continue to operate under a temporary license pending the pilot program's launch, subject to compliance with DCF regulations.

In her exceptions, petitioner argues that the Board has not enrolled in the pilot program or filed the necessary licensing application and, therefore, that the Board is continuing to operate the ITDC unlawfully. Petitioner contends that the finding of mootness relies on the Board's promise to comply with the licensing and pilot program requirements, and that the voluntary cessation doctrine holds that a matter of law cannot be considered settled or moot simply because the responding party chooses to cease the alleged unlawful act while the case is active, allowing them the ability to repeat the violation at a later time.

In reply, the Board notes that the relief sought in the petition of appeal was an order compelling the board to cause the ITDC to join the pilot program. The Board contends that its actions in furtherance of joining the program, combined with the assurance of DCF that the Board will be ensured admission into the program, render the petition moot.

Upon review, the Commissioner disagrees with the ALJ that the petition is moot. The Commissioner has previously found that the plain meaning of *N.J.S.A.* 18A:20-34(f) permits the use of school property for child care services *only* before or after school, for school aged children who attend the district's schools. *Under the Sun Learning Center of Marlton, Inc. et al. v. Bd. of Educ. of the Twp. of Evesham, Burlington Cty.*, Commissioner Decision No. 323-18, decided Oct. 19, 2018. *N.J.S.A.* 18A:20-34(f) precludes operation of programs such as the ITDC because it serves children who are not school aged, operates during regular school hours, and is open to non-residents.

While *N.J.S.A.* 30:5B-34 establishes a three-year School District Child Care Services Pilot Program that permits community child care providers to operate in a public school facility, notwithstanding the restrictions of *N.J.S.A.* 18A:20-34(f), the Board has yet to enroll in that program. The Commissioner recognizes that based on correspondence from DCF, the Board is

eligible to participate in the pilot program and has been assured of admission, provided that the Board complies with DCF's Manual of Requirements for Child Care Centers (*N.J.A.C.* 3A:52). However, the Commissioner has no ability to ensure that the Board complies with DCF's regulations and, unless and until the Board does so and is officially enrolled by DCF in the pilot program, ITDC is operating in violation of *N.J.S.A.* 18A:20-34(f).[1] The Board must complete its enrollment in the pilot program by June 30, 2023 or cease operations.

Accordingly, the Initial Decision is rejected, and the Board's motion to dismiss is denied.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2022
Date of Mailing: September 19, 2022

[1] The Commissioner notes that the ITDC, which was granted participant status in this matter, argues that it provides instruction and that its use is therefore permitted pursuant to *N.J.S.A.* 18A:20-34(a). Given that the ITDC provides services to children as young as six weeks, the Commissioner concludes that it does not meet the requirements of *N.J.S.A.* 18A:20-34(a).

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 06165-21
AGENCY DKT. 114-7/21

LAURIE WEBER,
Petitioner,
v.
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY
Respondent.

Laurie Weber, appearing pro se

Matthew Giacobbe, Esq. appearing on behalf of respondent (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys)

Charles V. Reilly, Esq., appearing on behalf of Infant Toddler Development Center Parent Group (Attorney)

Record Closed: June 20, 2022 Decided: June 22, 2022

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Petitioner requests that the Infant Toddler Development Center (ITDC) cease its operation or join the pilot program permitting such use. The New Jersey Department of

Families and Children (DCF) assured the school district that the ITDC is eligible for the program and can continue to operate. Is the case moot? Yes. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969).

PROCEDURAL HISTORY

On July 23, 2021, Weber filed a petition of appeal and motion for emergent relief, initially requesting that the Village of Ridgewood's Board of Education (Board or District) stop its operation of the ITDC. Further, petitioner sought to compel the Board to either proceed with the request for proposal (RFP) process to allow a private entity to provide child care services or apply to the newly created pilot program requiring Board compliance with the necessary financial and safety standards.

On July 27, 2021, the Department of Education (DOE), Office of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL) for hearing as a contested case and resolution of Weber's motion for emergency relief. On July 30, 2021, I denied Weber's request for emergent relief.

On September 13, 2021, the DOE's Acting Commissioner (Commissioner) upheld the denial of emergent relief and returned the case to the OAL for "proceedings as the parties and the [Administrative Law Judge] deem necessary to bring it to closure."

I held several conferences during which the parties indicated a desire to resolve the case and issues concerning the ITDC's operation.

On December 2, 2021, the newly-formed Infant Toddler Development Center Parent Group (ITDCPG) filed a Motion to Intervene in this case, an application that both petitioner and the Board opposed. On February 7, 2022, I denied the ITDCPG's motion for intervenor status.

Following the denial, the ITDCPG filed a Motion for Interlocutory Review before the Commissioner. On March 7, 2022, the Commissioner concurred that the ITDCPG did

not meet standards for intervention but afforded the ITDCPG limited participation status under N.J.A.C. 1:1-16.5.

On March 12, 202, the ITDCPG filed a motion seeking leave to appeal the Commissioner's March 7, 2022, decision. On May 5, 2022, Hon. Robert J. Gilson, J.A.D. of the Superior Court of New Jersey, Appellate Division, denied the ITDCPG's motion.[i]

While the ITDCPG's motion before the Appellate Division was pending, the Board continued its efforts to resolve the remaining issues in this case. Despite those efforts, petitioner is unwilling to withdraw her petition.

Respondent requested leave to file a motion to dismiss, which I granted. On May 31, 2022, the Board filed its motion. On June 15, 2022, the ITDCPG filed a brief in support of the Board's application agreeing that the petition is now moot, and petitioner filed her opposition to the motion. On June 20, 2022, having permitted further replies but received none, I closed the record.

FINDINGS OF FACT

Based on the documents submitted in support of and opposition to the motion, and assuming the facts alleged in the petition are true and giving petitioner the benefit of all legitimate inferences, I **FIND** the following as **FACT**:

The ITDC, located at the District's Gen School, provides full-time fee-based child care services to residents of the District and non-residents for children aged six weeks to four years, including children of the District's staff. ITDC staff are employees of the District and under the Board's operation. The IDTC operates from 7:00 a.m. until 6:30 p.m. for the calendar year. In other words, the IDTC is open and accepts non-school age children from within and outside the District during usual school operating hours.

In 2015, the District obtained an exemption from the DCF concerning the ITDC's licensing requirements, but at other times during its thirty-three years of operation, the

[i] The parties do not present the Judge's Order, but no party disputes this result.

ITDC had licensure. Notably, the DCF is responsible for inspecting and licensing all child care centers requiring licensure to ensure compliance with regulatory mandates.

Although faced with financial concerns regarding the IDTC, the Board permitted the IDTC to stay open and demonstrate its economic efficiency over the 2021-22 school year. The Legislature established a pilot program for school district full-time child care centers in 2020, but the Board declined to apply in April 2021. The pilot program experienced delays in implementation due to the COVID-19 pandemic.

To resolve the issues in this case, the District contacted the DCF about the pilot program and the ITDC's continued operation. The District presents correspondence dated March 25, 2022, from the DCF's Acting Commissioner of Policy, Oversight, and Regulatory Affairs, Brian C. Ross, Esq., stating that the ITDC was eligible to participate and assured admission into the Pilot Program enacted in 2020, designed "to study the impact and effect of community providers operating in public school facilities for the purpose of providing child care services for children younger than school age." Moreover, to allow for the continued operation of the District's ITDC pending the pilot program's launch, DCF will issue a temporary license to the ITDC, subject to compliance with the Manual of Requirements for Child Care Centers (Manual) under N.J.A.C. 3A:52.

Further, the Board publicly met on April 25, 2022, and passed a Resolution regarding the March 25, 2022, letter from DCF's Acting Commissioner. The Resolution provides that the Board accepts DCF's permission to enroll in the pilot program under N.J.S.A. 30:5B-34 and advises that it will fully comply with the applicable standards in the Manual under N.J.A.C. 3A:52. Moreover, the Board directs the ITDC's Director to ensure full compliance with the Manual. Lastly, the Board authorized the Board's attorney to share its Resolution and notify the DCF that it accepts enrollment in the pilot program under N.J.S.A. 30:5B-34 and that the ITDC will fully comply with the Manual.

According to Weber, the DCF performed a courtesy inspection of the ITDC on May 25, 2022.

DISCUSSION AND CONCLUSIONS OF LAW

Motion to Dismiss

The rules and regulations governing OAL procedures do not contain a provision for a motion to dismiss. However, N.J.A.C. 1:1-1.3(a) allows Administrative Law Judges to follow the New Jersey Court Rules when a rule is absent from the Administrative Code provisions covering the OAL. Thus, consideration of R. 4:37-2 (b) is appropriate, which allows for a motion to dismiss in a contested case. The Court in Dolson v. Anastasia, 55 N.J. 2, (1969), described the test for evaluating a motion to dismiss, instructing the judge to consider whether:

> The evidence, together with the legitimate inferences therefrom, could sustain a judgment in favor of the party opposing the motion, I.e. [sic], if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. The point is that the judicial function here is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion.
>
> [Ibid. at 5, 6.]

Child Care Services on School Premises

In enacting N.J.S.A. 18A:20-34, the Legislature recognized that schools might use their premises for additional lawful purposes when not needed for education. For example, the statute enumerates certain suitable functions, including polling places, lecture halls, gathering places for civic, social, artistic, entertainment purposes, or public libraries.

Under N.J.S.A. 18A:20-34(f), a District can use school premises for "[c]hild care services provided by the board of education, or a board-approved sponsor, or a child care

program licensed under P.L. 1983, c. 492 (C. 30:5B-1 et seq.), before or after regular school hours, for any school-aged child who attends school within the school district."

However, the Legislature established "a three-year School District Child Care Services Pilot Program to study the impact and effect of community providers operating in public school facilities [supplying] child care services for children younger than school age" beyond those permitted under N.J.S.A. 18A:20-34(f). P.L. 2019, c.492 (January 21, 2020).

The new pilot program addressed in N.J.S.A. 18A:20-34(g), amends N.J.S.A. 18A:20-34 regarding the use of school premises and supplements P.L.1983, c.492 (C.30:5B-1 et seq.), or the "Child Care Center Licensing Act." P.L. 2019, c. 426 § 1. The program and regulatory addition allow school districts to offer child care services, such as those provided by the ITDC, through licensed community providers. That provider can be a for-profit child care center, a non-profit child care center, or a local government unit. N.J.S.A. 30:5B-34 a—j. Undeniably, the Legislature intended that district-operated child care centers offering broader services to non-school-aged children comply with the licensing requirements and the DCF's Manual, N.J.A.C. 3A:52-1 to 9. See also N.J.S.A. 30:5B-34c (A community provider operating in a public school facility through the pilot program must be licensed under the "Child Care Center Licensing Act").

Notably, N.J.S.A. 18A:20-34(g) now permits school districts to provide full-time child care services to children younger than school age on school premises under certain conditions:

> (1) Child care services provided by the board of education, a board approved sponsor, or a child care program licensed pursuant to P.L.1983, c.492 (C.30:5B-1 et seq.) for children younger than school age and which are provided for less than 24 hours a day. Preference for the child care services for children younger than school age shall be given to children who reside within the school district and to children of persons employed by the school district whether the employee resides within the school district or outside the school district, and if available space permits the school district may provide the child care services to any child who resides outside the school district

> (2) Child care services provided pursuant to paragraph (1) of this subsection shall meet the standards established in the Manual of Requirements for Child Care Centers promulgated pursuant to regulations of the Department of Children and Families. The tuition amount charged for the child care services shall be within the range of tuition amounts charged for such services by licensed child care centers located within the county in which the school district is located. ...
>
> [Ibid.]

Mootness

"Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm." Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. at 496. At the heart of this doctrine is a court's ability to grant effective relief. Wilson v. Reilly, 163 Fed. Appx. 122, 125 (3d Cir. 2006). "Thus, 'if developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot.'" Ibid. (quoting Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 698–99 (3d Cir. 1996)). Notably, the New Jersey Supreme Court recognizes that court-fashioned doctrines for handling litigation, such as mootness, are applicable to administrative proceedings. City of Hackensack v. Winner, 82 N.J. 1, 29 (1980).

Here, the Board took steps not only to enroll in the pilot program but to address its continued operation until the implementation of that program. The Board's Resolution acknowledges its obligation to comply with the DCF's Manual and that its participation in the pilot program is through N.J.S.A. 30:5B-34. While Weber urges that I order the Board to begin the licensing process, the DCF governs that process, not the DOE. Notably, while Weber disputes the import of DCF's May 25, 2022, courtesy inspection of the ITDC, this demonstrates ITDC's commitment to move forward with DCF's compliance process. In other words, I **CONCLUDE** that because the District and Board have now resolved to

enroll in the pilot program and comply with its requirements, there is no remaining issue for resolution.

Even though Weber maintains that the Board can change its mind as it did in the past, speculation does not give rise to additional relief. Indeed, Weber obtained the relief requested, the Board's lawful operation of the ITDC and compelling the ITDC's enrollment in the pilot program.

While Weber insists that the parties must prepare a formal settlement agreement, I **CONCLUDE** this is unnecessary under the circumstances. See Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242 (2013) (a formal written and signed settlement agreement is not necessary for an enforceable settlement).

Therefore, I **CONCLUDE** that this case is moot and should be dismissed.

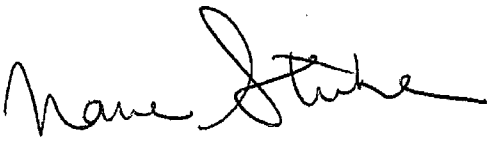
ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the motion to dismiss is **GRANTED**, and that this case 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.



June 22, 2022

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: June 22, 2022

Date Mailed to Parties: June 22, 2022

ljb

234-22

New Jersey Commissioner of Education

Decision

G.C., on behalf of minor child, B.C.,

Petitioner,

v.

Board of Education of the Township of Lacey, Ocean County,

Respondent.

Synopsis

Petitioner disputed the respondent Board's finding that her son, B.C., committed an act of harassment, intimidation or bullying (HIB) against a fellow student pursuant to New Jersey's Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13.2 et seq (the Act). After an investigation by the school's anti-bullying specialist, the Board determined that B.C. had committed an act of HIB against a transgender classmate (T1) when he commented that "girls should not be allowed to use the boys' bathroom" while both he and T1, who was previously known as female and now identifies as male, were in the boys' bathroom. The Board asserted that B.C.'s conduct satisfied all of the elements of the statutory definition of HIB under the Act. The petitioner contended that B.C. was simply stating an opinion, and that the Board's action was arbitrary, capricious, and/or unreasonable. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; an action by a board of education is entitled to a presumption of correctness unless it is proven to be arbitrary, capricious or unreasonable; under the Act, "harassment, intimidation, or bullying" is broadly defined as any gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability, that takes place on school property and substantially disrupts the orderly operation of the school; in the instant case, the record reflects that B.C. did not deny making the statement that "girls should not use the boys' bathroom," but characterized his comment as simply stating an opinion. The ALJ concluded B.C.'s comment was reasonably perceived as motivated by T1's gender identity, a protected characteristic under the Anti-Bullying Act; further, the Board's determination that B.C.'s conduct met the statutory definition of HIB, and that B.C. committed an act of HIB against T1, was not arbitrary, capricious, or unreasonable. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination pursuant to the Act. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

234-22
OAL Dkt. No. EDU 10910-20
Agency Dkt. No. 225-10/20

New Jersey Commissioner of Education

Final Decision

G.C. on behalf of minor child, B.C.,

Petitioner,

v.

Board of Education of the Township of Lacey, Ocean County,

Respondent.

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

Upon review, and for the reasons thoroughly detailed in the Initial Decision, the Commissioner concurs with the Administrative Law Judge that the Board's decision that B.C. committed an act of harassment, intimidation, and bullying was not arbitrary, capricious, or unreasonable.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelina Allen McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2022
Date of Mailing: September 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10910-20
AGENCY DKT. NO. 225-10/20

G.C. ON BEHALF OF MINOR CHILD, B.C.,
Petitioner,
v.
TOWNSHIP OF LACEY, BOARD OF EDUCATION, OCEAN COUNTY,
Respondent.

Joseph J. Dochney, Esq., for petitioner (Law Offices of Joseph J. Dochney, LLC, attorneys)

Geoffrey N. Stark, Esq., for respondent (Capehart Scatchard, P.A., attorneys)

Record Closed: June 20, 2022 Decided: August 10, 2022

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

In this matter, petitioner G.C.,[1] on behalf of her son, B.C., appeals the decision of respondent Board of Education of the Township of Lacey (Board) to the Commissioner of Education that B.C. committed an act of harassment, intimidation, or bullying (HIB) against a transgender classmate in violation of the Anti-Bullying Bill of Rights Act (Anti-Bullying Act), N.J.S.A. 18A:37-13 et seq. Specifically, the Board determined that B.C.'s utterance to the effect that "girls should not be allowed to use the boys' bathroom" while both he and T1, who was born female but identifies as male, were in the boys' bathroom satisfies all of the elements of the statutory definition of HIB under the Anti-Bullying Act. Petitioner contends that the Board's action was arbitrary, capricious, and/or unreasonable.

PROCEDURAL HISTORY

On October 16, 2020, G.C. filed a Petition of Appeal of the Board's HIB determination with the Commissioner of Education. On November 9, 2020, the Board filed an answer, and thereafter the Commissioner transmitted the matter to the Office of Administrative Law (OAL), where it was filed on November 12, 2020, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On March 24, 2022, the Board filed a motion for summary decision upholding the Board's HIB determination and dismissing G.C.'s appeal, and G.C. thereafter filed opposition to the motion. The Board held that B.C. committed HIB by "commenting to the effect that 'girls should not be allowed to use the boys' bathroom' while in the bathroom and in the presence of a transgender individual who identifies as a boy . . . because there is no dispute as to the material facts of the case, and because the Board did not act in an arbitrary, capricious, or unreasonable manner when it found [B.C.'s] admitted actions to be a violation of the [HIB] policy, and thereby constitute a[n] HIB violation." In opposition, G.C. maintains that B.C. did not commit an act of HIB against T1 because, although B.C.

[1] Students and parents will be referred to by initials or pseudonyms.

admits that he said girls should use the girls' bathroom, he was "stating his opinion" and "believed that T1 was a girl and was unaware of any gender transition."

FACTUAL DISCUSSION

Based upon the credible documentation submitted by the parties, I **FIND** the following **FACTS**:

In 2014, the Board adopted Policy #5512—Harassment, Intimidation, and Bullying, which prohibits HIB in accordance with the Anti-Bullying Act. (R-8.) In 2015, the Board adopted Policy #5756—Transgender Students, under which "[a]ll students are entitled to have access to restrooms, locker rooms, and changing facilities in accordance with their gender identity[.]" (R-7.)

On October 16, 2019, Gregory Brandis, the principal of Lacey Township High School, received an HIB complaint via email from the mother of T1, who was then a sophomore at the school. (P-E.) In the email, T1's mother wrote:

> Once again I'm emailing to report an incident of harassment [T1] experienced at school today. A group of boys outside the bathroom stall he was in were calling him a girl and saying he should use the girl's bathroom. Naturally he was afraid to come out since there's only one of him, so he waited until they left and doesn't know who they were. I don't know what else to say at this point. It's only two months into the school year and I'm literally exhausted and broken from watching my once happy child become someone who is sad and anxious daily. My heart breaks each morning as I watch him leave for school knowing he's filled with dread, knowing that he isn't going to be safe there.
>
> [Ibid.]

On October 17, 2019, Principal Brandis spoke with T1's mother about the incident. (P-A.) Because T1's mother could not identify the alleged aggressors, the assistant principal of the high school, Timothy Dowd, reviewed surveillance video, which showed that B.C., who was also then a sophomore, and another student, B.C.'s friend R.C., exited

the boys' bathroom just prior to T1. (P-G.) Principal Brandis directed Craig Cicardo, the high school's anti-bullying specialist, to conduct an HIB investigation. (P-A.) As part of the investigation, Mr. Cicardo interviewed B.C. and R.C. about the alleged incident. (P-H; P-I.) In a written statement, B.C. explained that, while he was in the boys' bathroom, he saw T1 waiting to use a stall. As B.C. went "to use the [urinal] I look back and he [was] already walking into the stall." (P-H) Then, while T1 was in a stall, B.C. "said to MYSELF 'Girls should not be allowed to use the bathroom.'" (Ibid.)

In his written statement, R.C. confirmed B.C.'s version of events. (P-H; P-I.) According to R.C., B.C. "said why is she in here, there's a girl bathroom. I [told] [B.C.] to chill and just leave." (P-I.) R.C. further stated that B.C. "meant to mumble those words," and "I told [B.C.] to knock it off and just to leave the bathroom." (Ibid.) T1 was not interviewed during the course of the investigation. However, Assistant Principal Dowd spoke with B.C.'s father about the incident. (P-A.)

As a result of his investigation, Mr. Cicardo concluded that B.C. committed an act of HIB against T1. (P-A.) In his incident report, Mr. Cicardo listed "Behavioral Observations" as "Embarrassing, Insulting Remarks, Socially Excluding" and listed "Motivational Characteristics" as "Gender Identity and Expression." (Ibid.) Mr. Cicardo determined that B.C.'s statement was "Reasonably perceived as motivated by actual or perceived characteristic" because "(T1) was referred to as 'Girl' and he identifies as a male"; the statement took place on school property; there was "Substantial disruption or interference with orderly operation of school or the rights of other students" because "Law requires those who identify as Transgender must have the right to use the Facilities of Their Gender Identification"; there was "Physical or emotional harm to student or property" and "Reasonable fear of harm to student or property" because "(T1) was emotionally hurt as a result of the incident"; the statement was "Insulting or demeaning to student/group" because "(T1) identifies as male"; and the statement "Created hostile educational environment" because "(T1) reported to his mom that he was afraid to come out of the bathroom stall after the comment(s)." (Ibid.) While Mr. Cicardo concluded that B.C. engaged in HIB, he determined that B.C.'s "HIB behavior" was "unintentional." (Ibid.)

In a letter dated November 25, 2019, Principal Brandis informed B.C.'s parents as follows:

> The district found evidence your child committed the following act(s) of [HIB]: The incident was reported by email from T1's mother. T1 was in a boy's bathroom and other students were outside telling T1 he should use the girl's bathroom, not the boy's bathroom.
>
> The investigation results have been reported to the Board of Education.
>
> As a consequence of the incident, B.C. was referred to the school [student assistance coordinator] for understanding the issue of Gender Identity.
>
> [B.C.'s parents could request a hearing before the Board to contest the HIB determination.]
>
> [P-J.]

In a December 20, 2019, letter to Principal Brandis, counsel for B.C.'s parents, Joseph J. Dochney, stated that the parents "are confused" by his November 25, 2019, letter because the principal's letter "does not specify what acts or conduct was done by their son" and "refers to apparent comments by 'other students' to 'T1'." (P-K.) Counsel requested further information about the incident and information concerning "[d]ates and procedures by which the school disseminated information regarding HIB or LGBTQ information and/or policies to the student body" and "[w]hat education was provided to students prior to this incident regarding transgenders and their rights to bathrooms/locker rooms/changing facilities, etc. of their choice." (Ibid.) Counsel stated that "[a]t this point, we are not requesting an appeal," but instead "investigating the incident [because] we are very confused as to what the actual actions were that apparently led someone to any conclusion of impropriety or violation of HIB." (Ibid.)

Subsequently, B.C.'s parents requested a Board hearing, which was ultimately held on July 20, 2020.[2] Prior to the hearing, the Board provided B.C.'s parents with certain requested information, including the October 16, 2019, email from T1's mother to Principal Brandis; B.C.'s and R.C.'s written statements; and Mr. Cicardo's HIB report. (P-L.) Upon receipt of that information, Mr. Dochney asked the Board's counsel if the Board would provide the other information specifically requested in his December 20, 2019, letter. (Ibid.) In response, the Board's counsel informed Mr. Dochney that "it is our position that you have those documents to which your clients are entitled, namely the HIB investigation report," and that "[t]here is no further discovery to which you are entitled." (P-M.)

By letter dated July 22, 2020, the superintendent of schools of the Lacey Township School District, Vanessa P. Clark, Ph.D., informed B.C.'s parents that, "[a]fter weighing all of the information presented by you and your attorney, as well as the Administration," the Board voted 3-3 to overturn the Administration's finding "that [B.C.'s] comment to a transgender student in the boy's bathroom to the effect that girls should not be allowed to use the boy's bathroom constituted an act of HIB under [the Anti-Bullying Act] and Board Policy 5512," and, therefore, their "appeal of the initial HIB finding is denied, and the decision that a[n] HIB violation occurred is affirmed." (P-N.)

In her letter, Superintendent Clark detailed the procedural history of the matter. She stated that the hearing was held on July 20, 2020, and "took place in executive session and lasted over one hour." While T1's parents "were invited to the Board hearing," they "chose not to attend." However, at the hearing, several people testified in support of B.C.'s "character and reputation in the community" and B.C. testified on his own behalf. B.C. "admitted making the comment regarding the transgender student but claimed it was said only to a friend of his in the bathroom, that he did not mean to hurt the student and that he was sorry." (Ibid.)

[2] In a letter to B.C.'s parents dated July 22, 2020, Lacey Township School District superintendent Vanessa P. Clark, Ph.D., stated that "the scheduling of your appeal . . . [was] delayed over several months" for various reasons, including the COVID-19 pandemic. (P-N.)

ARGUMENTS OF THE PARTIES

G.C. argues that there were certain procedural defects in the Board's handling of the HIB matter, specifically, that Principal Brandis' November 25, 2019, letter was somewhat vague by not specifically stating what B.C. himself was accused of having done, and instead describing the alleged act of HIB as, "T1 was in a boys' bathroom and other students were outside telling T1 he should use the girls' bathroom."

Further, G.C. argues that none of the papers indicate when or if the superintendent reported the HIB findings to the Board, and that the HIB report confusingly states that the HIB findings "will be affirmed at the 12/16/2019 Board meeting." The HIB report also does not state whether the investigation was completed within ten days of the initial complaint as required by the Anti-Bullying Act.

In her petition of appeal, G.C. alleges that "there is no clear evidence that B.C. had harassed, intimidated or bullied T1" because "[a]ny statements made by [B.C.] were his opinions directed to his friend" and "[h]e never addressed any personal comments to T1, nor did he intend to make T1 uncomfortable in any manner." (Petition of Appeal, ¶ 23.) G.C. further alleges that B.C. "did state his general opinion to his friend as they were leaving the bathroom," but that "[a]t the time, he had no knowledge that the person in the boy's bathroom identified as male, as all previous contact with T1 as a classmate indicated he was a female." (Ibid.) In the petition, G.C. takes issue with certain aspects of the school's HIB investigation. She alleges that "[t]here was never any conversation and/or written statements obtained from T1," and that T1's mother indicated that "a group of boys outside the stall had communicated directly with T1," but "B.C. denied any direct comments or name calling to T1" and "the investigation did not indicate if other boys had entered the bathroom after B.C. and his friend left[,] who may have been the actual culprits." (Id. at 11.) According to G.C., "neither the petitioner, nor any other boys[,] were ever identified by T1" and "T1 never reported the incident, was never interviewed[,] nor was there any determination that he was harmed." (Id. at 12, 21.)

G.C. further claims that "B.C. was not aware that transgender students were allowed to use the bathroom to which they identify," and that the school's "policy

pertaining to transgender students . . . was never properly disseminated to students or families." (Id. at 21, 22.) However, G.C. admits that she was told that "the policy was included in the student handbook," and that, although "the handbook was not distributed to the students," it was "available online." (Id. at 22.) As relief, G.C. seeks to "overturn the ruling that B.C. was guilty of a[n] HIB violation." On November 9, 2020, the Board filed an answer to the petition.

In response, the Board states that "due to T1's withdrawal from the District following this incident it was not possible for Mr. Cicardo to engage T1 or his parents in follow-up conversations." (Answer at 11.) The Board also states that "in his written statement, B.C. admitted to making the offending comment in the course of speaking to [R.C.]." (Id. at 21, 23.) Finally, the Board states that its "policies regarding HIB (No. 5512) and transgender students (No. 5756) are publicly available on the District's website," and that "the policy on Transgender Students was first adopted on August 18, 2015, and later revised on April 15, 2019," and denies that "the policy was never properly disseminated to students or families." (Id. at 22.) As such, the Board "requests dismissing the Petition with prejudice."

According to the Board, there is no dispute that B.C. made the statement about bathroom use by different genders and that he made the statement "in the presence of, and in reference to, a transgender student." The Board argues that "[t]he fact that B.C. has claimed that he was only stating his opinion, or that he did not intend for T1 to hear the statement, are irrelevant to whether the statement constituted a[n] HIB violation."

In its brief in support of its motion, the Board quotes the statutory definition of HIB and notes that "under the definition . . . comments, even isolated comments, motivated by a person's gender identity constitute HIB." However, in its brief, the Board neglected to address or apply to the facts of this case the several other elements of the statutory definition of HIB under N.J.S.A. 18A:37-14.

In her opposition brief, which is unaccompanied by a supporting affidavit or certification, G.C. reiterates many of the points she made in her petition. She maintains that B.C. did not commit an act of HIB against T1 because, although B.C. admits that he

said girls should use the girls' bathroom, he was "stating his opinion" and "believed that T1 was a girl and was unaware of any gender transition."

G.C. argues that the school's HIB investigation "was incomplete and inadequate," taking issue with the fact that only B.C. and R.C. were interviewed, and T1 was not interviewed. And although B.C. admits that he made a comment about bathroom usage in the presence of T1, G.C. casts doubt on whether B.C. was the student about whom T1's mother complained in her email to Principal Brandis. In particular, G.C. states that "it is noteworthy that no one seems to know the time in which the incident had occurred," and that "the District's understanding . . . that there were only [B.C., R.C., and T1] present in the bathroom at the time of the incident . . . is contradictory to the information provided in the initial e-mail [in which T1's mother wrote that "[a] group of boys outside the bathroom stall [T1] was in were calling him a girl and saying he should use the girl's bathroom"]. It appears that G.C.'s latter point is that two boys—B.C. and R.C.—does not make a "group." G.C. also questions the surveillance video reviewed by Mr. Dowd to identify B.C. and R.C. as the students in the bathroom with T1. According to G.C., she was never given an opportunity to review the video footage because the Board "indicated that it was no longer available[,] as it had been destroyed."[3]

G.C. also believes certain procedural deficiencies occurred after the district issued its HIB report. She states that the report "was apparently presented to the Board on November 21, 2019," but that it is not clear whether "the report was submitted or received by the Superintendent prior to this date." G.C. also thought the November 25, 2019, letter from Principal Brandis was "a little confusing" because he referred to "other students" when describing the incident and who was involved, and the HIB report "indicate[d] that the HIB violation will be 'affirmed' at the December 16, 2019, Board meeting." G.C. further contends that her husband, who is a teacher employed by the Board, met with Principal Brandis at the Board meeting on November 21, 2019, and the principal "assured him nothing was going to happen that night pertaining to the incident or his son," but that nonetheless "the Board had a closed meeting [that night] in which they determined that

[3] Petitioner's counsel was informed by email sent from Board counsel that "the video of the hallway outside the bathroom was recorded over shortly after there was confirmation of the identities of the individuals involved in the incident and long before your request for preservation." (P-C.)

B.C. had violated the HIB policies and would be subject to sanctions." G.C. also notes that, although B.C. was given a hearing before the Board on July 20, 2020, and was able to present his own testimony and that of others at the hearing, the Board provided "little discovery" in advance of the hearing.

G.C. argues that the Board's decision was arbitrary, as it "ostensibly was based solely upon the HIB Incident Summary completed by Mr. Cicardo" and "the Incident Summary merely summarizes the law without applying it to the herein circumstances." She maintains that the facts of this case do not meet the statutory definition of HIB because "[t]here was never any disruption of the orderly operation of school nor was anyone prohibited from using the boys' room facilities."

She further argues that B.C.'s statement was not motivated by T1's gender identity because he was "unaware of any transgender status of T1," and prior to the incident B.C. never received any information about the school's bathroom policy for transgender students; that a reasonable person "could not have known under the circumstances that his opinion/remark would have caused any harm either physically or emotionally" because "[i]t was not directed at any specific group or necessarily at any individual" and "there is nothing to indicate that T1 heard any remark by B.C."; and that "nothing in the investigation indicates that B.C.'s opinion as he was leaving the bathroom had caused the fear that was being expressed by T1" because "the e-mail indicates that the fear experienced by T1 on that day was caused by a 'group of boys outside the stall' and not by B.C."

According to G.C., B.C. was exercising his right to free speech "by expressing an opinion to his friend, R.C., that girls should be using the girls' bathroom," and "this incident did not cause a disruption of school activities" or "prohibit the rights of any student, let alone T1."

In reply, the Board argues that G.C. "attempts to muddy the waters of this case by pointing to alleged factual discrepancies which ultimately have no material bearing on this case." According to the Board, "[t]here is no doubt B.C. made the offending comment" and "the law is clear: making a derogatory comment about a transgender student,

regardless of whether the commenter intended for the target to hear it, constitutes a violation of the HIB policy." The Board also counters G.C.'s free-speech argument by stating that "B.C. simply does not have a constitutional right to engage in this type of HIB behavior in the school."

LEGAL ANALYSIS

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he 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). When the motion "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." Ibid.

An action by a local board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging a decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of Franklin Lakes, 2014 N.J. AGEN LEXIS 19 (February 24, 2014) (citation omitted), adopted, 2014 N.J. AGEN LEXIS 1137 (April 10, 2014). Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., 2013 N.J. AGEN LEXIS 58 (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, 2013 N.J. AGEN LEXIS 436 (April 25, 2013).

The Anti-Bullying Act is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment,

intimidation, and bullying of students that occur in school and off school premises."[4] N.J.S.A. 18A:37-13.1(f). Under the Act, "[h]arassment, intimidation or bullying" is defined as

> any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, 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 disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

Each school district must adopt a policy that prohibits HIB and provides "a procedure for prompt investigation of reports of violations and complaints." N.J.S.A. 18A:37-15(b)(6). Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6)(a). The investigation shall be conducted by a school anti-bullying

[4] The Act was recently amended to add several other procedural requirements regarding HIB investigations. L. 2021, c. 338. However, the amendments became effective in 2022, and thus do not apply to this case, the facts of which occurred in 2019 and 2020.

specialist, but "[t]he principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation." Ibid. The investigation shall be completed within ten days of the initial HIB complaint. Ibid.

The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. N.J.S.A. 18A:37-15(b)(6)(b). In particular, "the superintendent may decide to provide intervention services, establish training programs to reduce [HIB] and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action." Ibid.

The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." N.J.S.A. 18A:37-15(b)(6)(c).

The parents of the students involved in any alleged HIB incident "shall be entitled to receive information about the investigation, . . . including the nature of the investigation, whether the district found evidence of [HIB], or whether discipline was imposed or services provided to address the incident of [HIB]." N.J.S.A. 18A:37-15(b)(6)(d). The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Ibid. Any hearing shall be held in executive session to protect the identity of any students involved. Ibid. And "[a]t the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents[.]" Ibid.

A school board must issue a written decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner of Education. Ibid.

As for G.C.'s arguments regarding certain procedural defects in the Board's handling of the HIB matter, G.C. is correct that Principal Brandis' November 25, 2019,

letter was somewhat vague by not specifically stating what B.C. himself was accused of having done, and instead describing the alleged act of HIB as "T1 was in a boys' bathroom and other students were outside telling T1 he should use the girls' bathroom." Principal Brandis should have specifically informed B.C.'s parents that B.C. was the alleged perpetrator of an act of HIB, instead of generally referring to "other students."

G.C. is also correct that none of the papers indicate when or if the superintendent reported the HIB findings to the Board, and that the HIB report confusingly states that the HIB findings "will be affirmed at the 12/16/2019 Board meeting." This latter statement is troubling because it indicates that the affirmation of the HIB findings was a fait accompli before the Board even reviewed the findings.[5] The HIB report also does not state whether the investigation was completed within ten days of the initial complaint as required by the Anti-Bullying Act.

While the Board should, in the future, be more precise in its recordkeeping and reporting in HIB matters, these procedural missteps by the Board do not amount to a violation of petitioner's due-process rights.

It is clear from the record that B.C. and his parents were on notice of the HIB allegation specifically made against B.C., as the Board provided G.C. with a copy of the HIB report prior to B.C.'s hearing before the Board on July 20, 2020. And the fact is that B.C. was given a hearing before the Board to contest the HIB findings, and at that hearing he was represented by counsel and allowed to present his own testimony and the testimony of others in support of him. Thus, whatever procedural irregularities occurred in this matter were cured by the Board hearing on July 20, 2020.

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[5] The Board acknowledges in its motion brief that it "affirmed" the HIB findings at its December 16, 2019, meeting, but provided no documentation reflecting this outcome. It would seem that this should have ended the matter, as the Anti-Bullying Act requires the Board to affirm, reject, or modify HIB findings at its next meeting after receiving the report (November 21, 2019), and B.C.'s parents did not request a hearing to challenge the findings before the Board's apparent December 16, 2019, vote.

Regardless, it further appears that the Board nonetheless decided to grant B.C. a hearing to challenge the HIB findings, and "re-vote" after B.C. presented his case. Because the Board reached a 3-3 vote after the July 20, 2020, hearing, the Board explained that this "mean[s] that reversal of the decision failed to garner a majority of the Board's vote, and the finding was affirmed."

There are two other procedural arguments raised by G.C. that must be addressed. First, G.C. argues that the Board's decision was arbitrary or unreasonable because T1 was never interviewed. However, the Anti-Bullying Act does not require that an alleged victim be interviewed as part of an investigation.[6] While in certain HIB matters the failure of a school district to interview an alleged victim of HIB during the course of an investigation might be problematic and could result in the overturning of a school board's HIB decision as arbitrary or unreasonable due to the absence of such an interview, that is not the case here. Instead, the email from T1's mother and B.C.'s admissions are sufficient to uphold the Board's HIB decision even without an interview of T1.

Second, G.C. complains that the Board failed to provide her with certain discovery prior to the Board hearing. This complaint also misses the mark. The papers submitted in connection with the Board's motion in this matter indicate that the Board provided G.C. with the school district's HIB report in response to G.C.'s discovery requests ahead of the July 20, 2020, hearing, and that the Board informed G.C. that "no further discovery" would be forthcoming from the Board. In this regard, the Board did not act inappropriately. As the Commissioner has noted in other HIB matters, "[t]he procedures set forth in the Act are sufficient to allow all parties involved adequate notice and due process of law" and "the investigatory process and the HIB determination procedures [are not meant] to mirror discovery and trial-like adversarial proceedings[.]" L.K. & T.K. ex rel. A.K. v. Bd. of Educ. of Mansfield, 2019 N.J. AGEN LEXIS 345, at *5, n.4 (Apr. 22, 2019), aff'd in part and remanded on other grounds, 2020 N.J. Super. Unpub. LEXIS 2082 (App. Div. Nov. 2, 2020). B.C. and his parents got the school-board hearing to which they were entitled under the Anti-Bullying Act, and G.C.'s issue with the "limited discovery" she received before the Board hearing is misguided.

I **CONCLUDE** that the action taken by the District in response to the initial report by T1's mother was in compliance with the above requirements; although it is unclear whether the Board provided all the information to which B.C. was entitled to prepare his defense before the Board, the mistakes were not prejudicial.

[6] The Board represented that T1 left the school district after this incident, and even if the Board had wanted to interview T1, T1 was unavailable.

As to the substantive issues, the Commissioner has explained that under N.J.S.A. 18A:37-14, "a finding of HIB requires three elements":

> First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied.
>
> [Wehbeh v. Bd. of Educ. of Verona, 2020 N.J. AGEN LEXIS 50 (Feb. 4, 2020), at **7–8.]

In this matter, the Board is entitled to a summary decision upholding its determination that B.C. committed an act of HIB against T1 because there are no genuine issues of material fact with respect to whether B.C.'s conduct satisfies all of the elements of the definition of HIB under N.J.S.A. 18A:37-14.

First, To meet this statutory element, "the statute requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable." Wehbeh, 2020 N.J. AGEN LEXIS 50, at *8. To determine whether the perception is reasonable, "the alleged victim [need not] correctly assess the actor's motivation, as such a requirement would convert the analysis from one about reasonably perceived motivation to one about actual motivation and would inappropriately place the burden on the alleged victim to divine the intent of the actor." Ibid., n.3.

Here, T1 could have reasonably perceived that B.C.'s comment was motivated by the fact that T1, who was originally known to B.C. as a female, now identifies as a male. In B.C.'s written statement during the HIB investigation, B.C. admitted that he saw T1 waiting to use a boys' bathroom stall and then, while T1 was in the stall, B.C. "said to MYSELF 'Girls should not be allowed to use the bathroom.'" While in her opposition brief, G.C. repeatedly attempts to raise doubts whether B.C. was properly identified as the person about whom T1's mother complained in her email to Principal Brandis, the circumstances—including time, place, and, most importantly, B.C.'s own admissions (and the concurring statements of R.C.)—remove all doubt that B.C. was the subject of the

HIB complaint made by T1's mother. Thus, it is clear that T1 heard B.C.'s comment in the bathroom and that T1 reasonably perceived B.C.'s comment as motivated by T1's gender identity.

That B.C. claims he did not know that T1 identified as a male is inconsequential; the statute only requires that his comment was reasonably perceived as motivated by another person's protected characteristic. Not only did T1 reasonably perceive B.C.'s statement as motivated by T1's gender identity, but the papers also suggest that B.C.'s friend, R.C., did as well. R.C.'s written statement reflects that he knew T1 was allowed to be in the boys' bathroom, telling B.C. after he made the comment "to chill and just leave" and "to knock it off and just to leave the bathroom." In sum, the first element of the statutory definition of HIB is met because B.C.'s comment was reasonably perceived as motivated by T1's gender identity.

Second, B.C.'s comment substantially disrupted or interfered with the orderly operation of the school and the rights of T1.[7] This HIB requirement clearly reflects the free-speech concerns raised by the United States Supreme Court in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), in which the Court explained and held that, while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," school authorities may circumscribe student speech that "'materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school'" or "collid[es] with the rights of other students to be secure and to be let alone." Id. at 506, 508, 513 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)). This standard also puts to rest G.C.'s contention that B.C.'s "opinion" about bathroom usage was protected speech. Here, B.C.'s comment substantially interfered with T1's right to use the boys' bathroom and his right to be secure and to be let alone. As T1's mother explained to Principal Brandis, T1 "was afraid to come out" of the bathroom stall after hearing B.C.'s comment.

[7] It is not disputed that the incident in question took place on school grounds, another requirement under the Anti-Bullying Act.

B.C.'s comment meets the final requirement of the statutory definition of HIB because at least one of the three criteria enumerated in the Act regarding "the effect of the conduct" is satisfied here. With regard to the three statutory criteria for "the effect of the conduct," the Commissioner has explained that:

> [A]n act of HIB is one that "a reasonable person *should* know, under the circumstances, will have the effect of physically or emotionally harming a student," "*has the effect* of insulting or demeaning a student," or "*creates* a hostile educational environment . . . ." N.J.S.A. 18A:37-14(a) (emphasis added). None of these criteria require the actor to have actual knowledge of the effect that her actions will have, or to specifically intend to bring about that effect. The first requires only that a reasonable person should know there would be a harmful effect, not that the actor knows there would be such an effect. The second two criteria address only the actual effect of the act, without any reference to what either the actor or a reasonable person does or should know.
>
> [Wehbeh, 2020 N.J. AGEN LEXIS 50, at **8–9.]

Here, Mr. Cicardo's HIB report, which the Board, in essence, affirmed through its 3-3 vote,[8] determined that there was "Physical or emotional harm to student or property" and "Reasonable fear of harm to student or property" because "(T1) was emotionally hurt as a result of the incident"; that the statement was "Insulting or demeaning to student/group" because "(T1) identifies as male"; and that the statement "Created hostile educational environment" because "(T1) reported to his mom that he was afraid to come out of the bathroom stall after the comment(s)." Thus, the Board determined that B.C.'s comment met all three criteria for the "effect of the conduct" element of the HIB definition.

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[8] At the Board's July 20, 2020, meeting, a motion was made to "overturn the finding against [B.C.] in the October 2019 [HIB] case." As a result of the Board's 3-3 vote on the motion (one member absent), the motion was defeated and the superintendent's HIB finding was, in effect, affirmed.

Under the Anti-Bullying Act, "the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision," N.J.S.A. 18A:37-15(b)(6)(e). The Board's voting policy lists all actions, which by statute, specifically require a majority vote. The Anti-Bullying Act does not specifically require a majority vote like other education statutes.

These findings were reasonable because (1) a reasonable person should have known that commenting on a person's right to be in a bathroom while the person is actually in the bathroom would have the effect of emotionally harming that person by making the person feel unsafe or unwelcome; (2) B.C.'s comment had the actual effect of insulting or demeaning T1, as T1 reported to his mother; and (3) B.C. created a hostile educational environment for T1 by interfering with T1's education or by severely or pervasively causing physical or emotional harm to T1 because T1 was "afraid" to come out of the bathroom stall after hearing B.C.'s comment.

Based on the foregoing, I **CONCLUDE** that the Board's decision that B.C.'s conduct meets the statutory definition of HIB, and that B.C. committed an act of HIB against T1, was not arbitrary, capricious, or unreasonable.

Accordingly, I **CONCLUDE** that respondent's motion for summary decision should be granted.

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED**.

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

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

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

August 10, 2022
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

MAB/nn

APPENDIX

EXHIBITS

For Petitioner:

P-A HIB Incident Summary

P-B Petitioner's response to request for discovery

P-C Petitioner's second response to discovery

P-D Respondent's request for discovery

P-E Email from T1's mother

P-F Respondent's response to petitioner's request for discovery

P-G Respondent's response to question 14

P-H B.C. interview statement

P-I R.C. interview statement

P-J Principal's letter, dated November 25, 2019

P-K Petitioner's attorney letter to Board, dated December 20, 2019

P-L Petitioner's attorney email confirming receipt of documents, dated July 15, 2020

P-M Petitioner's attorney email confirming no further discovery, dated July 17, 2020

P-N Board's letter to B.C.'s parents notifying, dated July 22, 2022

For Respondent:

R-1 Petition of Appeal filed by Petitioners, October 16, 2020

R-2 Petitioners' responses to interrogatories, September 21, 2021

R-3 Respondents' responses to interrogatories, May 5, 2021

R-4 Petitioners' responses to deficiencies in prior interrogatory responses, November 22, 2021

R-5 Respondents' responses to deficiencies in prior interrogatory responses, October 25, 2021

R-6 HIB Report for Incident ID 6424

R-7 Board Policy 5756 – Transgender Students

R-8 Board Policy 5512 – Harassment, Intimidation, and Bullying

R-9 Board Policy 5512.01 – Harassment, Intimidation, and Bullying

235-22
OAL Dkt. No. EDU 13974-15
Agency Dkt. No. 210-8/15

New Jersey Commissioner of Education

Final Decision

Atlantic City Education Association and
Erica Shepherd,

Petitioners,

v.

Board of Education of the City of
Atlantic City, Atlantic County,

Respondent.

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

Upon review, the Commissioner agrees with the Administrative Law Judge's determination that the petition should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2022
Date of Mailing: September 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 13974-15
AGENCY DKT. NO. 210-8/15

ATLANTIC CITY EDUCATION ASSOCIATION, ON BEHALF OF ITSELF, AND ON BEHALF OF ERICA SHEPHERD, AND ERICA SHEPHERD, INDIVIDUALLY,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

Jason E. Sokolowski, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Tracy L. Riley, Esq., for respondent (Law Offices of Riley and Riley, attorneys)

Record Closed: August 1, 2022 Decided: August 11, 2022

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioners, the Atlantic City Education Association and Erica Shepherd, allege respondent, the Atlantic City Board of Education (BOE), violated Ms. Shepherd's tenure rights under N.J.S.A. 18A:17-2 by terminating her employment pursuant to a reduction in force which occurred on June 30, 2015. At issue is whether Ms. Shepherd's tenure rights were violated.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal with the Commissioner of Education (the Commissioner) on August 5, 2015. The BOE filed its answer on September 4, 2015. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on September 9, 2015.

On December 23, 2019, Administrative Law Judge John S. Kennedy issued a Letter Order denying respondent's Motion for Summary Decision. After Judge Kennedy's appointment to the Judiciary of the Superior Court, the matter was assigned to me on or about July 29, 2021.

After conducting telephone conferences with the attorneys, I scheduled the matter for a hearing, via Zoom platform, on August 1, 2022. Ms. Shepherd failed to appear.

FACTUAL FINDINGS

I **FIND t**he following as **FACTS:**

This matter was scheduled for a Zoom hearing on August 1, 2022, at 9:30 a.m. Petitioner was notified of the hearing by her attorney, Mr. Sokolowski, by regular mail, dated July 22, 2022. In his correspondence, Mr. Sokolowski advised Ms. Shepherd that her appeal would be dismissed if she failed to participate in the hearing.

At a telephone conference on November 5, 2021, Mr. Sokolowski advised me that he had not had any contact from Ms. Shepherd despite his efforts. I allowed Mr. Sokolowski the opportunity to continue his attempts to contact Ms. Shepherd.

On May 31, 2022, Mr. Sokolowski sent a letter by regular mail to Ms. Shepherd and copied the Atlantic City Education Association asking Ms. Shepherd to advise whether she intended to pursue her appeal or withdraw it. She failed to respond.

On July 13, 2022, Mr. Sokolowski re-sent his May 31, 2022, correspondence to Ms. Shepherd but received no response. By correspondence, dated July 22, 2022, Mr. Sokolowski advised Ms. Shepherd of the August 1, 2022, Zoom hearing. He also informed her that she risked the dismissal of her appeal if she failed to appear.

None of the regular mailings to Ms. Shepherd were returned as undeliverable by the United States Post Office. This appeal has been pending for approximately seven years and Mr. Sokolowski has not had any contact from Ms. Shepherd in over two years despite diligent efforts.

Ms. Shepherd has abandoned her appeal by failing to participate.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.A.C. 1:1-14.4(a),

> If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, . . . direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

This matter was scheduled for a hearing via Zoom on August 1, 2022, at 9:30 a.m. Petitioner was given notice of the hearing date and time by her attorney. Petitioner did not appear for the Zoom hearing.

Accordingly, I **CONCLUDE** that despite receiving appropriate notice, Ms. Shepherd failed to appear at the hearing scheduled for August 1, 2022. Therefore, the matter should be dismissed as petitioner has abandoned her appeal.

ORDER

It is **ORDERED** that the Clerk return this matter to the Commissioner of the Department of Education for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

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

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

Kathleen M. Calemmo

August 11, 2022
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency:

Date Mailed to Parties:

KMC/jns

236-22
OAL Dkt. No. EDU 13973-15
Agency Dkt. No. 211-8/15

New Jersey Commissioner of Education

Final Decision

Atlantic City Education Association and
Sharon Bing,

Petitioners,

v.

Board of Trustees of the City of Atlantic City,
Atlantic County,

Respondent.

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

Upon review, the Commissioner agrees with the Administrative Law Judge's determination that the petition should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2022
Date of Mailing: September 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 13973-15
AGENCY DKT. NO. 211-8/15

ATLANTIC CITY EDUCATION ASSOCIATION, ON BEHALF OF ITSELF, AND ON BEHALF OF SHARON BING AND SHARON BING, INDIVIDUALLY,

Petitioners,

v.

CITY OF ATLANTIC CITY BOARD OF EDUCATION, ATLANTIC COUNTY,

Respondent.

Jason E. Sokolowski, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Tracy L. Riley, Esq., for respondent (Law Offices of Riley and Riley, attorneys)

Record Closed: August 1, 2022 Decided: August 11, 2022

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioners, the Atlantic City Education Association and Sharon Bing, allege respondent, the Atlantic City Board of Education (BOE), violated Ms. Bing's tenure rights under N.J.S.A. 18A:17-2 by terminating her employment pursuant to a reduction in force which occurred on June 30, 2015. At issue is whether Ms. Bing's tenure rights were violated.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal with the Commissioner of Education (the Commissioner) on August 5, 2015. The BOE filed its answer on September 4, 2015. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on September 9, 2015.

On December 23, 2019, Administrative Law Judge John S. Kennedy issued a Letter Order denying respondent's Motion for Summary Decision. After Judge Kennedy's appointment to the Judiciary of the Superior Court, the matter was assigned to me on or about July 29, 2021.

After conducting telephone conferences with the attorneys, I scheduled the matter for a hearing, via Zoom platform, on August 1, 2022. Ms. Bing failed to appear.

FACTUAL FINDINGS

I **FIND t**he following as **FACTS:**

This matter was scheduled for a Zoom hearing on August 1, 2022, at 9:30 a.m. Petitioner was notified of the hearing by her attorney, Mr. Sokolowski, by email and regular mail, dated July 22, 2022. In his correspondence, Mr. Sokolowski advised Ms. Bing that her appeal would be dismissed if she failed to participate in the hearing.

At a telephone conference on November 5, 2021, Mr. Sokolowski advised me that he had not had any contact from Ms. Bing despite his best efforts. I allowed Mr. Sokolowski to continue his attempts to contact Ms. Bing.

On May 31, 2022, Mr. Sokolowski sent an email and regular mail correspondence to Ms. Bing and copied the Atlantic City Education Association asking Ms. Bing to advise whether she intended to pursue her appeal or withdraw it. She failed to respond.

On July 13, 2022, Mr. Sokolowski re-sent his May 31, 2022, correspondence to Ms. Bing but received no response. By correspondence, dated July 22, 2022, Mr. Sokolowski advised Ms. Bing of the August 1, 2022, Zoom hearing. He also informed her that her appeal would be dismissed if she failed to appear.

None of the regular mailings to Ms. Bing were returned as undeliverable by the United States Post Office. This appeal has been pending for approximately seven years and Mr. Sokolowski has not had any contact from Ms. Bing in over two years despite diligent efforts.

Ms. Bing has abandoned her appeal by failing to participate.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.A.C. 1:1-14.4(a),

> If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, . . . direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

This matter was scheduled for a hearing via Zoom on August 1, 2022, at 9:30 a.m. Petitioner was given notice of the hearing date and time by her attorney. Petitioner did not appear for the Zoom hearing.

Accordingly, I **CONCLUDE** that despite receiving appropriate notice, Ms. Bing failed to appear at the hearing scheduled for August 1, 2022. Therefore, the matter should be dismissed as petitioner has abandoned her appeal.

ORDER

It is **ORDERED** that the Clerk return this matter to the Commissioner of the Department of Education for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

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

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

Kathleen M. Calemmo

August 11, 2022
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency:

Date Mailed to Parties:

KMC/jns

237-22
OAL Dkt. No. EDU 13969-15
Agency Dkt. No. 215-8/15

New Jersey Commissioner of Education

Final Decision

Atlantic City Education Association and
Mildred Russell,

Petitioners,

v.

Board of Trustees of the City of Atlantic City,
Atlantic County,

Respondent.

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

Upon review, the Commissioner agrees with the Administrative Law Judge's determination that the petition should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2022
Date of Mailing: September 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 13969-15
AGENCY DKT. NO. 215-8/15

ATLANTIC CITY EDUCATION ASSOCIATION AND MILDRED RUSSELL,
Petitioners,
v.
CITY OF ATLANTIC CITY BOARD OF EDUCATION, ATLANTIC COUNTY,
Respondent.

Jason E. Sokolowski, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Tracy L. Riley, Esq., for respondent (Law Offices of Riley and Riley, attorneys)

Record Closed: August 1, 2022 Decided: August 11, 2022

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioners, the Atlantic City Education Association and Mildred Russell, allege respondent, the Atlantic City Board of Education (BOE), violated Ms. Russell's tenure

rights under N.J.S.A. 18A:17-2 by terminating her employment pursuant to a reduction in force which occurred on June 30, 2015. At issue is whether Ms. Russell's tenure rights were violated.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal with the Commissioner of Education (the Commissioner) on August 5, 2015. The BOE filed its answer on September 4, 2015. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on September 9, 2015.

On December 23, 2019, Administrative Law Judge John S. Kennedy issued a Letter Order denying respondent's Motion for Summary Decision. After Judge Kennedy's appointment to the Judiciary of the Superior Court, the matter was assigned to me on or about July 29, 2021.

After conducting telephone conferences with the attorneys, I scheduled the matter for a hearing, via Zoom platform, on August 1, 2022. Ms. Russell failed to appear.

FACTUAL FINDINGS

I **FIND t**he following as **FACTS:**

This matter was scheduled for a Zoom hearing on August 1, 2022, at 9:30 a.m. Petitioner was notified of the hearing by her attorney, Mr. Sokolowski, by email and regular mail, dated July 22, 2022. In his correspondence, Mr. Sokolowski advised Ms. Russell that her appeal would be dismissed if she failed to participate in the hearing.

At a telephone conference on November 5, 2021, Mr. Sokolowski advised me that he had not had any contact from Ms. Russell, and she failed to respond to any of his letters sent by email and regular mail. I allowed Mr. Sokolowski to continue his attempts to contact Ms. Russell.

On May 31, 2022, Mr. Sokolowski sent an email and regular mail correspondence to Ms. Russell and copied the Atlantic City Education Association asking Ms. Russell to advise whether she intended to pursue her appeal or withdraw it. She failed to respond.

On July 13, 2022, Mr. Sokolowski re-sent his May 31, 2022, correspondence to Ms. Russell but received no response. By correspondence, dated July 22, 2022, Mr. Sokolowski advised Ms. Russell of the August 1, 2022, Zoom hearing, and informed her that she risked the dismissal of her appeal by not appearing.

None of the regular mailings to Ms. Russell were returned as undeliverable by the United States Post Office. This appeal has been pending for approximately seven years and Mr. Sokolowski has not had any contact from Ms. Russell in over two years despite diligent efforts.

Ms. Russell has abandoned her appeal by failing to participate.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.A.C. 1:1-14.4(a),

> If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, . . . direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

This matter was scheduled for a hearing via Zoom on August 1, 2022, at 9:30 a.m. Petitioner was given notice of the hearing date and time by her attorney. Petitioner did not appear for the Zoom hearing.

Accordingly, I **CONCLUDE** that despite receiving appropriate notice, Ms. Russell failed to appear at the hearing scheduled for August 1, 2022. Accordingly, the matter should be dismissed as petitioner has abandoned her appeal.

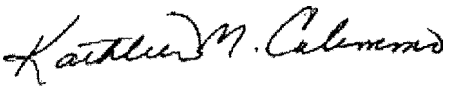
ORDER

It is **ORDERED** that the Clerk return this matter to the Commissioner of the Department of Education for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 11, 2022
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/jns

238-22
OAL Dkt. No. EDU 04317-22
Agency Dkt. No. 107-5/22

New Jersey Commissioner of Education

Final Decision

Alex Knox,

Petitioner,

v.

Board of Education of the City of Pleasantville, Atlantic County,

Respondent.

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

Upon review, the Commissioner agrees with the Administrative Law Judge's determination that the petition should be dismissed. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2022
Date of Mailing: September 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 04317-22
AGENCY DKT. NO. 107-5/22

ALEX KNOX,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,
Respondent.

No appearance by Alex Knox, petitioner, pro se

James J. Carroll, III, Esq., for respondent (The Carroll Law Firm, PLC, attorneys)

Record Closed: August 3, 2022 Decided: August 11, 2022

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioner, Alex Knox, appealed the validity of the respondent, the Board of Education of the City of Pleasantville (BOE), to eliminate her position pursuant to an alleged reduction in force.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal with the Commissioner of Education (the Commissioner) on May 12, 2022. The BOE filed its answer on May 24, 2022. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on May 26, 2022.

FACTUAL FINDINGS

I **FIND** the following as **FACTS**:

This matter was scheduled for an initial telephone prehearing conference on June 28, 2022. The parties were notified by email. James J. Carroll, III, Esquire appeared on the telephone call for respondent. After waiting almost ten minutes, my judicial assistant sent an email and placed a telephone call to petitioner to remind her about the conference. Petitioner returned the telephone call and told my assistant she would dial-in to the telephone conference. After waiting ten more minutes, I ended the conference call when petitioner failed to participate.

The telephone conference was rescheduled for July 12, 2022. Respondent's attorney participated and petitioner failed to dial-in to the conference call.

The third telephone conference was scheduled for August 3, 2022. Petitioner received notice by email and regular mail. The regular mail sent to petitioner's address was not returned from the United States Postal Service. Respondent's attorney participated but petitioner failed to dial-in to the conference call.

Petitioner has abandoned her appeal by failing to participate in duly scheduled telephone conferences.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.A.C. 1:1-14.4(a),

> If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, . . . direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

This matter was scheduled for three telephone conferences. Petitioner was given notice of all telephone conferences. All telephone prehearing notices contain the following language:

> Failure to dial in for the telephone conference, will result in the file being returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party.

On the third notice the above language was highlighted in bold for added emphasis.

Accordingly, I **CONCLUDE** that despite receiving appropriate notice, petitioner failed to appear at the three properly scheduled prehearing telephone conferences. Accordingly, the matter should be dismissed as petitioner has abandoned her appeal.

ORDER

It is **ORDERED** that the Clerk return this matter to the Commissioner of the Department of Education for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

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

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

Kathleen M. Calemmo

August 11, 2022
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/jns

STATE OF NEW JERSEY
AGENCY DKT. NO. 250-12/20
TENURE HEARING OF
GARY JIAMETTI
AND
RANCOCAS VALLEY SCHOOL DISTRICT

AWARD PURSUANT TO SETTLEMENT

This matter having been amicably resolved by the parties hereto, Gary Jiampetti and the Rancocas Valley School District, and a settlement on all issues inherent in the Tenure Charges filed by the District against Gary Jiampetti having been reached; AND

The settlement having satisfied the requirements set forth in *In re Cardonick,* 1990 S.L.D.842, 846, more specifically the settlement (1) was accompanied by documentation as to the nature of the charges; (2) included an explanation of the circumstances justifying the settlement; (3) demonstrated evidence of consent by both parties; (4) indicated the charged party agreed with the settlement under a full understanding of his rights; (5) demonstrated that it is in the public interest; and, (6) indicated the charged party had notice the Commissioner of Education has a duty to refer determinations resulting in loss of position to the State Board of Examiners for possible action against the charged party's certificate;

NOW THEREFORE the settlement is approved by the undersigned Arbitrator this Twenty-fourth Day of September, 2022

Ralph H. Colflesh, Jr., Esq. (digital signature)
Ralph H. Colflesh, Jr., Esq./Arbitrator

SEPARATION AGREEMENT AND GENERAL RELEASE

This Separation Agreement and General Release (hereinafter "AGREEMENT") is made by and between the Rancocas Valley Regional High School District (hereinafter "BOARD"), with principal offices located at 520 Jacksonville Road, Mount Holly, New Jersey 08060, and Gary Jiampetti (hereinafter "JIAMPETTI").

WHEREAS, JIAMPETTI is employed as a Physical Education and Health Teacher by the BOARD; and

WHEREAS, JIAMPETTI is tenured in that position; and,

WHEREAS, JIAMPETTI and the BOARD desire to settle all aspects of JIAMPETTI'S employment rights and benefits by executing this SEPARATION AGREEMENT AND GENERAL RELEASE ("AGREEMENT");

IT IS HEREBY AGREED by and between JIAMPETTI and the BOARD, as follows:

1. For and in consideration of the undertakings of the BOARD set forth herein, and intending to be legally bound, JIAMPETTI does hereby remise, release and forever discharge the BOARD and its officers, members, employees and agents, its and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of action and causes of action, suits, debts, claims and demands whatsoever in law or in equity, which he ever had, now has or hereafter may have, or which his heirs, executors or administrators hereafter may have by reason of any matter, cause or thing whatsoever, from the beginning of his employment with BOARD to the date of this AGREEMENT, and particularly, but without limitation, of the foregoing general terms, any claims arising from or relating in any way to his employment relationship and/or affiliation with BOARD, including, but not limited to, any claims which have been asserted or could have been asserted or could be asserted now or in the future under any and

all federal, state, or local laws and any common law claims or hereafter recognized and any and all claims arising out of his employment with the BOARD, with the following exceptions: claims arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1, *et seq.*, the Teachers' Pension and Annuity Fund Act, *N.J.S.A.* 18A:66-1, *et seq.*, the indemnity provisions of *N.J.S.A.* 18A:16-6 and 6.1 with regard to civil and criminal actions, claims by third parties, as well as claims arising from any breach of this AGREEMENT. The indemnification protections of this AGREEMENT are intended to protect, indemnify and otherwise hold harmless Jiampettti and his heirs and assigns from any claims of any type for financial loss or damages, including, but not limited to, compensatory damages, emotional distress and counsel fees by potential claimants as well as reasonable counsel fees incurred by Jiampetti in defending against such claims (in the event that the BOARD does not offer a defense) should they be brought in the future. This indemnification extends to any and all claims that may arise out of Jiampetti's employment by the Board from his date of hire to the date of his resignation pursuant to the terms of this AGREEMENT. Specifically, JIAMPETTI unless otherwise specified herein, hereby consents to irrevocably and unconditionally release and discharge the BOARD and its agents, employees and servants (collectively "RELEASEES") from any and all obligations, claims, demands, judgments, or causes of action of any kind whatsoever in tort, contract, by statute, or on any other basis for compensatory, punitive, or other damages, expenses, reimbursements or costs of any kind, including, but not limited to, any and all federal, state and local law claims which he has or may have as of the date he signs this AGREEMENT, whether statutory or common law, including, but not limited to, claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Civil Rights Act of 1866, the Age Discrimination in Employment Act of 1967, the Employee Retirement Income Security Act of 1974, the Americans with Disabilities Act, Executive Orders 11246 and

11141, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, and all federal, state, and local law claims, whether statutory or common law, including, but not limited to, claims of personal injury, breach of contract, unlawful discharge from employment, defamation, malicious interference with economic advantage, or discrimination on the basis of age, ancestry, atypical hereditary cellular or blood trait, liability for service in the Armed Forces of the United States, color, creed, disability, marital status, national origin, nationality, sex, race, sexual orientation or veteran's status, and/or claims growing out of any legal restrictions, express or implied, on BOARD'S right to control or terminate the employment of its employees. Further, JIAMPETTI understands he shall have twenty-one (21) days from the date he receives this AGREEMENT to decide whether to sign this AGREEMENT. If JIAMPETTI does sign this AGREEMENT, he understands he will have seven (7) days from the date he signs it to withdraw his consent to the terms of this AGREEMENT.

2. The BOARD, for and in consideration of the undertakings of JIAMPETTI set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge JIAMPETTI and his heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which it ever had, now has, or hereafter may have, or which its officers, members, employees and/or agents, and their respective successors and assigns, heirs, executors or administrators hereafter may have by reason of his employment relationship and/or the termination of his employment relationship and/or affiliation with the BOARD with the exception of claims arising from the breach of this AGREEMENT and claims by third parties.

3. In full consideration of the mutual execution of this AGREEMENT and the mutual agreement to be legally bound by its terms and in recognition that JIAMPETTI'S release of claims as set forth above represents good and valuable consideration:

(a) Subject to the seven (7) day revocation period set forth in Paragraph 1 of this AGREEMENT, JIAMPETTI shall submit an irrevocable Letter of Resignation to the BOARD, effective on the close of business of March 17, 2021 (Exhibit A). JIAMPETTI agrees that his signature on this AGREEMENT constitutes an acknowledgment that he is relinquishing, effective that date, all rights to employment, including any and all contractual rights and any tenure rights as well as any and all future rights to employment/re-employment with the BOARD.

(b) The BOARD, subject to the provisions of this AGREEMENT, agrees to pay JIAMPETTI'S salary through May 15, 2021.

(c) The BOARD agrees that JIAMPETTI shall be entitled to continued health insurance coverage through the BOARD, subject to the contributions required under Chapter 78, until June 30, 2021. This provision shall be void should JIAMPETTI obtain employment with health insurance coverage.

(e) The BOARD will pay to JIAMPETTI, on or before December 31, 2021, the amount due under the Collective Bargaining Agreement between the BOARD and the RVRHSEA regarding unpaid sick leave days.

(f) The BOARD will not contest, challenge, or appeal an application and/or award of unemployment benefits in the event that JIAMPETTI applies to the New Jersey Department of Labor and Workforce Development for unemployment benefits.

(g) The BOARD agrees not to challenge or take any action with regard to JIAMPETTI'S pension.

(h) The BOARD will not disclose the contents of JIAMPETTI'S personnel records and employee files, except to the Burlington County Prosecutor's Office, to any third party without either: i) the express written authorization of the New Jersey Commissioner of Education/Department of Education, or ii) a valid court order.

4. It is expressly agreed and understood that the BOARD does not have and will not have any obligation to provide JIAMPETTI at any time in the future with any payments, benefits or considerations, other than those recited above.

5. JIAMPETTI hereby agrees and recognizes that his employment relationship with the BOARD is permanently and irrevocably severed and any tenure entitlement is irrevocably relinquished as of the close of business on March 17, 2021, and that the BOARD does not have any obligation, contractual or otherwise, to hire, rehire, or re-employ him in the future.

6. JIAMPETTI hereby agrees not to disparage in any way and/or make any disparaging comments about the BOARD, Rancocas Valley Regional High School District and/or its employees. The BOARD agrees not to disparage in any way and/or make any disparaging comments about JIAMPETTI.

7. Both Parties agree and acknowledge that this AGREEMENT does not constitute an admission of any kind. Rather, the execution of this AGREEMENT is to provide an amicable conclusion of JIAMPETTI'S employment relationship with the BOARD. Both Parties further agree and acknowledge that this AGREEMENT is not, and shall not be, construed as an admission of any violation of federal, state or local statutes and regulations, or of any duty owed by the BOARD to JIAMPETTI or JIAMPETTI to the BOARD.

8. Nothing in this AGREEMENT shall constitute evidence of a past practice on the part of the BOARD, nor shall it be binding upon the BOARD with respect to any other employee of the Rancocas Valley Regional High School District. The BOARD and JIAMPETTI have entered into this AGREEMENT based upon the particular facts and circumstances unique to JIAMPETTI'S employment situation.

9. JIAMPETTI may have certain personal property on BOARD premises. He and his designated representative shall be permitted on notice to school administration, and at a mutually convenient day and time, to come onto school property, meet with a representative of school administration, designate which property belongs to him, and remove his personal property. The BOARD will cooperate in this regard and facilitate the return of his property within thirty (30) days of the execution of this AGREEMENT. JIAMPETTI shall return all DISTRICT property currently in his possession immediately following the approval of this AGREEMENT by the BOARD.

10. By signing this AGREEMENT, the Parties certify that they have had the opportunity to discuss this AGREEMENT with counsel. They are fully satisfied with the services of their counsel with respect to both this AGREEMENT and all other aspects of this case, and they enter into this AGREEMENT knowingly, willingly and without any coercion or improper inducements.

11. The Parties agree that this AGREEMENT may be signed in counterparts and that facsimiles of signatures as well as electronic signatures through email or portable document format (.pdf) will have the same force and effect as original signatures.

12. By signing this AGREEMENT, each signatory represents that he is a Party or has been duly authorized by a Party to sign on that Party's behalf and that this AGREEMENT is duly authorized, approved and consented to as to terms.

Intending to be legally bound hereby, JIAMPETTI and the BOARD execute the foregoing AGREEMENT.

WITNESS:

GARY JIAMPETTI

WITNESS:

RANCOCAS VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION

CHARLES S. MILLER, PRESIDENT

251-22
OAL Dkt. No. EDU 12989-18
Agency Dkt. No. 176-7/18

New Jersey Commissioner of Education

Final Decision

Estate of Vonetta J. Hunter,

Petitioner,

v.

The Essex County School of Technology Board of Education, Essex County,

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. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that items 3 and 4 of the Agreement reference payments that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 26, 2022
Date of Mailing: September 26, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12989-18
AGENCY DKT. NO. 176-7/18

ESTATE OF VONETTA J. HUNTER,
Petitioner,
v.
THE ESSEX COUNTY SCHOOL OF TECHNOLOGY BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

Colin M. Lynch, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

M. Murphy Durkin, Esq., for respondent (Durkin & Durkin, attorneys)

Record Closed: August 19, 2022 Decided: August 24, 2022

BEFORE **SUSANA E. GUERRERO**, ALJ:

Petitioner filed a Verified Petition with the Department of Education (Department) on or about July 25, 2018. The Department transmitted the matter to the Office of Administrative Law as a contested case. A telephone prehearing conference was held

on October 11, 2018 and the hearing was scheduled for March 6 and 7, 2019, but adjourned at the request of petitioner's former attorney, Gregory T. Syrek, Esq., because petitioner passed away. On October 11, 2019, Mr. Lynch filed an Amended Petition for Due Process to name the Estate of Vonetta Hunter as the petitioner because of her passing in January 2019. The undersigned issued an Order on October 25, 2019 granting the motion to amend the petition.

On or around September 9, 2021, respondent filed a motion for summary decision. Petitioner filed an opposition to the motion for summary decision on or around October 27, 2021. On December 10, 2021, the undersigned issued an Order denying the motion for summary decision. After numerous telephone conferences, the parties reached an amicable resolution and counsel for respondent submitted the attached Settlement Agreement, along with correspondence from the Board approving the settlement.

I have reviewed the record and the terms of the consent order and I **FIND**:

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

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

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

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

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

August 24, 2022
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: 8-25-22

Date Mailed to Parties: 8-25-22

jb

ZAZZALI FAGELLA NOWAK
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Attorney for Petitioner, Estate of Vonetta J. Hunter

ESTATE OF VONETTA J. HUNTER, Petitioner, v. ESSEX COUNTY VOCATIONAL TECHNICAL SCHOOLS BOARD OF EDUCATION Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW AGENCY DOCKET NO.: 127-6/17 OAL DOCKET NO.: EDU 12989-2018N **SETTLEMENT AGREEMENT**

This Settlement Agreement is entered into by and between the Petitioner, Estate of Vonetta J. Hunter ("Petitioner" or "Estate"), and the Respondent, the Essex County Vocational Technical Schools Board of Education ("Respondent" or "Board"), both of whom are collectively referred to as the Parties.

WHEREAS Vonetta J. Hunter ("Hunter") commenced employment with Respondent as a full-time Teacher on or about January 2, 2002, and worked within the scope of her Instructional Certificate with an endorsement to teach Dental Assistant students through May 7, 2018, when her employment was terminated by Respondent pursuant to a reduction in force ("RIF"); and

WHEREAS Hunter passed away on or about January 24, 2019; and

WHEREAS a Petition of Appeal was filed against Respondent challenging Hunter's termination as a violation of her tenure and seniority rights under N.J.S.A. 18A:28-5 et seq.; and

WHEREAS the Parties, through their respective counsel, have engaged in the exchange

of discovery and in settlement negotiations throughout this matter; and

WHEREAS, Petitioner and Respondent, upon consultation with their respective counsel, have independently concluded that it is in their respective best interests to settle and resolve this dispute, with each party to bear their own counsel fees, costs and disbursements; and

NOW THEREFORE, it is agreed by and between the Parties hereto as follows:

1. Respondent agrees to retroactively reinstate Hunter to a position of part-time teacher as of the effective date of her termination at the conclusion of the 2018-2019 school year until the date of her death (January 24, 2019) as if, during that time period, she taught part-time three (3) courses (50% of a full-time workload) and was compensated at the annual salary of $80,000.00.

2. Respondent hereby acknowledges that Hunter acquired tenure by virtue of her certificate and employment service with Respondent on or about January 3, 2005, and she is entitled to full seniority credit from her initial date of hire (January 2, 2002) with Respondent, to the date of her passing (January 24, 2019), as if she had been employed by Respondent pursuant to the terms set forth in Paragraph 1.

3. Respondent agrees to pay Petitioner the gross amount of $19,000.00 in back pay, subject to standard and ordinary deductions including employee pension contributions which represents earnings of $19,000.00 that Hunter would have earned for the 2018-2019 school year to the date of her passing(January 24, 2019) based on a pro-rated salary for a part-time schedule comprised of teaching three (3) courses

4. This award of back pay shall be made to Petitioner within thirty (30) days following the execution of this agreement.

5. The Parties agree that Petitioner shall pay the employee's share of any pension contributions to the Teachers' Pension and Annuity Fund ("TPAF").

6. Petitioner shall withdraw the Petition of Appeal presently pending before the Office of Administrative Law and Commissioner of Education, with prejudice, when its counsel receives notice and documentation that Respondent has approved the terms and conditions of this settlement.

7. This Settlement Agreement resolves any and all claims by Petitioner arising from Respondent's termination of Hunter's employment and regarding Petitioner's allegation that Respondent contrary to her seniority rights in terminating Hunter's employment and/or in failing to retain Hunter in a full-time or part-time teaching position.

8. Effective upon the execution and delivery of this Settlement Agreement, the Petitioner, and each of their successors, assigns, parents, subsidiaries, affiliates, predecessors, employees, agents, heirs, executors, as applicable, both present and former (collectively the "Petitioner Parties"), jointly and severally releases, acquits and forever discharges the Board, the Board's subsidiaries, affiliates, parents, officers, directors, employees, agents, attorneys, successors and assigns, both present and former (collectively the "Board Affiliates") of and from any and all manner of action and actions, cause and causes of action, suits, debts, controversies, damages, judgments, executions, claims and demands whatsoever, asserted or unasserted, in contract, tort, law or in equity which against the Board and/or Board Affiliates the Petitioner Parties ever had, now has or which the Petitioner Parties ever had or now has upon or by reason of any matter, cause, causes or thing whatsoever, including, without limitation, any presently existing claim or defense whether or not presently suspected, contemplated or anticipated and

including but not limited to any claim that relates to, in whole or part, directly or indirectly, the subject matter of the involved Petition and/or Hunter's employment with the Board.

9. This Agreement contains all the terms of the Parties' agreement and cannot be modified or changed unless the Parties agree to do so in writing.

10. The terms of this Agreement are confidential, and they are not to be discussed by the Parties hereto, except with their respective counsel, financial advisors and Respondent's employees on a need to know basis or as otherwise required by law.

11. The Parties agree that they have been represented by counsel and enter into this Agreement voluntarily. Neither party admits any wrongdoing whatsoever by executing this document.

12. The Parties agree that neither party is responsible for the payment of the other party's counsel fees in connection with this matter.

13. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.

14. Upon approval by Respondent and full execution of the Agreement, the Parties shall submit this Agreement and a copy of Respondent's resolution to the Honorable Susan Guerrero, ALJ within seven (7) days of the signing of this Agreement.

IN WITNESS WHEREOF, the Parties and/or their representative(s) hereto have duly executed this Agreement.

S.D.Hunter

Dated: May 23rd, 2022

Dr. Sheryl D. Hunter, M.D.
Personal Representative of the
Estate of Vonetta J. Hunter

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioner Estate of Vonetta J. Hunter

By: _____ Dated: 5/24/22
Colin M. Lynch, Esq.

Essex County Vocational Technical Schools Board of Education

By: _____ Dated: 6/30/22

DURKIN & DURKIN, LLC
Attorneys for Respondent,
Essex County Vocational Technical Schools Board of Education

By: _____ Dated: 7-5-22
M. Murphy Durkin, Esq.

Essex County Schools of Technology
BOARD OF EDUCATION

REV EDWIN D. LEAHY, O.S.B.
PRESIDENT

ADRIANNE DAVIS
VICE PRESIDENT

MEMBERS

SALVATORE CARNOVALE
JENNIFER M. CARRILLO-PEREZ
LEESANDRA MEDINA
DR. CHRIS T. PERNELL

DR. JAMES M. PEDERSEN
SUPERINTENDENT

DICXIANA A. CARBONELL, Ed.S.
ASSISTANT SUPERINTENDENT OF SCHOOLS FOR CURRICULUM & INSTRUCTION

BERNETTA DAVIS
BUSINESS ADMINISTRATOR

LORI TANNER
BOARD SECRETARY

M. MURPHY DURKIN, ESQ
BOARD ATTORNEY

Extract From The Minutes Of A Meeting Of The
Essex County Schools of Technology Board of Education
As Recorded In The Official Minute Book

The Board of Education of the Essex County Vocational Technical Schools District in the County of Essex, New Jersey convened for the Regular Board Meeting on **August 15, 2022** in the Administrative Offices, LeRoy Smith, Jr. Public Safety Building, 60 Nelson Place, 14th Floor, Sheila Oliver Conference Room, Newark, NJ 07102.
The members of the Board of Education present and absent at the time of this action were:

Present: Mr. Salvatore Carnovale, Dr. Chris Pernell, Ms. Carrillo-Perez
Ms. Adrianne Davis

Absent: Ms. LeeSandra Medina, Rev. Edwin D. Leahy

STATE OF NEW JERSEY, COUNTY OF ESSEX

I, Lori Tanner, Board Secretary of the Board of Education in the County of Essex, State of New Jersey, hereby certify that the following extract from the minutes of the meeting of the Board of Education duly called and held on the date indicated has been compared by me with the original minutes as officially recorded in my office in the Minutes Book of said Essex County Vocational Technical Schools District; 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 Essex County Vocational Technical Schools District.

Resolution #23-109: Authorization for the District to Enter into a Settlement with regard to a case captioned Estate of Vonetta J. Hunter v. Essex County Vocational Technical Schools Board of Education, OAL Docket No. EDU-12989-2018N for the sum of $19,000.00, Local Funds

WHEREAS, on or about July 25, 2018, Vonetta Hunter filed an action captioned Estate of Vonetta J. Hunter v. Essex County Vocational Technical Schools Board of Education with the Office of Administrative Law under docket no. EDU-12989-2018N. The District thereafter filed a responsive pleading to same. During the pendency of this action, Ms. Hunter passed away which resulted in her Estate being replaced as the plaintiff.

WHEREAS, there have been numerous settlement discussions by and between the District and the Estate of Vonetta Hunter with regard to settlement. These discussions have resulted in the Estate of Vonetta Hunter agreeing to accept the sum of $19,000 in full satisfaction of all claims. M. Murphy Durkin, Board Counsel, recommends to the Board that they enter into the Settlement Agreement.

On the motion of Mr. Carnovale, seconded by Dr. Pernell, BE IT RESOLVED, that upon the recommendation of the Superintendent of Schools, the Board hereby authorizes the District to settle the case captioned Estate of Vonetta J. Hunter v. Essex County Vocational Technical Schools Board of Education under Office of Administrative Law docket no. EDU-12989-2018N for the sum of $19,000.00 pursuant to the terms and conditions of the Stipulation of Settlement, a copy of which is attached hereto and incorporated herein as if fully set forth; and

BE IT FURTHER RESOLVED, that the Superintendent of Schools is hereby authorized to execute the Stipulation of Settlement referenced above.

Roll Call: Yeas: Mr. Carnovale, Dr. Pernell, Ms. Carillo-Perez, Ms. Davis
Nays: None
Absent: Ms. Medina, Fr. Leahy

Lori Tanner
Board Secretary

August 17, 2022
Date

252-22
OAL Dkt. No. EDU 00197-22
Agency Dkt. No. 229-12/21

New Jersey Commissioner of Education

Final Decision

D.K., on behalf of minor child, B.K.,

Petitioner,

v.

Board of Education of the Township of West Deptford, Gloucester 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 have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 26, 2022
Date of Mailing: September 26, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00197-22

AGENCY DKT. NO. 229-12/21

D.K. ON BEHALF OF MINOR CHILD, B.K.,

Petitioner,

v.

TOWNSHIP OF WEST DEPTFORD BOARD OF EDUCATION, GLOUCESTER COUNTY,

Respondent.

Danielle Kaign, petitioner, pro se

Caitlin Pletcher, Esq., for respondent (Florio Perrucci Steinhardt Capelli Tipton & Taylor, LLC, attorneys)

Record Closed: August 25, 2022 Decided: August 26, 2022

BEFORE **CARL V. BUCK III,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on January 6, 2022, 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 terms of settlement, and I **FIND**:

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

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

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

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

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

August 26, 2022
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: 9/1/2022

Date Mailed to Parties: 9/2/2022

/tat

8/26/22 MLG

Caitlin Pletcher, Esq.
FLORIO PERRUCCI STEINHARDT & CAPPELLI TIPTON & TAYLOR, L.L.C.
1010 Kings Highway South, Building 1
Cherry Hill, New Jersey 08034
(856) 853-5530
cpletcher@floriolaw.com

Attorneys for Respondent, West Deptford Township BOE

D.K. o/b/o B.K., Petitioners, v. West Deptford Township Board of Education, Respondent.	OAL DOCKET #: EDU 00197-2022S SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into by and between the West Deptford Township Board of Education, which has offices located at 675 Grove Road, West Deptford, New Jersey ~~08096~~ 08066 DK (hereinafter referred to as the "Board") and D.K. on behalf of B.K., who are domiciled at 1329 Puritan Drive, West Deptford, New Jersey 08096 (hereinafter referred to as the "Petitioners") (hereinafter collectively referred to as the "Parties").

WHEREAS, B.K. is a four (4) year old student in preschool, residing within the West Deptford Township School District, operated by the Board; and

WHEREAS, B.K. is diagnosed with Type I Diabetes and has a Section 504 Plan and an Individualized Health Plan ("IHP") for implementation in the school setting; and

WHEREAS, the Parent filed a Petition of Appeal (hereinafter referred to as the "Petition"), seeking a 1:1 nurse for B.K. in the school setting; and

WHEREAS, the District filed an Answer to the Parent's Petition and maintains that B.K.'s current Section 504 Plan and IHP are appropriate, as written; and

WHEREAS, the Parties are desirous of resolving the issues raised by the Parent and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the Parties agree as follows:

1. The District will amend B.K.'s IHP to reflect that the District will provide B.K. with an aide during the school day, starting on September 6, ~~2023~~ 2022. The aide will be assigned to B.K., with the ability to be shared by a maximum of three (3) students, who will all be in the same classroom.

2. Prior to the start of the 2022-2023 school year, the aide assigned to B.K. will undergo diabetes training and will be designated as an additional "trained glucagon delegate" with the authority to administer B.K.'s glucagon pen in accordance with her IHP. B.K.'s IHP will also be amended to reflect the aide as a "trained glucagon delegate."

3. The Parent will sign a release, authorizing the school nurse and B.K.'s aide to communicate with B.K.'s medical providers regarding her diabetes and the treatment of same.

4. The terms of this Agreement represent the compromise of disputed claims between the Parties.

5. This Agreement shall not constitute, be interpreted, construed, or used as evidence of any admission of fact, law, responsibility, or liability on the part of any party.

6. In the event that the Parent and/or B.K. are no longer domiciled in the District, the Board's responsibility under this Agreement shall immediately cease.

7. The Parties agree to submit this Agreement to an Administrative Law Judge for approval in full settlement of all issues pertaining to this matter. If approved, this Agreement shall be incorporated into a Final Decision by an Administrative Law Judge. Nothing contained herein shall be interpreted as preventing the Parties from filing a lawsuit to enforce the terms of this Agreement.

8. The Parent, individually and on behalf of B.K., hereby forever and fully waive and release the Board from all claims that have accrued as of the date of this Agreement, which they and/or B.K. have or may have against the Board in relation to the educational, special education and/or related services provided and/or offered to B.K., including all legal, contractual, common law, statutory and/or equitable claims under state and/or federal law, including but not limited to claims for and/or under:

a. compensatory education;

b. attorneys and other professional fees;

c. reimbursement related to any unilateral and/or out-of-district placement for B.K., whether known or unknown;

d. N.J.A.C. 6A:14-1.1, et seq.;

e. Individuals with Disabilities in Education Improvement Act, 20 U.S.C. §1415 et seq.;

f. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §701, et seq.;

g. Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §12101;

h. Family Education Rights and Privacy Act, 20 U.S.C. §1232g, et seq.;

i. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000, et seq.

j. The Rehabilitation Act of 1973, as amended, 20 U.S.C. §7801, et seq.;

k. 29 U.S.C. §794(a);

l. 42 U.S.C. §1983;

m. 42 U.S.C. §1988; and

n. New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et. seq.

Nothing in the release set forth in this paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

9. Each party shall bear their own attorneys' fees, costs, expert witness fees, and/or costs of evaluations and expert reports for the entirety of any matter or matters related to the subject matter of this Agreement.

10. It is expressly acknowledged that neither the Board, the Parent, nor B.K. is the prevailing party for any purpose, including attorneys' fees, costs, expert/witness fees, and/or costs of evaluation and expert reports. The Parents waive any other financial claims that they may have against the Board.

11. The terms of this Agreement shall remain strictly confidential and shall not be divulged to any third party, except the Parties' attorneys and/or accountants/auditors, unless such disclosure is required under applicable law and/or legal process. In response to any direct inquiry about the outcome of the above-described action, the Parties shall indicate only that the matter has been concluded. In the event that the terms of this provision are violated, the non-breaching party may take all reasonable measures (including, but not limited to, court proceedings) to restrain the prohibited or unauthorized disclosure of said information. Any and all costs incurred in connection with such proceedings, including, but not limited to, reasonable attorneys' fees, shall be charged

to the party deemed responsible after a final adjudication by a court of competent jurisdiction for breaching this confidentiality provision.

12. The Parent agrees, jointly and severally, to indemnify and hold forever harmless the Board, its officers, employees, administrators, and/or agents for any claim, complaint, suit, demand, cost, expense or legal fee, penalty, loss or judgment (collectively "liability") or any challenge successful or unsuccessful, brought by anyone on behalf of B.K. and in any judicial or administrative court, tribunal or other forum, through the date of this Agreement or related to subject matters encompassed in the Agreement.

13. This Agreement shall be construed and enforced in accordance with the laws of the State of New Jersey.

14. The undersigned represent that they have the requisite authority to sign this Agreement on behalf of the respective party.

15. The Parties may execute this Agreement in counterparts, each of which is deemed an original and all of which only constitute one original.

16. This Agreement is subject to ratification by the Board and is without prejudice to any party if the terms are not agreed upon. The representatives of the District shall recommend the terms of this Agreement to the District for approval at its next regularly scheduled BOE meeting.

17. This Agreement constitutes the entire understanding of the Parties hereto and shall supersede any prior agreements between the Parties with respect to its subject matter. Further, there are no representations, warranties, covenants or undertakings other than those expressly set forth herein. Each party acknowledges and agrees that they are not relying upon any oral statements, representations, promises or expectations which are not expressly and explicitly set

forth in this Agreement, which alone fully and completely expresses all agreements between the Parties.

18. A modification or waiver of any of the provisions of this Agreement shall be effective and enforceable, only if made in writing, signed and duly authorized by all Parties and executed with the same formality as the Agreement.

19. The terms and conditions set forth herein shall be deemed severable. If any clause or provision contained herein shall be held unenforceable by a court of competent jurisdiction, it shall not affect the validity of any other clause or provision, all of which shall continue in full force and effect.

20. The Parties acknowledge that they are entering into this Agreement of their own accord and without any undue influence, coercion or pressure of any kind; that all the provisions of this Agreement, as well as all questions pertinent thereto, have been fully and satisfactorily explained to them; that they have given due consideration to such provisions and questions and understand them clearly; that the provisions of this Agreement are in all respects acceptable to them and that they, therefore, accept these provisions in full and final satisfaction of all claims and demands which have been raised or which could have been raised in any litigation related to G.P.

21. The Parties recognize that each had the opportunity to be represented by legal counsel and that they sign this within Agreement as their own voluntary act and deed, and that they understand the duties and obligations enumerated herein.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year set forth:

Witness:

WEST DEPTFORD TOWNSHIP SCHOOL DISTRICT

By: _____
Dr. Drew Ricchiuti, Board President

Dated: 7/26/22

Dated: 7/26/22

By _____
~~Gregory Cappello, Esquire, Superintendent~~
DR. BRIAN GISMONDI, ACTING SUPERINTENDENT

Dated: 7-26-22

Witness:

By: _____
D.K., legal guardian of B.K.

Dated:

Dated: 4/18/2022

Witness:

253-22

New Jersey Commissioner of Education

Final Decision

J.C., on behalf of minor child, J.C.,

Petitioner,

v.

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

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that her minor child was not entitled to a free public education in the Closter School District following the family's relocation to Norwood after the property they were renting in Closter was sold in January 2022. Petitioner sought an order directing the Board to allow J.C. to continue to attend elementary school in Closter free of charge for the remainder of the 2021-2022 school year. The Board filed a counterclaim for tuition for the period of J.C.'s ineligible attendance, February 10, 2022 to April 27, 2022. Petitioner failed to attend two scheduled hearings in this matter without explanation. A previous Commissioner decision in this matter, issued on July 13, 2022, determined that J.C. was not entitled to a free public education in the district's schools from February 10, 2022 through April 27, 2022, but remanded the case to the OAL for calculation of the tuition owed by petitioner to the Board for J.C's ineligible attendance in the district's schools during that time

On remand, the ALJ found, *inter alia*, that: from February 10, 2022, the date on which the District notified J.C.'s parents that their child was not entitled to a free public education in the District, to and including April 26, 2022, the last day J.C. was enrolled in the District, there were 43 school days; the District's annual tuition rate for the 2021-2022 school year was $15,390.00; pursuant to *N.J.S.A.* 18A:38-1b(1), 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. Accordingly, the ALJ concluded that the total amount of tuition to be reimbursed in this matter is $3,676.50, and ordered the petitioner to pay said amount to the respondent Board.

Upon review, the Commissioner adopted the ALJ's Initial Decision as the final decision in this matter. Petitioner was ordered to reimburse the Board in the amount of $3,676.50 for tuition costs incurred during the time period from February 10, 2022 to April 26, 2022, when the minor child J.C. was ineligible to attend school in Closter. 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.

253-22
OAL Dkt. No. EDU 05946-22 (EDU 02441-22 on Remand)
Agency Dkt. No. 46-3/22

New Jersey Commissioner of Education

Final Decision

J.C., on behalf of minor child, J.C.,

Petitioner,

v.

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

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.

The Commissioner previously determined that J.C. was not entitled to a free public education in the district's schools from February 10, 2022 through April 27, 2022, and remanded this matter to the OAL for calculation of the tuition owed by petitioner to the Board for J.C's ineligible attendance in the district's schools during that time. *J.C., on behalf of minor child, J.C. v. Bd. of Educ. of the Borough of Closter, Bergen Cty.*, Commissioner Decision No. 173-22, decided July 13, 2022.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in the district. The record on remand reflects that there were 43 school days between February 10, 2022 and

April 26, 2022, and that the per diem cost of tuition is $85.50.[1] Therefore, the Board is entitled to tuition reimbursement in the amount of $3,676.50 for the period from February 10, 2022 to April 26, 2022, during which time petitioner's minor child was ineligible to attend school in Closter.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $3,676.50 for tuition costs incurred during the time period from February 10, 2022 to April 26, 2022, when the minor child was ineligible to attend school in Closter. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 26, 2022
Date of Mailing: September 26, 2022

[1] This amount represents 1/180 of the total annual per pupil cost of $15,390, consistent with *N.J.S.A.* 18A:38-1b.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05946-22
AGENCY DKT. NO. 46-3/22

J.C. ON BEHALF OF J.C.,
Petitioner,

vs.

BOROUGH OF CLOSTER BOARD OF EDUCATION, BERGEN COUNTY,
Respondent.

ON REMAND
OAL DKT. NO.: EDU 02441-22

J.C., petitioner, pro se appearing on the papers pursuant to N.J.A.C. 1:1-14.8

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorney) appearing on the papers pursuant to N.J.A.C. 1:1-14.8

Record Closed: August 12, 2022 Decided: August 16, 2022

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed the Final Notice of Determination of Ineligibility by Respondent school district, dated February 18, 2022, wherein Respondent determined that the minor child was ineligible to attend school in Respondent school district.

Petitioner filed a pro se petition of appeal with the Office of Controversies and Disputes in the New Jersey Department of Education on March 14, 2022.

Respondent filed its Answer, Separate Defenses and Counterclaim thereto on March 29, 2022.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on March 30, 2022 as a contested case, under OAL Docket No. EDU 02441-22.

A Prehearing Order was entered on April 5, 2022.

The matter was listed for a hearing on May 17, 2022 via Zoom. Petitioner failed to appear, or otherwise contact the OAL regarding the non-appearance. The undersigned adjourned the matter to June 3, 2022, so as to notify Petitioner that the matter would proceed to a proof hearing should Petitioner not log in to the Zoom hearing. Notices were provided. Petitioner failed to appear. Respondent requested a proof hearing on their counterclaim.

The hearing proceeded on June 3, 2022, without Petitioner pursuant to N.J.S.A. 1:1-14.4(d).

The undersigned issued an Initial Decision, dated June 13, 2022, wherein I determined that the Petitioner failed to sustain her burden of proof that she was domiciled in Closter from February 10, 2022 through April 27, 2022, and therefore, J.C. was not entitled to a free public education in the Closter District.

The matter was remanded in accordance with the Final Decision of the Acting Commissioner of Education, dated July 13, 2022, wherein the Acting Commissioner concurred with the Initial Decision in that the Petitioner failed to sustain her burden of proof, but remanded the same to calculate tuition in accordance with N.J.S.A. 18A:38-1b.

In response to the Final Decision, Respondent submitted the Certification of Floro M. Villanueva, Jr., Business Administrator/Board Secretary for the Closter School District, containing Exhibits A and B.

Petitioner was advised, via email dated July 28, 2022, that any submission she intended to make would be due on or before August 12, 2022. She was also advised in said email there would not be an additional hearing. No submission was made by Petitioner. The record closed August 12, 2022.

ISSUE ON REMAND

What are the number of days of ineligible attendance by J.C.; and, what is the proper amount of tuition reimbursement due Respondent in accordance with N.J.S.A. 18A:38-1b.

FINDINGS OF FACT

From February 10, 2022, the date the District notified J.C.'s parents that the student was not entitled to a free public education in the District, to and including April 26, 2022, the last day J.C. was enrolled in the District, there were 43 school days at Hillside Elementary School. (Exhibit A, Villanueva Certification)

The annual tuition rate for the 2021-2022 school year was $15,900.00. (Exhibit B, Villanueva Certification)

1/190 of the total annual tuition rate of $15,390.00 equals $85.50. This is the per diem tuition rate. Said amount multiplied by 43 days of ineligible attendance equals $3,676.50. This is the amount of reimbursement due the District from Petitioner.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 18A:38-1b(1) states in pertinent part: 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.

In the instant matter, through the Certification of Floro M. Villanueva, Jr., it is established that the total tuition for the 2021-2022 school year was $15,900.00. 1/180 to the total annual per pupil cost for said school year equals $85,50. The number of ineligible days of attendance equal 43. The total amount of tuition to be reimbursed is therefore $3,676.50.

ORDER

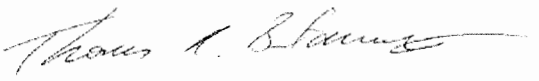
It is **ORDERED** that Respondent is entitled to tuition reimbursement in the amount of $3,676.50; and

It is further **ORDERED** that Petitioner shall pay said amount to Respondent.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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, 2022
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:
db

APPENDIX

List of Witnesses

For Petitioner:

None

For Respondent:

None

List of Exhibits

For Petitioner:

None

For Respondent:

Certification of Floro M. Villanueva, Jr., with Exhibit A (Hillside Elementary School Calendar) and Exhibit B (annual tuition rate for school year 2021-2022)

254-22

New Jersey Commissioner of Education

Final Decision

M.M. and A.M., on behalf of minor children,
E.M. and I.M.,

Petitioners,

v.

Board of Education of the Township of South Brunswick,
Middlesex County,

Respondent.

Synopsis

Pro se petitioners appealed the determination of the respondent Board that their minor children were not entitled to a free public education in the South Brunswick School District (District) during the 2021-2022 school year. The Board contended that, based on the results of residency investigations, petitioners do not live at the address provided on the children's school registration but rather may live at another address within the District, where M.M.'s mother resides. The Board sought reimbursement for the cost of tuition for the period of E.M. and I.M.'s ineligible attendance.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1(a), public schools are free to any person over five and under twenty years of age who is domiciled within the District; the issues in dispute here are whether the family resided on Bernini Way during the 2021-2022 school year and, if not, the amount of tuition owed by petitioners to the Board for that period of time; the credible evidence indicates that the address provided on the school registration is within a 55 and over community that does not allow children under the age of 19, and that the family may actually live at a different address within the District, where the children's grandmother resides. The ALJ concluded that petitioners did not sustain their burden of proving that E.M. and I.M. were domiciled on Bernini Way and did not submit evidence supporting residency at the other address; accordingly, the children were not entitled to a free public education in the District during the 2021-2022 school year, and petitioners are responsible for tuition reimbursement in the total amount of $25,922.

The Commissioner concurred with the ALJ's finding that petitioners failed to prove that they were domiciled within the District during the 2021-2022 school year, and further concurred that the children were, therefore, not entitled to a free public education in the District's schools during that time. However, the Commissioner concluded that the record does not present sufficient information to accurately determine the per diem tuition owed, nor whether the children attended school in the District for the entire year. Accordingly, this matter is remanded to the Office of Administrative Law for further proceedings to calculate the per diem tuition and number of days of ineligible attendance, as required by *N.J.S.A.* 18A:38-1b.

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

254-22
OAL Dkt. No. EDU 04264-22
Agency Dkt. No. 47-3/22

New Jersey Commissioner of Education

Final Decision

M.M. and A.M., on behalf of minor children, E.M. and I.M.,

Petitioners,

v.

Board of Education of the Township of South Brunswick, Middlesex County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioners failed to sustain their burden of establishing that they were domiciled in South Brunswick during the 2021-2022 school year. The Commissioner further concurs with the ALJ's conclusion that minor children E.M. and I.M. were, therefore, not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioners for the time period during which the minor children were ineligible to attend school in the district. The statute specifically provides that the Commissioner may order tuition "computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the

number of days of ineligible attendance." *N.J.S.A.* 18A:38-1b. The Initial Decision notes that the cost of tuition is $72 per day, or $12,961 per year.[1] However, this information appears only in the notice of ineligibility sent by the district to petitioners, and in the ALJ's summary of witness testimony about the issuance of that notice. The record contains no certification from district staff with knowledge about tuition costs, nor does the Initial Decision recount any witness testimony on this topic.[2] The Commissioner therefore concludes that the record does not present sufficient information to calculate the per diem tuition. Furthermore, while the Initial Decision assesses tuition for the 2021-2022 school year, there is no evidence in the record demonstrating that the children attended school in South Brunswick for the entire school year, either in the form of a certification or witness testimony.

Accordingly, this matter is remanded to the Office of Administrative Law for further proceedings to calculate the per diem tuition and number of days of ineligible attendance, as required by *N.J.S.A.* 18A:38-1b.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 26, 2022
Date of Mailing: September 26, 2022

[1] Multiplying $72 by 180 days results in an annual tuition cost of $12,960, not $12,961. While this discrepancy may be due to rounding of one figure or the other, the Commissioner declines to make such an assumption, particularly when neither figure is supported by competent evidence in the record.

[2] The Commissioner was not provided with a transcript of the proceedings and therefore relies on the ALJ's summary of the testimony. If the tuition costs were testified to by one of the Board's witnesses, that information should be included on remand to clarify the record.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04264-22
AGENCY DKT. NO. 47-3/22

M.M. AND A.M. ON BEHALF OF
E.M. AND I.M.,
Petitioners,
v.
TOWNSHIP OF SOUTH BRUNSWICK
BOARD OF EDUCATION,
Respondent.

M.M. and A.M. on behalf of E.M. and I.M., petitioners, pro se

David L. Disler, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: July 20, 2022 Decided: August 15, 2022

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

Petitioners M.M. and A.M., on behalf of minor children, E.M. and I.M., appeal the decision of respondent Township of South Brunswick Board of Education (Board) that E.M. and I.M. were not eligible to attend the South Brunswick Township Public Schools in the 2021-2022 school year. Petitioners also seek a ruling that they are not responsible

to pay tuition for E.M. and I.M. for the 2021-2022 school year in the amount of $12,961 for each child.

PROCEDURAL HISTORY

On March 4, 2022, petitioners filed a pro se residency appeal with the Office of Controversies and Disputes of the New Jersey Department of Education. On May 2, 2022, the matter was transmitted to the Office of Administrative Law (OAL) where it was filed 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 June 28, 2022, the parties appeared for a prehearing telephone conference, during which the hearing was scheduled for July 20, 2022. A prehearing order was issued on June 30, 2022.

On July 20, 2022, the hearing was conducted using Zoom Communications, Inc., a remote audio/video platform licensed by the OAL for use during the public health emergency in which the Governor of the State of New Jersey issued Emergency Orders mandating stay-at-home protocols for citizens and public employees (COVID-19). Petitioners, who speak Russian and are not fluent in English, were assisted throughout the proceedings, including the hearing, by Natalia Sorokina, a Russian language interpreter. The record closed on July 20, 2022.

FACTUAL DISCUSSION AND FINDINGS

The issues in dispute are whether the M. family, mother and two minor children,[1] resided at Bernini Way, Monmouth Junction, New Jersey, within the geographic area served by the South Brunswick Township School District (District), during the 2021-2022

[1] A.M., the father of the two minor children involved in this matter, stated that he lives in Brooklyn, New York, apart from his wife and children.

school year and if not, the amount of tuition owed by petitioners to respondent for the 2021-2022 school year.[2]

At the hearing, respondent presented three witnesses; A.M. testified on behalf of petitioners. The following is not a verbatim recitation of the testimony but a summary of the testimonial and documentary evidence that I found relevant to the above issues.

TESTIMONY

Suzanne Luck-Born (Luck-Born), District Director of Student Assessment and Instructional Support, testified on behalf of respondent. She has been employed by the District for twenty-six years in various positions, the last eleven in her current position. Luck-Born is responsible for the Registration Department, including oversight of two Central Registrars who register new families and coordinate registrations with the Transportation and Buildings Departments.

On September 13, 2021, shortly after the school year began, Luck-Born received an email from the Director of Transportation stating that Mickey Guzman (Guzman), the Community Manager of the Villagio South Brunswick Homeowners Association (Villagio HOA), objected to District buses entering the Villagio community as it is an age-restricted community in which school-aged children are not permitted. (R-1.)[3] According to the District records, the M. children resided in the Villagio community at Bernini Way, but the lease M.M. had provided to the District as proof of residency had expired. Luck-Born or her staff contacted petitioners and requested updated residency documents, which M.M. hand-delivered on September 14, 2021, including a lease for July 1, 2021, through July 1, 2023, for Bernini Way.

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[2] E.M. has attended school in the District continuously since the 2018-2019 school year and I.M. has attended school in the District continuously since the 2020-2021 school year.

[3] Luck-Born identified this summary of the residency investigation conducted in this matter, which she wrote. She stated that this document was provided to Board of Education members prior to the M. family hearing. Not all communications described in this document were written but all were corroborated by later writings and/or action taken in response.

On September 21, 2021, Luck-Born retained a private investigator, Patrick O'Brien (O'Brien), to conduct a residency investigation. Luck-Born identified the report generated by O'Brien, in which he concluded that the M. family was not residing at Bernini Way. (R-2.) Using this report, Luck-Born told her supervisor that as a result of the investigation, the District had no basis to conclude that E.M. and I.M. lived at Bernini Way, but the M. family may have been residing at Drinking Brook Road, another location within the township.[4] Luck-Born identified the "system-generated" letter sent to petitioners on December 17, 2021, stating that the District does not "accept students" from the Villagio address, but they could provide proof of residency at the alternate location. (R-3.)

On January 10, 2022, Luck-Born sent a letter to petitioners stating that E.M. and I.M. are not eligible to attend the District schools because:

> • Petitioners failed "to provide requested documentation that satisfies the residency requirements as outlined in N.J.S.A. 18A:38-1[.]"
>
> • "Based upon an investigation by [the District's] Residency Officer," the District determined that the M. family "is not residing at Bernini Way[.]"
>
> • "The 55 and Older Community" in which Bernini Way is located "does not use [the District's] schools due to the age restriction of residents."
>
> [R-4.]

On January 26, 2022, petitioners sent a letter to Luck-Born disputing the findings of the investigation, claiming that the District was discriminating against them, and stating that if the District was unwilling to permit the children to complete the year in the District, they would "be forced to go to court and appeal your decision, as well as file a lawsuit for persecution and discrimination." (R-5.) A Board hearing was scheduled and, in the

[4] The District operates seven elementary schools. The two addresses at issue here, Bernini Way and Drinking Brook Road, are within the geographic boundaries for different elementary schools. There was no evidence presented as to why the M. family would prefer one school over another, other than because their children were already attending the first school and because they stated that they do not live within the geographic boundaries of the second school. See, P-6.

interim, the District hired Prime Source Investigators to obtain a second opinion and more recent information.

On two days in February 2022, the investigator from Prime Source parked outside Bernini Way from 6:00 a.m. to 10:00 a.m., and he reported seeing no activity at the house during those hours. (R-8.) Further, in response to a request from District Superintendent Scott Feder (Feder), Guzman provided excerpts from the Villagio HOA governing documents, which make clear that no children under the age of 19 are permitted to reside in a home in the community. (R-6.)

On February 10, 2022, respondent held a hearing at which petitioners appeared and gave testimony. On February 14, 2022, Feder sent a final notice of ineligibility to petitioners, which described the basis for the decision of respondent that petitioners' children are not domiciled at Bernini Way and are not eligible to attend school in the District. (P-3.) Petitioners were again given the opportunity to provide proof of residency at Drinking Brook Road. In this notice, respondent stated that they would be responsible for tuition for each child in the amount of $72 per day, or $12,961 per year.

Petitioners did not provide additional information to respondent. This appeal followed.

Patrick J. O'Brien, testified on behalf of respondent. He spent twenty-five years on the South Brunswick Police Department, five as an investigator. From December 2011, through December 2021, O'Brien served as the District Residency Investigator. During this time, he estimates that he handled over one-hundred residency investigations, in cases in which "the Board had reason to believe that non-resident children were attending school" in the District.

O'Brien identified the report he prepared on his investigation of the M. family who were allegedly living at Bernini Way. (R-2.) He began on September 21, 2021, by

conducting internet research. He was able to confirm the house at Bernini Way was purchased in 2009 by Charles and Maria Lichtenstein.[5]

O'Brien stated that on September 24, 2021, he arrived at Bernini Way at 7:30 a.m., and stayed one hour, during which he saw no activity, no cars, no lights on inside the house, and no children or adults leaving the house. (R-2.)

On October 15, 2021, O'Brien arrived at Bernini Way at 8:15 a.m. and saw an open second floor window. At 8:23 a.m., a silver SUV with New Jersey license plates pulled into the driveway and when the garage door was opened remotely, drove into the garage. O'Brien described the driver as an adult male in his 60's; he stated that A.M., who was present by Zoom during O'Brien's testimony, was not the man he saw driving the SUV. At 8:26 a.m., O'Brien saw an adult female walking inside the house from the first to the second floor. O'Brien described the adult female as in her 60's; he stated that M.M., who was present by Zoom during O'Brien's testimony, was not the woman he saw in the house.

On November 29, 2021, O'Brien arrived at Bernini Way at 7:32 a.m. and saw the same second floor window open. He saw no cars or other activity. He drove to the elementary school where the M. children were attending. While he was told by staff that M.M. usually drove her children to school and parked in the rear lot, he did not see M.M. or the children that morning.

On November 29, 2022, O'Brien drove past Bernini Way at 7:50 a.m., observed no cars, and proceeded to the elementary school. At 8:45 a.m., a woman driving a white SUV with New Jersey license plates parked in a spot in the rear lot. The car came from the direction opposite of where it would travel if coming from Bernini Way. The woman walked two students, one male and one female into the school, returned to her car, and proceeded to Drinking Brook Road, parking in the driveway.

[5] Maria Lichtenstein is the landlord on the leases M.M. signed for Bernini Way. (P-6, P-7, P-8.) On each lease, Lichtenstein uses Bernini Way as her address for notices.

On November 30, 2022, O'Brien arrived at Drinking Brook Road at 8:25 a.m., and observed the same white SUV parked in the driveway. He saw the lights go on in the car at 8:45 a.m. O'Brien drove to the elementary school, saw the same white SUV drive in from the same route and park in the rear lot at 8:54 a.m. O'Brien left and went to Drinking Brook Road. The same white SUV returned at 9:06 a.m. and parked in the driveway. On Saturday, December 11, 2021, O'Brien saw the same white SUV parked in the driveway at Drinking Brook Road.

O'Brien stated that on each occasion he went to Bernini Way, he never saw children, whether at the home or in the neighborhood, and never saw signs of children such as toys or bicycles. He concluded that based on his investigation, there are no grounds to believe that the M. family resided at Bernini Way.[6]

Austin Lindsay (Lindsay) testified on behalf of respondent. Since 2018, he has been a field investigator with Prime Source Investigators and in this position, has conducted over one thousand investigations. In a typical residency investigation, he is briefed by the client and given an address to surveil, and reports back with a description of the residence, any vehicles present, and any activity that he observes.

Lindsay identified the report he wrote regarding the investigation he conducted on Bernini Way. (R-8.) On February 3, 2022, Lindsay arrived at Bernini Way at 6:00 a.m. Knowing that school started at 8:55 a.m., and that the children involved were young and likely woke up early, Lindsay wanted an early start. He described Bernini Way as a large home with a two-car garage, located in a cul-de-sac in a nice neighborhood. By the time he left at 10:00 a.m., Lindsay had seen no activity at the house, no lights inside the house going on, no doors opening, no vehicles departing.

On February 4, 2022, Lindsay arrived at Bernini Way at 6:00 a.m., and stayed until 10:00 a.m. Again, he saw no activity, no lights going on, no vehicles. As shown on a

[6] O'Brien further concluded that the family resided at Drinking Brook Road, but respondent offered no further evidence to support this theory.

video Lindsay took of the residence, one light above the interior staircase was on when he arrived, and it turned off at 8:05 a.m., without any other lights going on. (R-10.) Lindsay concluded that this light was on a timer. Lindsay saw no children at Bernini Way, nor in the neighborhood, and saw no school buses (though both February 3 and 4, 2022 were school days). He concluded that the M. family does not live at Bernini Way.

A.M. testified on behalf of petitioners. He stated that he and M.M. decided to live separately[7] but continue to parent their children together. In 2018, M.M. and the children moved to Monmouth Junction to live with M.M.'s aunt, Maria Lichtenstein (Lichtenstein), and M.M.'s mother.

Lichtenstein lives at Bernini Way with her husband, M.M. and the children. M.M.'s mother, who was not named, lives at Drinking Brook Road. M.M.'s mother is quite old and sickly and cannot be with the children all the time, but the children do stay with her from time to time. The dates chosen by the investigators to surveil Bernini Way are all days on which the children stayed with their grandmother.

In 2018, petitioners took E.M. to register at Monmouth Junction Elementary School. They were told what documents were required for registration and provided all required documents, including the lease between Lichtenstein and M.M. for Bernini Way.[8] At the same time, petitioners told the registrar that they did not need transportation for E.M. because they lived in the Villagio, and school buses are not allowed in the community.

Each successive year, from 2019 through 2021, petitioners submitted all required documents to the registrar and each year, petitioners told the registrar that they did not need transportation for E.M., and eventually for both children. In 2021, someone in the school system made a mistake and sent the bus to Bernini Way.

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[7] A.M. did not say whether he and M.M. are divorced.

[8] Petitioners also introduced copies of M.M.'s federal tax return, her New Jersey drivers' license, and her bank account statements, all of which show her address as Bernini Way. (P-6 through P-20.)

A.M. stated that respondent did not prove that M.M. and the children do not live at Bernini Way; just because the HOA rules forbid children does not mean the family does not live there. M.M. pays rent to Lichtenstein, as provided in the lease. When asked to provide proof of payment of rent, A.M. stated that they pay in cash some months and did not have documentary proof of non-cash payments.

DISCUSSION

To the extent that testimony given by petitioner and the other witnesses is in conflict or inconsistent, the credibility of their testimony must be assessed. Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
>
> [Ibid. at 522.]

See also, Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, 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).

Luck-Born, O'Brien and Lindsay were all credible witnesses. They spoke without emotion about routine matters they took on in the course of their employment. While I question the limitations of O'Brien's investigation—he did not have proof that the children he saw with the woman in the white SUV were actually E.M. and I.M.—respondent did

not pursue the alternate theory, that the M. family was living at Drinking Brook Road. It was enough that neither investigator saw any children, or even a woman of M.M.'s age, at Bernini Way.

There is no dispute that the Villagio HOA rules forbid children under the age of 19, and it should not then be a surprise that by the second week of the 2021-2022 school year, Guzman had had enough of the disruptive school buses and contacted the District to keep them out. A.M. testified that starting in 2018, when E.M. began school, petitioners notified the Transportation Department that they did not need busing and someone made a mistake in September 2021 and sent a bus to their address. While not all of A.M.'s testimony rang true, this explanation makes sense. Prior to September 2021, Guzman had no reason to complain to the Transportation Department because there were no buses going through the Villagio. The M. family may have been living at Bernini Way between September 2018 and June 2021, which would explain why M.M. went to the trouble of opening bank accounts with that address, using that address for her drivers' license and her federal tax returns. There was no testimony regarding the apparent willingness of M.M.'s aunt to sign a lease that violates the Villagio's stringent age-restriction rules,[9] but the question here is not whether the M. family and/or their landlord was breaking the rules by setting up house in a fifty-five and over community.[10] The question is whether they lived in the Villagio community during the 2021-2022 school year.

The credible evidence presented by two investigators is that on five occasions, between October 2021, and February 2022, when school was in session and the M. children were in attendance, the children did not spend the previous night at Bernini Way and did not leave from Bernini Way to go to school. Coincidence is not enough to overcome the preponderance of the credible evidence and accordingly, I **FIND** that petitioners did not prove that during the 2021-2022 school year, E.M. and I.M. resided at Bernini Way.

---

[9] There was also no documentary proof that the M. family made lease payments to Lichtenstein.

[10] Given how quickly Guzman reacted when she saw the school buses, it is surprising that she never noticed elementary school-aged children allegedly living in the community for close to four years, a clear violation of HOA rules.

LEGAL ANALYSIS AND CONCLUSION

Petitioners contend that E.M. and I.M. are entitled to a free education in the District 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. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom., Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, for a student to receive a free education). E.M. is nine years old and I.M. is seven years old and, therefore, I **CONCLUDE** they meet the age requirements to be entitled to a free public 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, and a child's domicile is normally that of his or her parents. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parents have the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

Here, the evidence as to E.M. and I.M. being domiciled in the District is mixed. E.M. started school in the District in September 2018, and she and her brother have attended continuously since then. M.M. went to a great deal of trouble to show Bernini Way as her address. Both houses in which M.M.'s relatives reside—Bernini Way and Drinking Brook Road—are in the District, albeit within the geographic boundaries of

different elementary schools. Petitioners refused to concede residency at Drinking Brook Drive—either because they did not want their children to change schools in the middle of the school year or because they did not live there and could not prove otherwise.[11]

Accordingly, in light of all of the facts and circumstances, I **CONCLUDE** that E.M. and I.M. are not entitled to a free public education in the District. I **CONCLUDE** petitioners failed to satisfy the burden of proving that E.M. and I.M. are domiciled at Bernini Way and elected not to submit evidence supporting residency at Drinking Brook Road.

N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition:

> [F]or 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.

The record reflects that the actual cost of attendance in-District was $12,961 per year for each student for the 2021-2022 school year.

N.J.A.C. 6A:22-6.3(a) provides that,

> Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

[11] In their letter of January 26, 2022, petitioners state that they could enroll their children in private school but prefer for them to complete the current school year at Monmouth Junction Elementary School. (P-2.)

Therefore, I **CONCLUDE** that petitioners are responsible to pay tuition to respondent for attendance by E.M. and I.M. at Monmouth Junction Elementary School in the amount of $12,961 for each, for a total of $25,922.

ORDER

I **ORDER** that the decision of respondent South Brunswick Township Board of Education that E.M. and I.M. were not eligible for a free public education in the District during the 2021-2022 school year is **AFFIRMED** and the pro se residency appeal of petitioners M.M. and A.M. on behalf of E.M. and I.M. is **DISMISSED.**

Further, I **ORDER** that petitioners shall pay respondent tuition in the amount of $25,922.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration. This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 initial 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.

August 15, 2022
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nmn

APPENDIX

WITNESSES

For Petitioners:

A.M.

M.M.

For Respondent:

Suzanne Luck-Born

Patrick J. O'Brien

Austin Lindsay

EXHIBITS

For Petitioner:

P-1 - Letter from South Brunswick Public Schools to Petitioners regarding ineligibility of children, dated January 10, 2022

P-2 - Letter from Petitioners to Suzanne Luck-Born, dated January 26, 2022

P-3 - South Brunswick Public Schools Final Notice of Ineligibility, dated February 14, 2022

P-4 - Pro Se Residency Appeal, dated March 4, 2022

P-5 - Letter of Counsel for Respondent, dated April 29, 2022

P-6 - Lease dated June 30, 3018

P-7 - Lease dated June 1, 2019

P-8 - Lease dated June 1, 2021

P-9 - PNC Bank Statement

P-10 - PNC Bank Statement

P-11 – PNC Bank Statement

P-12 – Citibank, N.A. Statement

P-13 - Citibank, N.A. Statement

P-14 - Citibank, N.A. Statement

P-15 - Citi Diamond Preferred Card Statement

P-16 - Citi Diamond Preferred Card Statement

P-17 - Citi Diamond Preferred Card Statement

P-18 – Federal 2019 Income Tax Return, Form 1040

P-19 - Federal 2020 Income Tax Return, Form 1040

P-20 - New Jersey State Driver's License Issued to M.M.

P-21 - New York State Driver's License Issued to A.M.

For Respondent:

R-1 Summary of Residency Investigation

R-2 Daily Report Log from Residency Investigation

R-3 Letter to Petitioners from Scott Feder, dated December 17, 2021

R-4 Letter to Petitioners from Suzanne Luck-Born regarding Determination of Ineligibility, dated January 10, 2022

R-5 Letter to Suzanne Luck-Born from Petitioners, dated January 26, 2022

R-6 Email from the Villagio South Brunswick to Scott Feder regarding Villagio South Brunswick HOA, dated February 1, 2022

R-7 Respondent's District Policy 5111 – Eligibility of Resident/Non-Resident Pupils

R-8 Email from Nate Reber to David Pawlowski regarding his Investigation Report Summary, dated February 7, 2022

R-9 South Brunswick School District's Statements of Assurance

R-10 Video

255-22
OAL Dkt. No. EDU 03831-22
Agency Dkt. No. 55-3/22

New Jersey Commissioner of Education

Final Decision

T.M., on behalf of minor child, J.M.,

Petitioner,

v.

Board of Education of the South Orange-Maplewood School District, Essex County,

Respondent.

The record of this matter and the advisement by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-14.4, of petitioner's failure to appear at an August 17, 2022 hearing have been reviewed.

Petitioner filed a hand-written explanation asserting that he missed the hearing because he was preparing for a job interview. The petitioner further states that he wishes to continue with the process in the interests of his son.

Based upon the petitioner's timely written explanation for his nonappearance, this matter is being retransmitted to the OAL for further disposition, pursuant to *N.J.A.C.* 1:1-3.3(b).

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 26, 2022
Date of Mailing: September 26, 2022

256-22
OAL Dkt. No. EDU 04099-22
Agency Dkt. No. 80-4/22

New Jersey Commissioner of Education

Final Decision

J.S., on behalf of minor child, J.S.,

Petitioner,

v.

Board of Education of the Township of Mount Laurel, Burlington County,

Respondent.

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

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 26, 2022
Date of Mailing: September 26, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04099-22
AGENCY DKT. NO. 80-4/22

J.S. ON BEHALF OF J.S.,
Petitioner,
v.
MOUNT LAUREL TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY,
Respondent.

J.S., petitioner, pro se

Emily S. Strawbridge, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: August 26, 2022 Decided: August 31, 2022

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 20, 2022, 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, along with the Board Resolution, indicating the terms thereof, which is attached and fully incorporated herein.

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

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

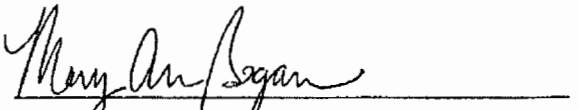
2. The settlement fully disposes of all issues in controversy.

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

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

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

August 31, 2022
DATE



MARY ANN BOGAN, ALJ

Date Received at Agency: 9/1/2022

Date Mailed to Parties: 9/2/2022

MAB/kl

PARKER McCAY

RECEIVED
2022 AUG 24 P 2:29
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

Parker McCay P.A.
9000 Midlantic Drive, Suite 300
P.O Box 5054
Mount Laurel, New Jersey 08054-1539

P: 856.596.8900
F: 856.596.9631
www.parkermccay.com

Emily S. Strawbridge, Esquire
P: 856-985-4005
estrawbridge@parkermccay.com

File No.: 12291-5

August 24, 2022

looks good. This is an EDU case it has a special wait start Dec. re. SEA.

VIA ELECTRONIC MAIL
Honorable Mary Ann Bogan, A.L.J.
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049
Nicole.newman@oal.nj.gov

Re: J.S. o/b/o J.S. vs. Mt. Laurel Township Board of Education
OAL Docket No.: EDU 04099-2022S, Agy Ref. No.: 80-4/22

Dear Judge Bogan:

As Your Honor is aware, this office represents the Mount Laurel Board of Education (hereinafter "Board") in the above matter. Please see the attached fully executed Settlement Agreement.

It is respectfully requested that the Settlement Agreement be entered as final order in this matter.

Thank you for your time and consideration.

Very truly yours,

/s/ Emily S. Strawbridge
EMILY S. STRAWBRIDGE

ESS/dc
Enclosures
cc: Jazmyn Suszynski, Petitioner (via email)
Dr. George Rafferty, Superintendent (via email)

Law Offices
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
(856) 596-8900
Attorneys for Respondent-Cross Petitioner, Mount Laurel Township Board of Education

J.S. o/b/o minor child J.S. **Petitioners,** vs. **MOUNT LAUREL TOWNSHIP BOARD OF EDUCATION** **Respondent-Cross Petitioner.**	**BEFORE THE COMMISSIONER OF EDUCATION** **STATE OF NEW JERSEY** **OAL DOCKET NO.: EDU 04099-2022S** **AGENCY REF. NO.: 80-4/22** **CIVIL ACTION** **SETTLEMENT AGREEMENT**

This Settlement Agreement and General Release (the "Agreement") is entered into on this ____ day of August, 2022 by and between J.S. o/b/o J.S., and the Mount Laurel Board of Education (hereinafter "District"), with its mailing office located at 330 Mount Laurel Road, Mount Laurel, NJ , 08054 ("J.S. o/b/o J.S. and District" hereinafter collectively, "the Parties").

WHEREAS, J.S. is a student currently enrolled in the Mount Laurel Public School District;

WHEREAS, J.S. was determined to be residing outside of the Mount Laurel School District;

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WHEREAS, a dispute arose as to J.S.'s current domicile and his enrollment as a student in the Mount Laurel Public School District; and

WHEREAS, J.S. filed a Petition of Appeal with the Commissioner of Education challenging the removal of J.S. from the District; and,

WHEREAS, the District filed an Answer and Counterclaim seeking payment of tuition; and,

WHEREAS, the matter was transmitted to the Office of Administrative Law for a Hearing; and,

WHEREAS, the Parties in conducted negotiations and have reached a resolution of the claims contained in the Petition of Appeal and the Answer and Counterclaim filed on behalf of the Parties;

The Parties hereby agree as follows:

1. As of the date of this agreement, J.S. shall be withdrawn as a student in the Mount Laurel Public School District and enroll in the public school district of his current residence.

2. J.S. agrees to register J.S. in the current school district of residence for the 2022-2023 school year.

3. In the event J.S. is currently residing in Mount Laurel Township, J.S. agrees to properly register J.S. in the District in accordance with all applicable New Jersey Statutes and Regulations and District Policy 5111 – Admission, and by completing all required forms in the manner required by the District, no later than August 31, 2022.

4. In the event J.S. is presently residing with a relative within Mount Laurel Township, J.S. agrees that the resident with whom J.S. and the student J.S. are residing will appear

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in person to complete the required paperwork in the presence of the District's notary public, no later than August 31, 2022.

5. The District will waive any entitlement to payment of tuition by J.S. o/b/o J.S. for J.S.'s attendance at the Mount Laurel School District through the date of this agreement.

6. In consideration of the above, J.S., individually and on behalf of J.S., hereby fully and completely release the District, its members, officers, administrators, agents, servants, employees, or assigns from any and all claims they have or may have accrued against the District, under any law, regulation, or legal theory, and including, without limitation, Section 504 of the Rehabilitation Act of 1973, 29 *U.S.C.*§ 794(a), §705(8), the Family Education Rights and Privacy Act, 20 *U.S.C.* §1232g, *et seq.*, 29 *U.S.C.* §794(a), 42 *U.S.C.* §1983, 42 *U.S.C.* §1988, 29 *U.S.C.* §705(20), the Individuals with Disabilities In Education Act ("IDEA"), 20 *U.S.C.* §1400, *et seq.*, the Americans with Disabilities Act, 42 *U.S.C.* §12132, *et seq.*, the Rehabilitation Act of 1973, 20 U.S.C. §7801, Title II of the Americans with Disabilities Act, 42 *U.S.C.* §12132, *et seq.*, *N.J.A.C.* 6A:14-1.1, *et seq.*, *N.J.A.C.* 6A:14-3.7, Title VII of the Civil Rights Act of 1964, 42 *U.S.C.* §2000, *et seq.*, the Americans with Disabilities Act, 42 *U.S.C.* §621,*et seq.*, all as amended, any statutes of New Jersey including but not limited to the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1, *et seq.*, or any other claims which have been or could have been asserted by J.S. or on behalf of J.S., in any forum arising out of or connected with J.S.'s education by the District, including but not limited to, claims for attorney's and other professional fees and costs, reimbursement related to any unilateral and/or out-of-district placement for J.S., whether known or unknown, or to the extent permitted by applicable law through the date of this agreement.

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7. The Parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of a residency hearing and litigation. It is understood that the execution of this Agreement does not constitute an admission by the District.

8. This Agreement contains the entire Agreement and understanding between the Parents and Respondents and constitutes a full and final Agreement on any and all issues. This Agreement shall be governed by the laws of the State of New Jersey.

9. J.S. o/b/o J.S. acknowledges that she has read and understands the terms of this Agreement, that she has had the opportunity to have the Agreement reviewed by counsel, that she is satisfied with the advice of her respective counsel, and that she is entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

IN WITNESS HEREOF, the Parties have set their hands this 23rdday of August, 2022

BY: _____ DATED: 8/23/2022
Danielle Stuffo, President
Mount Laurel Township
Board of Education

BY: DocuSigned by: _____ DATED: 8/23/2022
J.S. O/B/O J.S.
Petitioner

257-22
OAL Dkt. No. EDU 03839-22
Agency Dkt. No. 83-4/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Teaching Certificate of Veronica Gasper, Township of Montgomery Board of Education, Somerset County.

The record of this matter, the proposed Consent Order (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 26, 2022
Date of Mailing: September 26, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03839-22
AGENCY DKT. NO. 83-4/22

IN THE MATTER OF THE TEACHING CERTIFICATE OF VERONICA GASPER, TOWNSHIP OF MONTGOMERY BOARD OF EDUCATION, SOMERSET COUNTY.

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

Veronica Gasper, respondent, pro se

Record Closed: August 25, 2022 Decided: September 1, 2022

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

This matter was transmitted to the Office of Administrative Law on May 11, 2022, 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. This Consent Order resolves all disputes.

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 Consent Order and the attached Board resolution.

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 1, 2022 — Edward J. Delanoy Jr.

DATE — **EDWARD J. DELANOY, JR.**, ALJ

Date Received at Agency: 9-1-22

Date Mailed to Parties: 9-6-2022

EJD/nn

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STATE OF NEW JERSEY

Stephen R. Fogarty, Esq.
Attorney ID No. 011151979
FOGARTY & HARA, ESQS.
21-00 Route 208 South
Fair Lawn, New Jersey 07410
(201) 791-3340
(201) 791-3432 Telecopier
Attorneys for Petitioner,
Montgomery Township School District
Board of Education
Our File No. 39/785

MONTGOMERY TOWNSHIP SCHOOL DISTRICT BOARD OF EDUCATION,	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL Dkt. No.: EDU 03839-2022S Agency Ref. No.: 83-4/22
vs.	
VERONICA GASPER,	**CONSENT ORDER**
Respondent.	

WHEREAS, this matter having been opened before the Commissioner of Education by Fogarty & Hara, counsel for Petitioner, the Montgomery Township School District Board of Education (the "Board"), by way of Verified Petition and Order to Show Cause; and

WHEREAS, the Board, by and through the Verified Petition and Order to Show Cause, and for the reasons set forth therein, seeking the suspension of Respondent, Veronica Gasper's (hereinafter "Ms. Gasper"), 1410 Instructional Certificate (hereinafter "Teaching Certificate"), issued by the State of New Jersey, Department of Education, State Board of Examiners, pursuant to N.J.S.A. 18A:26-10 and N.J.A.C. 6A:9B-4.8; and

WHEREAS, the aforesaid Verified Petition and Order to Show Cause having been filed by the Commissioner and assigned Docket Number 83-4/22; and

WHEREAS, Ms. Gasper having Answered the Verified Petition and Order to Show Cause; and

WHEREAS, the Commissioner of Education, on or about May 11, 2022, having transmitted the above-captioned matter as a Contested Case to the State of New Jersey, Department of Education, Office of Administrative Law ("OAL"); and

WHEREAS, the Board and Ms. Gasper have reached a mutually acceptable resolution of the matter in difference by and between them; and

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

NOW, THEREFORE, it is hereby ORDERED THAT Ms. Gasper's Teaching Certificate shall be suspended for a period of nine (9) calendar months, said suspension commencing upon August 1, 2022 and ending on May 1, 2023.

BY: _____
EDWARD J. DELANOY, JR., Deputy Director & A.L.J.

Dated: August 28, 2022

_____
Stephen R. Fogarty, Esq.
Attorney for Petitioner,
Montgomery Township School District Board of Education

Dated: 16 August 2022

_____
Veronica Gasper
Respondent

Dated: 8/16/22

MONTGOMERY TOWNSHIP SCHOOL
DISTRICT BOARD OF EDUCATION

By: _____
Ms. Zelda Spence-Wallace
Board President

Dated: 8/24/22

MONTGOMERY TOWNSHIP SCHOOL
DISTRICT BOARD OF EDUCATION

By: _____
Ms. Alicia M. Schauer
School Business Administrator/
Board Secretary

Dated: 8/24/22

2022 AUG 25 A 9:50

STATE OF NEW JERSEY

Resolution 4.8

RESOLUTION

BE IT RESOLVED by the Montgomery Township School District Board of Education (hereinafter referred to as the "Board") that the terms, stipulations and conditions as established in the Consent Order between the Board and Employee Number 6618 agreeing to a nine month suspension of Employee's Teaching Certificate commencing August 1, 2022, are hereby adopted and approved by the Board. The Board President and Business Administrator/Board Secretary are hereby authorized and directed to execute the Consent Order, and any other documents necessary to effectuate the settlement.

ROLL CALL VOTE:

AYES: Ms. Bursh, Mr. Carlson, Ms. Harris, Mr. Specht, Ms. Spence-Wallac3 and Ms. Spina
NAYS: None

ABSTENTIONS: None

CERTIFICATION

I hereby certify that the within Resolution is a true and accurate copy of the original and was adopted by the Montgomery Township School District Board of Education by a majority vote at its duly authorized meeting on August 23, 2022.

Alicia M. Schauer
Business Administrator/Board Secretary

DATED: August 23, 2022

260-22

New Jersey Commissioner of Education

Final Decision

K.P., on behalf of minor children, J.P. and J.P.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

Synopsis

Petitioner appealed the decision suspending her two eighth-grade children for violations of the Board's student conduct policies based on their alleged involvement with a Google slideshow and Snapchat conversations which contained racial slurs, anti-Semitic and anti-LGBTQ+ comments, personal student information, explicit photos and videos, and threats of physical and sexual violence. J.P. and J.P. denied responsibility for the postings. The suspension determination followed an investigation by the North Arlington Police Department, which traced the Internet Protocol (IP) address associated with the postings to the petitioner's home, and a disciplinary hearing before the Board. Petitioner sought to have the suspension decisions reversed and removed from her children's school records.

The ALJ found, *inter alia*, that: the parties relied on the record of the disciplinary hearing before the Board; the witnesses in that proceeding had not been sworn or affirmed; further, the screenshots from Snapchat and the Google slideshow presented as evidence by the Board had not been marked as exhibits during the disciplinary hearing; since no specific images were marked as exhibits at that hearing and attorneys on both sides of the case cannot attest that the screenshots presented in the OAL were the same documentary evidence that was considered by the Board at its disciplinary hearing, there was no foundation to allow these exhibits to be admitted into evidence. Based on the foregoing, the ALJ concluded that the Board's actions were arbitrary, capricious and unreasonable. Accordingly, the ALJ overturned the suspensions and ordered the discipline removed from the children's student records.

On review, the Commissioner disagreed with the ALJ's finding that the Board's decision to suspend J.P. and J.P. was arbitrary, capricious or unreasonable. The Commissioner found, *inter alia*, that decisions of a local board of education acting within its discretionary authority are entitled to a presumption of correctness; the evidence presented at the Board hearing complied with the statute governing disciplinary hearings, even if the manner of presenting that evidence would not meet the evidentiary rules of other forums; there was no basis for the ALJ to exclude the proffered testimony or screenshots from evidence; and the record shows that the conduct of J.P. and J.P. at issue here did materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. Based on the threats of violence contained in the postings, the Commissioner concludes that it was not arbitrary, capricious, or unreasonable for the Board to find that there was good cause for suspension pursuant to *N.J.S.A.* 18A:37-2. Accordingly, the Initial Decision was rejected, and the petition dismissed.

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

260-22
OAL Dkt. No. EDU 04249-21
Agency Dkt. No. 74-5/21

New Jersey Commissioner of Education

Final Decision

K.P., on behalf of minor children, J.P. and J.P.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

Petitioner's minor children were accused of violations of the Board's student conduct policies based on their involvement with a Google slideshow and Snapchat conversations (collectively, the "postings") that contained racial slurs, anti-Semitic and anti-LGBTQ+ comments, personal student information, explicit photos and videos, and threats of physical and sexual violence. The incidents occurred throughout the fall of 2021 and winter of 2022, but the Board waited to impose discipline while the North Arlington Police Department (NAPD) was investigating the source of the postings. After issuing subpoenas to Google and Verizon, the NAPD traced the the Internet Protocol (IP) address associated with the postings to petitioner's

[1] Petitioner did not file a reply to the Board's exceptions.

home. The administration recommended that J.P. and J.P. be suspended, and the Board held a disciplinary hearing in March 2022. Principal Nicole Russo testified about the early steps of the investigation, the effect that the postings had on the school, and the decision to suspend J.P. and J.P. NAPD Detective Nayda testified about the subpoenas and stated that charges had been filed against J.P. and J.P. Counsel for petitioner cross-examined both witnesses. J.P. and J.P. then testified, denying that they were responsible for the postings.

On March 19, 2022, the Board issued a decision suspending J.P. and J.P until they were cleared by a psychiatrist to return to school.[2] Petitioner appealed, seeking to have the decision to suspend her children reversed and the suspensions removed from their records.[3] At the OAL, the parties relied on the record of the disciplinary hearing before the Board. The Administrative Law Judge (ALJ) excluded the witness testimony, finding that the witnesses had not been sworn or affirmed. The ALJ also excluded all of the screenshots, finding that they had not been marked as exhibits during the disciplinary hearing. The ALJ concluded that the Board's actions were arbitrary, capricious, and unreasonable and overturned the suspensions.

In its exceptions, the Board argues that all of the documentary evidence presented at the disciplinary hearing was provided to petitioner and, in the absence of any evidence that those materials were withheld,[4] there was no legal prerequisite for counsel to lay a fresh evidentiary foundation for the ALJ to consider the record of what occurred before the Board.

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[2] Separate decisions were issued for each student, but given their similarities, they will be referred to herein as a single decision for ease of reference.

[3] The petition of appeal initially included a request for emergent relief to return J.P. and J.P. to school, but when they children were cleared to return, petitioner withdrew her request for emergent relief.

[4] The Commissioner notes that petitioner has not argued that any material was withheld. Petitioner's arguments have focused on the sufficiency of the evidence.

The Board notes that petitioner's counsel provided the materials to the ALJ as hearing exhibits and agreed that they should be considered by the ALJ, such that it was improper for the ALJ to refuse to consider them. The Board also notes that petitioner's counsel cross-examined the Board's witnesses during the disciplinary hearing. According to the Board, the ALJ misconstrued an appeal from a disciplinary action as a trial de novo and improperly disregarded the law governing disciplinary hearings before boards of education, which sets forth specific standards for the conduct of hearings that do not require witnesses to be sworn or documents to be identified and formally admitted into evidence. Finally, the Board argues that the ALJ erroneously substituted his judgment for the Board's, contrary to the standard of review that applies to discretionary decisions of boards of education.

Upon review, the Commissioner disagrees with the ALJ that the Board's decision was arbitrary, capricious, and unreasonable. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "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). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" and the Commissioner will not substitute her judgment for that of the board. *Bayshore Sewerage Co. v. Dep't. of Envtl. Prot.*, 122 *N.J. Super.* 184, 199 (Ch. Div. 1973), *aff'd*, 131 *N.J. Super.* 37 (App. Div. 1974).

Pursuant to *N.J.A.C.* 6A:16-7.3(a)(10), when a board of education imposes a long-term suspension on a student, the board must provide a formal hearing that affords certain

procedural due process protections. Students must have the opportunity to 1) confront and cross-examine witnesses if there is a question of fact and 2) present their own defense, which includes the opportunity to produce oral testimony or written supporting affidavits. The record is clear that the Board complied with these requirements. It was not arbitrary, capricious, or unreasonable for the Board to rely on evidence that complied with the statute that governs disciplinary hearings, even if the manner of presenting that evidence would not meet the evidentiary rules of other forums. Therefore, there was no basis for the ALJ to exclude the testimony or screenshots.

The Commissioner must next determine whether the Board's decision was arbitrary, capricious, or unreasonable in light of the evidence presented to the Board during the disciplinary hearing. The evidence presented in support of the suspension included Detective Nayda's testimony that the IP address associated with the postings was traced to petitioner's house. The record reflects that the only other residents of the house were petitioner, her husband, and an older child who was in college, none of whom were believed to be responsible for the postings. The NAPD found the evidence sufficiently compelling to proceed with charges against J.P. and J.P.[5] J.P. and J.P.'s defense at the hearing consisted primarily of their denials. Additionally, counsel for petitioner pointed out to the Board that Detective Nayda had not brought documentation related to the subpoenas or examined the family's Wifi or computers, and argued that tracing the IP address associated with the postings to petitioner's house is insufficient to conclude that J.P. and J.P. were responsible for the postings. While the

[5] The Board found that the testimony of Detective Nayda and Principal Russo was credible. While the Commissioner is not obligated to defer to a board of education's credibility findings, based on the applicable standard of review, the Commissioner concludes that there is nothing in the transcript of either witness's testimony that would suggest that it was arbitrary, capricious, or unreasonable for the Board to find their testimony credible.

testimony and arguments may leave room for different opinions regarding whether J.P. and J.P. were responsible for the postings, a difference of opinion is insufficient to overturn the Board's decision. *Bayshore Sewerage Co., supra,* 122 *N.J. Super.* at 199. Based on the evidence, the Commissioner finds that it was not arbitrary, capricious, or unreasonable for the Board to conclude that J.P. and J.P. were responsible for the postings. Additionally, given the disrespectful, obscene, and violent nature of the postings, the Commissioner also concludes that it was not arbitrary, capricious, or unreasonable for the Board to find that J.P. and J.P.'s conduct was in violation of the student conduct policies.

Under *N.J.A.C.* 6A:16-7.5, discipline for conduct that occurred away from school grounds must be reasonably necessary for reasons relating to the safety, security, and well-being of other students, staff, or school grounds, and the conduct must materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. Principal Russo testified that the postings caused a substantial disruption at school, with effects lasting for months. Many students visited the guidance office for counseling and some students reported that they were afraid to return to school. Multiple students were so affected by the postings that they contacted the NAPD. Parents repeatedly contacted the administration seeking answers and action. Based on that information, the Commissioner concludes that it was not arbitrary, capricious, or unreasonable for the Board to conclude that discipline was appropriate under *N.J.A.C.* 6A:16-7.5.[6] Furthermore, based on the threats of violence contained in the postings, the Commissioner concludes that it was not arbitrary, capricious, or

[6] The Commissioner notes that the level of disruption caused by the postings far exceeds the circumstances of *Mahanoy Area School District v. B.L.*, 594 *U.S.* ____ (2021), in which the Supreme Court held that brief class discussions for a couple of days and some students being upset about social media postings did not rise to the level of substantial disruption.

unreasonable for the Board to find that there was good cause for suspension pursuant to *N.J.S.A.* 18A:37-2.

Accordingly, the Initial Decision is rejected, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[7]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 4, 2022
Date of Mailing: October 4, 2022

[7] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04249-21
AGENCY DKT. NO. 74-5/21

K.P. ON BEHALF OF MINOR CHILDREN,
J.P. AND J.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY
Respondent.

S. Emile Lisboa, IV Esq., (Galantucci and Patutuo, attorneys) for petitioner

Eric L. Harrison, Esq., (Methfessel and Werbel, attorneys) for respondent

Record Closed: May 23, 2022 Decided: July 15, 2022

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

STATEMENT OF THE CASE

Petitioner, K.P. on behalf of minor children, a daughter, J.P. and son, J.P. (petitioner or K.P.) filed a Petition of Appeal, N.J.A.C. 6A: -3-1.5 and alleged that respondent, the Board of Education of the Borough of North Arlington, Bergen County (BOE), violated her children's rights in their handling of disciplinary proceedings against

the two students, then attending 8th grade at their middle school in North Arlington (School), which resulted in an indefinite period of suspension during which time the children had to see a psychiatrist and could not return to school until he or she "cleared" them.

The BOE made findings of fact that the children violated Policies and Regulations Nos. 5500 (Expectations for Pupil Conduct), 5600 (Student Discipline/Code of Conduct), 5620 (Expulsion), N.J.S.A. 18A:37-2 (causes for Suspension or Expulsion of a Student), N.J.S.A. 2C:12-3 (Terroristic Threats), and the Middle School's 2020-2021 Handbook. Petitioner's request for a Fair Hearing was transmitted to the Office of Administrative law on My 14, 2021. The petitioner initially sought relief from the suspensions imposed on the two children. However, after the conditions of the suspension were lifted, and before the Emergent Hearing could be conducted, petitioner withdrew her application for emergent relief. [1]

BACKGROUND AND PROCEDURAL HISTORY

A disciplinary hearing at the North Arlington BOE concerning the charges against J.P. and J.P. took place at the School on March 15, 2021. Although the alleged facts were somewhat complicated, essentially, one child was accused of creation of a Google slideshow, and posing as another student while making racial slurs anti-Semitic comments, posting student personal information, posting explicit sexual pictures and videos, and the other child, on another occasion, creating at least two fake Snapchat accounts, posing as another student, using the "N" word, making anti-LGBTO+ comments, threatening to rape and shoot another student, making claims of sexual contact with another student's mother and "other inappropriate and disrespectful statements." Although some of the postings and images concerned "students," no particular students were targeted or named in them. None of these violations of school policy took place on school grounds; nor was school property involved. Both children denied committing any of the offenses.

[1] Several months after the emergent proceedings, respondent moved for summary decision, arguing that with the lifting of the suspension against the children, the issues raised in the petition seeking a Fair Hearing at the Office of Administrative Law were moot. This motion was denied, in a decision dated, February 2, 2022.

Although the suspensions were eventually lifted after the children met the demands of the school, the suspensions remain on record. Petitioner seeks to have the decision of the North Arlington BOE reversed and her children's names and school records be cleared. Respondent believes their decision to suspend the children was reasonable and ask that their decision be affirmed.

Hearings were held via Zoom April 20, 2022 and April 26, 2022. The record was left open until May 23, 2022 for receipt of post hearing briefs at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The parties agreed to rely on the record of the disciplinary hearing before the BOE which consisted mostly of a transcript of said proceeding. They added to that record a Certification by the Principal concerning the suspensions (R-4). They also added photocopies of images that purportedly were seen on the Snapchat and Google slideshow. (Joint Exhibits K-M). No specific images on these exhibits were specifically identified at the hearing before the BOE.

The allegations against the two children brother and sister were serious. The essential findings made by the BOE as stated in Exhibits J-1 and J-2, J.P. (female) wee that between September 23, 2020 and November 23, 2020 and again between December 22, 2020 and January 15, 2021, J.P.(female) was allegedly involved in the creation of a Google Slideshow, in which he posed as another student "while making racial slurs, anti-Semitic comments posting personal student information and posting explicit sexual pictures and videos." During the same time, J.P. also created at least two fake Snapchat accounts, posing as another student, "using the 'N' word, making anti-LGBTQ+comments, threatening to rape and shoot another student, making claims of sexual contact with a student's mother, amount other inappropriate and disrespectful statements." (J-1, Summary of the Evidence Presented.) J.P. (male) was charged with the virtually identical conduct. The sole evidence consisted of statements made by

Detective Nayda, the juvenile detective for the North Arlington Police Department, and by Principal Russo. The two children completely denied the allegations.

The BOE found "credible" the statements by Detective Nayda, the juvenile detective for the North Arlington Police Department. He "issued a subpoena to Snapchat and learned that the [faked Snapchat accounts] were accessed from the IP address of" J.P. (female) and J.P. (male)'s household." The Detective "also learned that the email used to create the accounts" came back to a J.P. (female) account.

As noted in the post hearing brief of respondent, which recounts as "testimony" the unsworn "evidence" at the school hearing, Detective Nayda, in order to trace who was connected to the Google slideshow, also created and sent a subpoena to Google who responded with an IP address of Verizon. Subsequently, the respondent states (in its post hearing brief) "a subpoena to Verizon yielded an IP address that was traced directly to J.P. (male) and J.P. (female)'s household." As further evidence that J.P. (male) was actually "behind" the Google slideshow, the BOE relied on Principal Russo's recounting of a Google meet session, regarding the Google slideshow during which J.P. shut off his camera after which Principal Russo then received an electronic message that the slideshow had been deleted.[2]

There were several questionable practices in the methodology of the BOE's decision making, at least as can be discerned in its decision. Under "II, Summary of the Evidence Presented," it states that before the hearing the accused were "provided with a *list* of potential witnesses and documentary evidence." (emphasis supplied). Thus, it would appear that the children (and their mother and attorney) were only given prior to the hearing a "list" of documentary evidence intended to be introduced. A list is not the same as having a copy of all the documents on the list. Further and more disturbing, during the hearing, "the BOE had the documentary evidence on Chromebooks for their

[2] It is interesting that this described incident occurred in October 2020. J.P. (female) and J.P. (male) were charged as a 'result of the actions that occurred (emphasis supplied) on or about September 23, 2020 through on or about November 23, 2020 and from *on or about December 22, through on or about January 15, 2021 which time she was alleged to be in the creation of a Google slideshow* (emphasis added). What does a deleted Google slideshow have to do with the actions that occurred between November 2020 and January 15, 2021, if it was deleted in October 2020?

review." Included were "many screenshots taken of the Snapchat accounts and the Google Slideshows." Based on the certified transcript of the proceedings, it appears that the children, their mother, their lawyer were not given the same Chromebooks and thus could not effectively examine the documentary evidence being used against them. Worse. regarding said images, none of them were identified, marked, or entered as evidence. Further, the BOE's decision does not describe any of images except in the most general way, e.g., "the level of threats in the posts was extreme and other posts were very sexual and very graphic." It appears obvious that it was of the utmost importance that the actual images that were on the Snapchat accounts and the Google slideshow be marked into evidence so that the witnesses could effectively attempt to prove their innocence, as they maintained throughout the proceedings.

More problematically, the hearing consisted entirely of statements or conversations by witnesses who, according to the Transcript, were never given, and never took the oath nor affirmed as to the truthfulness of anything they said. Consequently, J.P. and J.P. were effectively deprived of the right to cross examine witnesses against them, as those witnesses were not under oath nor affirmation, and not speaking under penalty of possible punishment for failing to tell the truth. Thus the "hearing" was fundamentally unfair.

As noted, none of the screenshots from the Google slideshow or snapchats were sufficiently identified in the record of the proceeding before the BOE to know what images the BOE were reviewing on the Chromebooks. It is clear from the hearing that no particular screenshots were entered into evidence, so we only have the BOE's witnesses and their vague characterizations as to what was contained on the Google Slideshow and Snapchat accounts rather than the copies of the actual evidence they reviewed. Whatever value the unsworn to evidence contained in the transcript has, it shows that none of the specific screenshots were entered as evidence. The Exhibits identified in the hearing before me were, both parties agreed, were received in Discovery, but they are very possibly not the same screenshots that the BOE considered in making its decision. There is simply no way of knowing.

At the BOE hearing, the Detective admitted that the images being shown to the BOE on the date of the hearing had been altered from the way he had seen them on the actual devises when he was in process of obtaining the subpoenas. Furthermore, the Detective did not produce for anyone copies of the Google Verizon and Snapchat subpoenas that he created nor the actual written response by those companies to the subpoenas. Instead, he just recounted what these documents from these three companies said. Even if Detective Nayla had been under oath, the BOE should not have simply accepted his statement as to what was on the subpoena's responses, and they should not have accepted his statements as evidence without his providing the documents.

Finally, the parties now appear to agree that the creation of Google slideshow does not prove who placed what information or images on the slideshow at any given time because those to whom the slideshow was sent can edit it or add to it. Further ,one cannot tell who made which statements on the Snapchat account. Clearly, some others than the creators of these two fakes snapchat account seemed to have created similar offensive comments and were not investigated or disciplined for it.

LEGAL ANALYSIS AND CONCLUSION OF LAW

The burden is on the petitioner to overcome the "presumption of correctness" by providing by a preponderance of the evidence that the BOE's action was arbitrary capricious and unreasonable. The BOE stated in its decision that it relied on the lay opinion of Detective Nayda that he believed J.P. (female) was responsible for creating the false and offensive Snapchat accounts, and that J.P. (male) was, in the BOE's words "behind" the creation of the Google slideshow.

While I agreed to allow the parties to rely on the record below, I did not know until I read the BOE certified transcript , that would that none of the "witnesses" who spoke at the hearing were ever sworn in nor affirmed. Regarding any documentary evidence, I was also unaware that no specific images from the Snapchats or Google slideshow were marked as exhibits at the hearing.

I cannot sustain guilty verdicts resulting in serious disciplinary action that are not based on sworn or affirmed testimony nor on documents for which no foundation has been supplied. Again, both attorneys agree that they cannot attest that the screenshots in Joint Exhibit P-K are the same documentary evidence that was considered by the BOE. I therefore cannot allow them to be admitted to evidence, for lack of foundation. I also cannot admit the full transcript consisting mostly of unsworn and unaffirmed testimony.

When I agreed to allow the parties to rely on the record below, I did not know until I read the BOE certified transcript, that none of the "witnesses" who spoke at the hearing were ever sworn in, nor did they affirm. N.J.A.C. 1:1-5.8 (d) provides that "A witness may not testify without taking an oath or affirming to tell the truth under the penalty provided by law." I cannot admit the full transcript consisting almost entirely of unsworn testimony.

Regarding any documentary evidence, I was also unaware that no specific images from the Snapchat or Google slideshow were marked as exhibits at the hearing. Both attorneys agree that they cannot attest that the screenshots in Joint Exhibit P-K are the same documentary evidence that was considered by the BOE. I therefore cannot allow them to be admitted to evidence, for lack of foundation

Regarding the testimony at the hearing, although the BOE's decision specified the dates in which these activities took place, it did not state what specific offensive material was available (or when it was available) for others to see. They did not rule out that others could have edited and changed whatever J.P. (male) and/or J.P. (female) may have posted. They did however provide credible uncontested evidence that J.P. (male) and J. P. (female) were good students whom they would not, I believe, normally suspect to be responsible for such behavior, and that the children were at least consistent in steadfastly denying they were responsible for the actions for which they were charged.

Further, the detective wasn't made to bring the subpoena data with him to the BOE, so it could be entered as evidence. In his investigation, the Detective ignored threats that has been made to J.P. and J.P. he didn't know whether any content was added or deleted from the slideshow, did not seem to know that IP addresses can periodically change, and did not know how many students had participated in the Snapchat.

Finally, as stated in the BOE's decision, Principal Russo relied on her interviews with "several, several, students" but never bothered to say which students and what they actually said, to conclude J.P. and J.P. were guilty. This is even more egregious and fundamentally unfair given that her own statements were not made under oath or affirmation.

I agree with petitioner that this was an instance of a rush to judgement which required a truly expert investigation and plausible expert testimony, in order to attempt to determine who made the offensive comments on the slideshow and Snapchats. At a very minimum, the hearing should have been conducted so that there was certainly that the evidence the BOE had (on their Chromebook) was given to J.P. and J.P. to know the evidence they would be confronted with as no specific documents were entered into evidence on the record. Because of the failure to do so, we are uncertain even today what evidence the BOE considered. Accordingly in making my decision, I exclude all the alleged screenshots in the exhibits or described from the exhibits in the briefs because of the lack of foundation as to whether that evidence was used at the hearing. I also exclude any so called testimony which attempts to describe the content of the images, as they were mostly double hearsay and especially because they were not sworn or affirmed to.

While it is true that both parties had a right to call witnesses and have a fresh and Fair Hearing as provided for by our rules, here the parties chose to rely on the record below, which in this case is terribly inadequate and unreliable to justify the severe punishment these two then eight graders were handed out after being rather hastily accused.

Accordingly, I **FIND** that no other conclusion can be drawn but that the BOE's actions were unfair, unreasonable, and the essence of arbitrariness and capriciousness, and that its decision to find J.P. (female) and J.P. (male) of the alleged conduct and the consequent suspension which lasted 73 days should be **OVERTURNED**, and that this record of punitive disciplinary action be removed permanently from their records.

CONCLUSION

I **CONCLUDE** the finding that the offensive Snapchat comments and images, and images and statements on a Google slideshow account allegedly committed by petitioners was not proven, and that any presumption of validity the BOE's decision had was easily overcome by a preponderance of evidence showing the investigation and especially the proceedings before the BOE, and thus its conclusions to be unfair, arbitrary, capricious, and unreasonable. Therefore, the disciplinary action of suspension or any other disciplinary action cannot be sustained.

ORDER

It is therefore **ORDERED** that the decision of suspension for J.P. (male)'s conduct and J.P. (female)'s conduct be **OVERTURNED,** and the disciplinary history heretofore imposed as a result of the BOE's decision be removed from the school's records.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 15, 2022
DATE

Ernest M. Bongiovanni
ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: July 15, 2022

Date Mailed to Parties: July 15, 2022

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

None[3]

For Respondent:

None[4]

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits:

R-1[5] BOE Decision on Disciplinary Hearing on J.P. (female) dated March 19, 2021

R-2 BOE Decision on Disciplinary Hearing on J. P (male) dated March 19, 2021

R-3 Transcript of Proceeding March 15, 2021

R-4 Certification of Stephen M. Yurchak Ed. D, Superintendent of BOE

R-5 Pro Se Petition of Appeal by K.P., dated May 11, 2021

R-6 Emails by K.P. to NJ DOE Commissioner, dated May 11, 2021

R-7 Emails concerning withdrawal of emergent application.

P-A BOE District Policy 5500

P-B BOE District Policy 5600

P-C BOE District Policy 5610

R-D BOE District Policy 5620

R-E N.J.S.A.18A:37-2 Causes for suspension or expulsion of students

[3] J.P. (male) and J.P. (female) identified as "G.P." spoke at the hearing; however, as they were never placed under oath, their statements do not constitute admissible "testimony".

[4] Nicole Russo, Principal at Veterans Middle School, and Detective Jeramiah Nayda spoke at the hearing; however, as they were never placed under oath, their statements do not constitute admissible "testimony".

[5] These exhibits were pre-marked and petitioner's and respondent's exhibits however all agreed with my suggestion they could be listed as Joint Exhibits.

R-F N.J.S.A. 23:12-3 Terroristic Threats

R-G Middle School Handbook

R-H Discipline Log for J.P. (female) 2018-2021

R-I Attendance Record for J.P. (female) 2018-2021

R-J Interim Reports and grades for J.P. (female) 2018-2021

R-K Images reportedly from computers/screenshots of Google slideshow and snapchats (80 pages) (Not in Evidence-no foundation)

R-I Parent Portal questions responses (Not in Evidence)

R-M Notice that psychiatric eval has not been received

261-22
State Board of Examiners Dkt No. 1718-164
Agency Dkt. No. 4-6/22A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Sherry Frazier, State Board of Examiners,
New Jersey Department of Education.

Order of Revocation by the State Board of Examiners, September 21, 2018

Respondent-Appellant, *pro se*

For the Petitioner-Respondent State Board of Examiners, Colin Klika, Deputy Attorney General (Matthew J. Platkin, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Sherry Frazier's appeal of the Order of the State Board of Examiners (Board), dated September 21, 2018, revoking her Teacher of the Handicapped certificate. In October 2017, the Florida Education Practices Commission issued a formal reprimand to appellant, following allegations that appellant inappropriately disciplined students and made insulting comments about students and their families. In January 2018, the Board found that the level and nature of appellant's conduct provided just cause for the consideration of the revocation of her New Jersey certificate and issued an Order to Show Cause (OTSC). Petitioner failed to respond, and a second notice was sent by the Board in March 2018. Petitioner again failed to respond and, pursuant to *N.J.A.C.* 6A:9B-4.6(c), the allegations set forth in the OTSC were deemed to be admitted. The Board concluded that appellant had engaged in unbecoming conduct and that the appropriate penalty was revocation of her certificate.

On appeal, appellant argues that she did not receive the letters that the Board sent to her in 2018 and did not find out that her New Jersey certificate had been revoked until October 2021. Appellant contends that she did not engage in any unbecoming conduct in Florida.

After a comprehensive review of the record, the Commissioner concludes that appellant's appeal is untimely. Pursuant to *N.J.A.C.* 6A:4-2.2, a party is required to appeal a final decision issued by the Board within 30 days. Even accepting that appellant did not receive any of the communications from the Board in 2018,[1] and only found out about the Board's actions in October 2021, the notice of appeal was not filed until June 28, 2022, well beyond the 30-day limitation period.

Accordingly, the decision of the State Board of Examiners is affirmed. Appellant's Teacher of the Handicapped certificate is hereby revoked.[2] The Commissioner notes that appellant may reapply for certification pursuant to *N.J.A.C.* 6A:9B-4.9, as more than four years have passed since the revocation.[3]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 4, 2022
Date of Mailing: October 4, 4044

[1] The Commissioner notes that while the certified mail copies of some documents were returned to the Board, the regular mail copies were not returned. Additionally, the certified mail containing the Board's September 21, 2018 decision was claimed and signed for on October 1, 2018.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

[3] Should appellant choose to reapply for certification, the Board will review the application and make a determination consistent with the applicable law. There is no guarantee that a reapplication for a certificate following revocation will be granted.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATE OF	:	STATE BOARD OF EXAMINERS
SHERRY D. FRAZIER	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1718-164

At its meeting of December 8, 2017, the State Board of Examiners (Board) reviewed information the National Association of State Directors of Teacher Education and Certification (NASDTEC) had forwarded regarding Sherry D. Frazier. NASDTEC provided notice that on October 24, 2017, the Education Practices Commission of the State of Florida issued a formal reprimand to Frazier. The notice followed allegations that Frazier inappropriately disciplined students by pushing and grabbing them. She also allegedly called students "dumb" and "stupid" and commented on their parents' education level or their families' ability to afford supplies.

Frazier currently holds a Teacher of the Handicapped certificate. Upon review of the above information, at its January 19, 2018 meeting, the Board voted to issue Frazier an Order to Show Cause as to why her certificate should not be revoked.

The Board sent Frazier the Order to Show Cause by regular and certified mail on January 23, 2018. The Order provided that Frazier had 30 days to respond. The certified mail copy was returned as "Unclaimed" and the regular mail copy was not returned. Frazier did not respond. On March 6, 2018, the Board sent Frazier another notice by certified and regular mail providing her an additional 15 days to respond to the Order to Show Cause. The certified mail copy was returned as "Unclaimed" and the regular mail copy was not returned. Frazier did not file a response.

Thereafter, pursuant to *N.J.A.C.* 6A:9B-4.6(e), on April 13, 2018, the Board sent Frazier a hearing notice by regular and certified mail. The notice explained that the allegations in the Order to Show Cause were deemed to be admitted as a result of her failure to file an Answer. Thus, Frazier 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, as well as arguments with regard to the appropriate sanction in the event that the Board found just cause to take action against her

certificate. It also explained that, upon review of the charges against her and the legal arguments tendered in her defense, the Board would determine if Frazier's offense warranted action against her certificate. Thereupon, the Board would also determine the appropriate sanction, if any. Frazier was also offered the opportunity to appear before the Board to provide testimony on the sanction issue. The certified mail copy was returned as "Unclaimed" and the regular mail copy was not returned. Once again, Frazier did not file a response.

The threshold issue before the Board in this matter is whether Frazier's conduct constitutes conduct unbecoming a certificate holder or other just cause. Since Frazier failed to respond to the Order to Show Cause, the allegations therein are deemed admitted. *N.J.A.C.* 6A:9B-4.6(c). Consequently, at its meeting of June 29, 2018, the Board considered only the allegations in the Order to Show Cause and the information received from NASDTEC. The Board concluded that no material facts related to Frazier's offense were in dispute since she never denied that she engaged in the conduct alleged. Thus, the Board determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9B-4.6(h). After reviewing the allegations, the Board found that Frazier had engaged in unbecoming conduct.

The Board must now determine whether Frazier's conduct, as set forth in the Order to Show Cause, provides just cause to act against her certificate pursuant to *N.J.A.C.* 6A:9B-4.4. The Board finds that it does.

The Board 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:9B-4.4. "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. Moreover, 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 (1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). Frazier's actions in pushing and grabbing students to discipline them, calling students "dumb" and "stupid" and commenting on their parents' education level or their families' ability to afford supplies is clearly conduct

that is unacceptable for a role model. The Board therefore concludes that the appropriate response to her breach is the revocation of her certificate.

Accordingly, on June 29, 2018, the Board voted to revoke Sherry D. Frazier's Teacher of the Handicapped certificate. On this 21st day of September 2018 the Board voted to adopt its formal written decision and it is therefore ORDERED that the revocation of Frazier's certificate be effective immediately. It is further ORDERED that Frazier return her certificate to the Secretary of the State Board of Examiners, Office of Certification and Induction, 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:
Via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

262-22E
OAL Dkt. No. EDU 07687-22
Agency Dkt. No. 233-9/22

New Jersey Commissioner of Education

Order on Emergent Relief

Kiddie Korner Learning Center,

Petitioner,

v.

Board of Education of the City of Newark,
Essex 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 petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *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 stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.[1]

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 4, 2022
Date of Mailing: October 4, 2022

[1] The Commissioner notes that the ALJ calls the Commissioner's jurisdiction into question. A final determination on this threshold issue may be made as this matter proceeds at the OAL.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 07687-22
AGENCY DKT. NO. 233-9/22

KIDDIE KORNER LEARNING CENTER,
Petitioner,
v.
NEWARK BOARD OF EDUCATION,
Respondent.

Anthony Russo, Esq., for petitioner (Cornell, Merlino, McKeever & Osborne, attorneys)

Brenda Liss, General Counsel, for respondent

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Kiddie Korner Learning Center (petitioner or Kiddie Korner) challenges the determination by respondent Newark Board of Education (the Board) regarding the number of preschool classrooms it may operate. On or about September 7, 2022, petitioner filed a Verified Petition with the Commissioner of Education, accompanied by a motion for emergent relief. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on September 8, 2022, and scheduled for

oral argument on September 14, 2022 regarding the emergent application. In support of its application, petitioner filed a brief (Pb) with exhibits attached. The Board opposes the motion and submitted a brief, along with a certification of its Executive Director of Early Childhood Education, Yolanda Severe (Severe Cert.). Oral argument on the motion was entertained on September 14, 2022.

FACTUAL DISCUSSION

For purposes of the within motion, the pertinent facts as gleaned from the documentation submitted follows:

Petitioner is a private preschool provider authorized to provide services and operate an early childhood education program for eligible students who reside in the City of Newark pursuant to the School Funding Reform Act, P.L. 2007, c. 260; N.J.A.C. 6A:13A-1 et seq., Elements of High-Quality Preschool Programs; N.J.A.C. 6A:23A-1 et seq., Fiscal Accountability, Efficiency and Budgeting Procedures; and the Preschool Education Program Contract (Contract) approved by the Board. (Severe Cert. at ¶ 2.) Petitioner has operated as a private preschool provider for the City of Newark for many years. (Id. at ¶ 16.)

Pursuant to the parties' Contract for the 2021–2022 school year, petitioner was authorized to serve, and would be compensated for, a maximum of sixty students in four preschool classes. (See Severe Cert. at ¶ 3; Pb, Exbibit A.)

On April 11, 2022, the Board's Executive Director of the Office of Early Childhood, Yolonda Severe, issued a letter to petitioner with the heading "2nd Year Conditional Renewal for 2022–23 Preschool Contract." (Pb, Exhibit B.) The April 11, 2022 letter offered to renew petitioner's Contract subject to four conditions on renewal: staffing of all classrooms with appropriately certified teachers; comprehensive curriculum; maintenance of minimum standardized test scores in all classes; and proper and timely recording of child assessment information and data for each child. (Ibid; see Severe Cert. at ¶ 8.) The letter further advised that petitioner's authorized enrollment for the 2022–

2023 school year was reduced to forty-five students and three classrooms. The letter states:

> Take further note that, pursuant to Section V Monitoring of Program Performance of the Preschool Contract where each contracted classroom is required to maintain a minimum of 14/15 students throughout the school year, be advised that the Board will be reducing your enrollment for the upcoming 2022–2023 school year due to the fact that for the past two school years, Kiddie Korner has been unable to maintain and/or reach full enrollment for its current 4 classrooms. ([D]uring 2021–22, enrollment consisted of only 45 students despite receiving funding for 60). As Board funding is dependent on all Providers meeting their full capacity by October 15th of each school year, this communication serves to confirm our phone conference held April 11, 2022 wherein, among other things, you were notified of Kiddie Korner's under enrollment as well as Kiddie Korner's inability to secure a certified teacher for one classroom during the 2021–22 school year. Therefore, the Board will be reducing the number of classrooms from 4 to 3 with a total of 45 students for school year 2022–2023.

The letter informed petitioner that it had thirty days to notify Executive Director Severe, in writing, that petitioner accepted the renewal of its Contract with the listed conditions.

Executive Director Severe explained in her certification that the decision to reduce petitioner's authorized enrollment upon renewal of its Contract for 2022–2023 was not based solely on the number of students enrolled in the school. (Severe Cert. at ¶ 7.) Rather, that decision was based on three reasons: (1) petitioner's failure to obtain required student achievement levels; (2) petitioner's failure to employ certified teachers for all of its classes; and (3) petitioner's failure to enroll a sufficient number of students to support more than three classes. (Ibid.)

By letter dated April 25, 2022 to Executive Director Severe, petitioner questioned the reduction in its authorized enrollment and requested that the renewal of its Contract remain at four classrooms for a total of sixty students. (Pb, Exhibit C.) According to petitioner's letter, "the [C]enter has maintained full enrollment with the exception of this current school year"; "[t]he Center recruitment has improved significantly this year with

more parents inquiring about enrolling preschool students"; and "[t]he Center has experienced interest in the program that resembles pre-pandemic levels which we anticipate will lead to full enrollment of 60 students."

By letter dated April 27, 2022, Executive Director Severe informed petitioner that, "for the reasons previously provided in its letter dated April 11, 2022, the Board's prior conditional offer will not be modified." (Severe Cert. at Exhibit A.) In response, petitioner sent a letter to Executive Director Severe dated April 29, 2022, in which it accepted the Board's offer of a Contract for the 2022–2023 school year. (Severe Cert. at Exhibit B.) In this regard, petitioner's letter advised:

> Kiddie Korner Learning Center will accept the renewal of the Preschool Agreement for 2022–2023 School Year for one (1) year. The Center acknowledges the conditions outlined in the April 11, 2022 letter from the Newark Board of Education including the reduction of classrooms.

On July 8, 2022, the Board's Principal Auditor in its Office of Early Childhood sent a letter to petitioner regarding its approved budget for the 2022–2023 school year. (Pb, Exhibit D.) The Principal Auditor is responsible for, under Executive Director Severe's supervision, ensuring the fiscal accountability and integrity of the school district's preschool program pursuant to N.J.A.C. 6A:13A-4.7. (Severe Cert. at ¶ 10.) The Principal Auditor is responsible for, among other things, monitoring each contracting private preschool provider for compliance with its preschool program contract and providing financial management assistance to contracting private providers in the monitoring of their annual budgets. (Ibid.)

The Principal Auditor's July 8, 2022 letter provided notice to petitioner of approved funding for the 2022–2023 school year in the amount of $796,969. (Pb, Exhibit D; see Severe Cert. at ¶ 10.) That funding amount was based on the approved enrollment of forty-five students and three teachers as stated in the April 11, 2022 letter. The July 8, 2022 letter noted petitioner's capacity of forty-five students and its enrollment of forty-eight students as of June 27, 2022. The letter advised:

> Kiddie Korner must refer the excess number of enrolled students (3) to other programs within the North Ward of the City of Newark. It is the responsibility of the Kiddie Korner Learning Center to ensure enrollment and hiring requirements are met prior to submitting staff in excess of actual enrollment. **There must be at least nine (9) students approved in order to approve an additional class.** The District shall be permitted to conduct an onsite verification to determine the total number of approved classes required based on the number of students served.
>
> [Emphasis supplied and bolding in original.]

Executive Director Severe explained in her certification that the statement in the July 8, 2022 letter that "[t]here must be at least nine (9) students approved in order to approve an additional class" refers to two required sets of approvals. (Severe Cert. at ¶ 11.) The "at least nine (9) students approved" refers to each student's approval for enrollment granted by the Board's Enrollment Office and recorded in the school district's PowerSchool data management system upon the student's eligibility verification, based on proof of age, residence, and immunization. (Ibid.) The "in order to approve an additional class" refers to approval by the Board to allow an additional class to be opened and operated by the preschool provider above and beyond the number previously approved. (Ibid.) A contracting preschool provider is not authorized to increase its authorized enrollment to accept a larger number of students than that approved by the Board, or to enroll any student whose eligibility has not been verified by the Board's Enrollment Office. (Id. at ¶ 12.) The Board's Principal Auditor would not have been authorized to approve any change in the approval granted by the April 11, 2022 letter or to promise that any such change would be forthcoming under any circumstances. (Id. at ¶ 9.) Rather, only the Board, upon recommendation of Executive Director Severe and the Superintendent of Schools, would have been authorized to approve such a change. (Ibid.)

On July 13, 2022, petitioner sent a letter to Executive Director Severe "requesting approval for the reopening of [its] 4th classroom for the 2022–2023 school year based on current developments." (Pb, Exhibit E.) According to the letter, "the center currently has 59 students who have begun the registration process with 48 students who are rollovers

or in the student tracker at this time," and "the center has families scheduled for tours and to pick up application[s] this week." Petitioner "attached a list of students on the waitlist" for Executive Director Severe's review.

Subsequently, counsel for petitioner sent a letter to the Board's Principal Auditor in its Office of Early Childhood dated August 25, 2022, advising that, "[a]s of today's date, approximately 60 students have been approved or are awaiting approval from the District, warranting an additional classroom in accordance with the Board's July 8, 2022 Letter," and "ask[ing] that the Board modify Kiddie Korner's budget and allow for the opening of a fourth classroom." (Pb, Exhibit G.)

On August 28, 2022, the Principal Auditor sent an e-mail to petitioner's counsel advising, among other things, that petitioner "was approved for 45 students and not 60; the 15 excess students must be referred to surrounding schools in the 2 Mile Area." (Pb, Exhibit H.)

According to the school district's PowerSchool data management system, as of September 12, 2022, petitioner had thirty-nine students approved for enrollment in the 2022–2023 school year or six students less than the number authorized by its Contract. (Severe Cert. at ¶ 14.)[1] All students who have been approved to enroll in petitioner's program have been enrolled in the program. (Id. at ¶ 15.) No student or family has been refused enrollment in a preschool program as a result of the reduction in petitioner's authorized enrollment or deprived of the opportunity to enroll in the preschool program of their choice. (Ibid.)

Petitioner has been paid in full for services rendered in the 2021–2022 school year and will be paid in full for services to be rendered in the 2022–2023 school year in accordance with its Contract. (Severe Cert. at ¶ 17.)

It is against this backdrop that petitioner's application for emergent relief is considered.

[1] During oral argument, Board counsel advised that petitioner currently has forty students approved for enrollment.

LEGAL DISCUSSION AND CONCLUSIONS

Petitioner's emergent application seeks an order enabling it to operate four classrooms with a maximum total capacity of sixty students. N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief and instructs:

> 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.

"Each of these factors must be clearly and convincingly demonstrated" by the moving party. Waste Mgmt. of N.J. v. Union County. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Turning to the first criteria, emergent relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. 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). "In other words, [petitioner] must have no adequate remedy at law." Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). Further, 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. (Citations omitted.)

Having considered the parties' submissions and arguments, I **CONCLUDE** that petitioner has failed to clearly and convincing demonstrate that it will suffer irreparable harm unless the requested relief is granted.

Petitioner contends in its brief that it will suffer irreparable harm unless emergent relief is granted because it will "be left without the ability to fund a fourth (4^{th}) classroom," "the financial viability of the entire business [will be] placed in jeopardy," and "the parents of many of Kiddie Korner's students will have no other choice [but] to be placed in, or find, other schools for their children to attend for the school year." Apart from the lack of any certification to support petitioner's claim of financial harm or financial viability, it is undisputed that petitioner agreed to accept the conditional renewal of its Contract, including the reduction of its classrooms, via letter April 29, 2022. Accordingly, the reduction in petitioner's authorized enrollment has caused no financial harm to petitioner that petitioner should not have anticipated when it accepted the Board's offer. It is further well settled that financial harm will not suffice to establish irreparable harm. The certification of Executive Director Severe also makes clear that no students have been harmed by the determination to reduce petitioner's authorized enrollment; all students who have been approved to enroll in petitioner's program have been enrolled in the program, and no student or family has been refused enrollment in a preschool program as a result of the reduction in petitioner's authorized enrollment or deprived of the opportunity to enroll in the preschool program of their choice. Indeed, the fact that petitioner currently remains under-enrolled substantially undermines petitioner's assertion that, unless emergent relief is granted, many of its students will be forced to enroll in another school.

Petitioner must also make a preliminary showing of a reasonable probability of ultimate success on the merits of its underlying claim and demonstrate that the legal right underlying its claim is settled, to prevail on an application for an emergent relief. Crowe, 90 N.J. at 133. I **CONCLUDE** that petitioner has failed to shoulder its burden of proving both standards.

The Commissioner of Education's jurisdiction is defined by statute and is limited to "controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. Our courts have held that "[w]here the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel." Bd. of Educ. of E. Brunswick v. Twp. Council of E. Brunswick, 48 N.J. 94, 102 (1966). It is recognized that "the sweep of the Department's interest and the Commissioner's jurisdiction does not extend to all matters involving boards of education." Archway Programs, Inc. v. Pemberton Twp Bd. of Educ., 352 N.J. Super. 420, 424–25 (App. Div. 2002). In determining the scope of the Commissioner's jurisdiction under N.J.S.A. 18A:6-9, the Appellate Division has held that "contract claims against boards [of education] do not arise under the school laws but rather from statutory or common law," and such claims are appropriately adjudicated by the Superior Court. Id. at 425; see Picogna v. Bd. of Educ. of Cherry Hill, 249 N.J. Super. 332, 335 (App. Div. 1991) (holding that the "contract claim of a nontenured school employee does not arise under the school laws simply because its outcome may later enable him to attain tenure under the school laws," and "[w]hether petitioner's employment was wrongfully terminated under the contract and under the CEP Act is for the court, not the Commissioner, to decide"); S. Orange-Maplewood Educ. Ass'n v. Bd. of Educ. of the Sch. Dist. of S. Orange and Maplewood, 146 N.J. Super. 457, 463 (App. Div. 1977) (holding that the Commissioner did not have jurisdiction over a dispute involving the interpretation of a sabbatical leave provision set forth in a collective negotiations agreement between the board of education and the education association). In this matter, petitioner's underlying claim is predicated solely on a theory of promissory estoppel based on the Principal Auditor's July 8, 2022 letter. In short, the jurisdictional viability of petitioner's legal and/or equitable claims, including its alternative request for a monetary award of $300,000, cannot be said to be settled in petitioner's favor in that such claims do not clearly implicate or require an interpretation of the school laws, requiring the expertise of the Commissioner.

Beyond this, petitioner has failed to demonstrate a likelihood of prevailing on the merits of its promissory estoppel claim. "Promissory estoppel is made up of four elements: (1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment." Toll Bros. Inc. v. Bd. of Chosen Freeholders of Burlington, 194 N.J. 223, 253 (2008). In addition to petitioner's hurdle of establishing a clear and definite promise based on the plain language of the July 8, 2022 letter, the reasonableness of petitioner's reliance on an auditor's letter is questionable. Succinctly stated, petitioner has operated as a private preschool provider for many years, and petitioner reasonably should be well aware that only the Board can approve a change in the terms of its Contract. And petitioner has had notice since its receipt of the April 11, 2022 letter that it was approved for only forty-five students for the 2022–2023 school year, and petitioner accepted that offer of renewal.

In view of the foregoing, it is unnecessary to address whether, when the equities and interests of the parties are balanced, petitioner will suffer greater harm than the Board if the requested relief is not granted.

Based upon the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements warranting emergent relief.

ORDER

It is **ORDERED** that petitioner's request for emergent relief be and hereby is **DENIED**.

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

September 15, 2022
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

jb

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges by	X	
NEW JERSEY DEPARTMENT OF CORRECTION (A.C. WAGNER YOUTH CORRECTIONAL FACILITY)	X	Review and Approval of Settlement
	X	Agency Docket
"Petitioner"		No. 48-2/20
	X	
-against-		
	X	
CHRISTOPHER BOUND	X	
"Respondent"	X	
	X	
Pursuant to N.J.S.A. 18A:28-5 and 6-10		

APPEARANCES

FOR THE PETITIONER
RYAN J. SILVER, DEPUTY ATTORNEY GENERAL

FOR THE RESPONDENT
KARPF, KARPF & CERUTTI, P.C.
By: Allison A. Barker, Esq.
W. Charles Sipio, Esq.

BEFORE: Earl R. Pfeffer, Arbitrator

DISCUSSION AND FINDINGS

The New Jersey Department of Correction ("Department"), through the Director of its Officer of Educational Services, Jecrois Jean-Baptiste, filed Sworn Tenure Charges against Respondent Christopher Bound in accordance with N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, following a Departmental Predetermination Hearing on October 30, 2019, at which Respondent was represented by his Union Representative, and following a review of evidence presented at said Hearing, the Department on January 9, 2020, found probably cause to credit the evidence in support of the Charges and it consequently determined to certify the Charges to the Commissioner of Education for a hearing pursuant to law. Jean-Baptiste signed a Certification of the Department's actions and same was served on Bound.

On or about March 16, 2020, Respondent filed his Answer denying the counts set forth in the Charges, and on March 17, 2020, I was appointed Arbitrator to hear and decide this tenure matter. Following significant delays incurred on account of the Covid-19 pandemic and related suspensions of administrative proceedings, and a subsequent continuance to permit Bound to retain counsel, a Status Conference was convened on June 9, 2021, at which the parties agreed to a discovery schedule and multiple hearing dates, commencing August 31, 2021.

By email dated August 30, 2021, the parties advised me they had reached a tentative settlement, and requested the hearing be adjourned pending a final Settlement Agreement, which request was granted.

On or about June 14, 2022, a Settlement Agreement ("Agreement") was executed by all parties, and on June 22, 2022, same was submitted to me for review and approval pursuant to N.J.A.C. 6A:3-5.6. I have carefully reviewed the Agreement, which is appended hereto, and I determine it satisfies the statutory requirements for withdrawal and settlement of tenure charges, as set forth in N.J.A.C. 6A:3-5.6. In particular:

1. The nature of the Charges are part of the record of this proceeding and were known to all parties to the Agreement;

2. The circumstances justifying settlement and withdrawal are incorporated into the Agreement. For the Respondent, the Board agreed to accept his resignation and to stipulate he is no longer under consideration for any disciplinary action. The Settlement Agreement resolves any and all disciplinary actions pending against Respondent. Nothing in the Agreement shall constitute an admission or stipulation of facts regarding the charges, and Respondent preserves his denial of the charges and maintains his right to defend against them in any further proceedings, including but not limited to proceedings to determine his pension eligibility.

3. For the Department, Respondent agrees not to seek or accept future Departmental employment. The parties acknowledge that no pension, seniority or benefit time will be credited for periods Respondent was not paid by the Department, and Respondent has been advised the Commissioner of the New Jersey Department of Education has a duty to refer all tenure determinations resulting in loss of position to the State Board of Examiners, which is the educator licensing agency in New Jersey.

4. Respondent's personnel records shall be amended to reflect the terms of the Settlement Agreement, and all internal records of the Department will be kept intact, with the parties recognizing nothing in the Agreement shall preclude the Department from releasing information on this matter to anyone who has a release executed by Respondent or as consistent with state or federal law. As may be required by N.J.S.A. 43:1-3.3, or as otherwise required by law, any information regarding the underlying charges will be provided to the Public Employees Retirement System.

5. Respondent 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 and the New Jersey Department of Corrections, including their employees, agents or assigns. Respondent waives all other claims against the Department with respect to this matter, including any award of back pay, counsel fees or other monetary relief. There is an exception for pending workers compensation claims.

6. The foregoing summary reflects my statutory review of the Settlement Agreement under the standard stated in N.J.A.C. 6A:3-5.6(a), and does not constitute an interpretation of the Settlement or a restatement of its terms.

7. The Agreement has been entered upon the consent of both the Department and the Respondent. It is signed by the parties and their representatives, who acknowledge its terms are binding and may not be supplemented, amended, changed or modified in any manner except in writing signed by a duly authorized representative of each party. Bound has averred he entered into the Settlement Agreement voluntarily, and he has asserted he has a full understanding of its meaning and of his rights thereunder following his review of its terms as well as full, unimpeded discussions with his representative in which all of his questions were answered. He is satisfied with his representation.

8. The Agreement, I find, does not contain terms which restrict access to information or records deemed public by law, accurately represents the circumstances of Respondent's resignation and is in the public interest.

I approve the Agreement.

October 4, 2022.

Earl R. Pfeffer, Arbitrator

STATE OF NEW JERSEY)
) ss.:
COUNTY OF ESSEX)

On this 4th day of October 2022, before me personally came and appeared EARL R. PFEFFER, Arbitrator, to me known and known by me to be the individual described herein, and who executed the foregoing instrument and who acknowledged to me that he executed the same.

Sworn to and subscribed
before me this 4th day
of October 2022.

Notary Public

JOYCEL RUDIN
NOTARY PUBLIC
NEW JERSEY
No. 50070820
My Comm. Exp. 10-26-2022

AGENCY DOCKET NO. 48-2/20

IN THE MATTOR OF TENURE HEARING OF: CHRISTOPHER BOUND and NEW JERSEY DEPARTMENT OF CORRECTIONS	AGENCY DOCKET NO. 48-2/20 Arbitrator Earl R. Pfeffer **SETTLEMENT AGREEMENT**

The parties hereto have voluntarily resolved all disputed matters and enter into the following Settlement Agreement, which fully disposes of all issues in controversy between them:

A. The **Tenure charges** filed on February 24, 2020, attached hereto as Attachment 1, contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)(6) - Conduct unbecoming an employee	Removal	10/30/2019
2. N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause	Removal	10/30/2019
3. H.R.B. 84-17, as amended: C11 - Conduct unbecoming an employee	Removal	10/30/2019
4. H.R.B. 84-17, as amended: E1 - Violation of a rule, regulation, policy, procedure, order or administrative decision	Removal	10/30/2019

B. Respondent Christopher Bound ("Respondent") withdraws his appeal and request for a hearing and the Petitioner Appointing Authority the New Jersey Department of Corrections ("Petitioner" or the "Appointing Authority") agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C. 4A:2-2.3(a)(6) - Conduct unbecoming an employee	General Resignation (See Paragraph C - resolving all charges)
2. N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause	Same
3. H.R.B. 84-17, as amended: C11 - Conduct unbecoming an employee	Same
4. H.R.B. 84-17, as amended: E1 - Violation of a rule, regulation, policy, procedure, order or administrative decision	Same

C. The parties have agreed to the following:

Respondent agrees to accept a General Resignation, which shall be effective October 30, 2019, as a resolution to the tenure charges appeal and each charge listed in Paragraph A. As of this date, Respondent is no longer under consideration for any disciplinary action.

i. The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension, seniority or benefit time will be credited for periods for which the employee is not paid by the employer.

ii. Respondent agrees not to seek or accept future employment with the New Jersey Department of Corrections.

iii. Respondent has been advised that, as a teaching staff member, the Commissioner of the New Jersey Department of Education has the duty to refer all tenure determinations resulting in loss of position to the State Board of Examiners.

iv. The parties acknowledge and agree that settlement is justified in this matter and is in the public interest as Respondent wishes to seek employment outside of the Appointing Authority and that such settlement will provide the benefit of avoiding the costs and expenses of litigation.

D. The Appointing Authority shall amend Respondent's personnel records to reflect the terms of this Agreement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Respondent or as consistent with state or federal law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3, as amended, or as otherwise provided by law. Respondent denies the charges against him and maintains his right to defend against these charges in any further proceedings including, but not limited to, proceedings to determine his pension eligibility.

E. Respondent waives all other claims against the Department of Corrections with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein. This Agreement resolves any and all disciplinary actions pending against Respondent.

F. Nothing in this Agreement shall constitute an admission or stipulation of facts regarding the charges listed in Paragraph A. By entering into this Agreement, neither party admits or denies a violation of any state or federal law, any agency or departmental policy, or the parties' collective negotiations agreement. This Agreement shall not constitute precedent in matters involving other employees. The Department makes no

representations as to any matter not made part of this agreement, including but not limited to, pension eligibility.

G. Respondent 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 or 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 Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

AGENCY DOCKET NO. 4[illegible]

I. This Settlement Agreement is binding on the parties and may not be supplemented, amended, changed or modified in any manner, orally or otherwise, except in writing signed by a duly authorized representative of each party.

J. By signing this Settlement Agreement, the signatories represent that they have read this Agreement and fully understand its terms.

APPROVAL OF THE SETTLEMENT AGREEMENT

In witness of this Agreement, having read and understood the terms and having agreed to be bound by each of the terms of this Agreement, the parties affix their signatures below.

6/2/2022

DATE

Respondent
Christopher Bound

6/14/22

DATE

On Behalf of Dept. of Corrections

AGENCY DOCKET NO. 48-2/20

CERTIFICATION

I, Christopher Bound, being the Respondent in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all of my questions regarding this Settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

It is also my understanding that this Settlement Agreement will terminate all claims and further appeal against the State of New Jersey and the New Jersey Department of Corrections.

I certify that the foregoing statement 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.

6/2/2022

Dated:

Christopher Bound

264-22

BEFORE THE COMMISSION OF EDUCATION OF NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of **DAWN KOSMAN,** **Respondent** **v.** **NEW JERSEY DEPARTMENT OF HUMAN SERVICES, COMMISSION FOR THE BLIND AND VISUALLY IMPAIRED,** **Agency** **Agency Docket No. 203-8/22**	**RE: SETTLEMENT AGREEMENT** **Dr. Andrée Y. McKissick** **Arbitrator**

APPEARANCES:

For the Agency:
Kathryn Moynihan, Esquire
Hugo Ruiz, Esquire
Department of Human Services
25 Market Street
Post Office Box 112
Trenton, New Jersey 08625

For the Respondent:
David Weiner, Union Representative
Communications Workers of America, Local 1037
1216 Walnut Avenue
Ocean Township, New Jersey 07712

CONFIRMATION OF VALID SETTLEMENT

The record of this matter and the proposed settlement agreement and general release have been reviewed. Upon such review, this Arbitrator finds that the proposed settlement is consistent with established standards governing settlement of tenure matters. (See In Frank Cardonick v. Board of Education of the Borough of Brooklawn, Camden County and In the Matter of the Tenure Hearing of Frank Cardonick, School district of the Borough

of Brooklawn, Camden County, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.) The criteria and guidelines which this Arbitrator considered in evaluating this tenure settlement is in concurrence with New Jersey courts which have shown great favor upon voluntary resolution of litigation through settlement. Analogous to this subject matter regarding settlements, please note the most recent appeal from the United States District Court for the District of New Jersey (DC Civil Action No. 2-19 CV-13734), GW: MIC.W Appellants v. Ringwood Board of Education, District Judge: Honorable John M. Vacquez, filed March 16, 2022; US Court of Appeals for the Third Circuit, No: 20-3552, is directly on point. In sum, it is in the public interest to compromise and settle tenure litigation pursuant to Tenure Employees Hearing Law (NJSA, 18A: 6-10 et Seq.). This Arbitrator makes the following findings:

1. The parties have voluntarily agreed to the settlement. This is evidenced by their signatures on the document.
2. This settlement fully dispenses all issues in the controversy between the parties and consistent with the law.
3. This Arbitrator orders that the parties comply with the terms of this settlement.

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

AFFIRMATION

I, Dr. Andrée McKissick, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

DATE: October 5, 2022

Dr. Andrée McKissick

ARBITRATOR

265-22

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

October 5, 2022

Colin M. Lynch, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
570 Broad Street, Suite 1402
Newark, New Jersey 07102

Adam S. Herman, Esq.
Adams Gutierrez & Lattiboudere, LLC
555 Route 1 South, Suite 240
Iselin, New Jersey 08830

Re: *In the Matter of the Tenure Hearing of Sanyika Montague, School District of the City of Newark, Essex County, Agency Dkt. No. 220-8/22* **and** *In the Matter of the Tenure Hearing of Jennifer Ferrara, School District of the City of Newark, Essex County, Agency Dkt. No. 221-8/22.*

Dear Counsel:

I have considered the papers filed in connection with the respondents' Motion to Consolidate the above-captioned tenure matters. The tenure charges filed in these cases by the Newark School District consist of charges of inefficiency against each of the respondent teachers.

Upon full consideration of the submitted materials, I have determined not to grant the Motion to Consolidate. Pursuant to *N.J.S.A.* 18A:6-17.2, in rendering a decision on an inefficiency charge, the arbitrators must consider only the specific criteria outlined in the statutory provision. The enumerated criteria will require an analysis of the evaluation process unique to each of the respondent teachers, and thus there may not be a commonality of issues that would benefit from consolidation. Moreover, there may be factual differences in each matter that could lead to a different outcome for each of the respondents. While I am mindful that the respondents are making the same argument as to the underlying reason that they allege the tenure charges were filed, each respondent will have to ability to fully present his/her defenses to the assigned Arbitrator.

Accordingly, the Motion to Consolidate is hereby denied. The tenure charges in each respective case will be assigned to an Arbitrator in accordance with *N.J.S.A.* 18A:6-17.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JKH
265-22L

267-22

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

October 12, 2022

Frances L. Febres, Esq.
Cleary, Giacobbe, Alfieri, Jacobs, LLC
169 Ramapo Valley Road
Upper Level, Suite 105
Oakland, New Jersey 07436

Nicholas Poberenzhsky, Esq.
Caruso Smith Picini, P.C.
60 Route 46 East
Fairfield, New Jersey 07004

Re: ***In the Matter of the Tenure Hearing of Terrance Hanratty, School District of the Township of Berkeley Heights, Union County, Agency Dkt. No. 219-8/22.***

Dear Counsel:

I have reviewed the record in the above-captioned matter. The record includes the Berkeley Heights School District's request to withdraw the tenure charges filed in this matter based upon the fact that respondent, Terrance Hanratty, resigned from the School District. As a result, respondent is no longer employed with the District. In light of this information, I find that no purpose would be served by further proceedings in this matter.

Accordingly, I approve the dismissal of the tenure charges with prejudice and dismiss the matter as a contested case before me.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JKH

267-22L

269-22

New Jersey Commissioner of Education
Final Decision

Board of Education of the Bordentown Regional School District, Burlington County,

Petitioner,

v.

Raymond Marini, Interim Executive County Superintendent, New Jersey Department of Education, Board of Education of the Northern Burlington County Regional School District, Burlington County, and Z.L. and T.L., on behalf of minor children, J.L. and B.L.,

Respondents.

Synopsis

The Board of Education of the Bordentown Regional School District (Bordentown) appealed the determination of respondent Raymond Marini, Interim Executive County Superintendent (Marini), that Z.L. and T.L. and their minor children are homeless. Bordentown contended that Z.L. and T.L. are domiciled in Bordentown, as they have resided in the Bordentown home of T.L.'s mother for a number of years since losing their housing within the Northern Burlington County Regional School District (Northern Burlington) due to financial hardship, and further argued that Bordentown is therefore not financially responsible for tuition costs related to J.L. and B.L.'s attendance in Northern Burlington schools.

The ALJ found, *inter alia*, that: Z.L. and T.L. have lived in Bordentown with T.L.'s mother for five years and have no plans to relocate; the family has full access to the Bordentown home's bathroom and kitchen; all family members have a bed; and the Bordentown home is a fixed, regular, and adequate place to live; accordingly, the children can no longer be considered homeless. The ALJ concluded that the family have become residents of Bordentown and Bordentown has no financial responsibility for the children's attendance in Northern Burlington schools.

Upon review, the Commissioner is constrained to remand this matter to the OAL as she is unable to determine from the present record whether the family is homeless. The Commissioner noted, *inter alia*, that although domicile attaches immediately when a child's dwelling becomes fixed, regular and adequate, homelessness determinations require a fact-specific analysis that includes the intentions of the parents or guardians, and "cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality," *M. O'K. v. Board of Education of the Borough of Cresskill, et al*, Commissioner Decision No. 325-14, decided August 12, 2014 at 3, *aff'd*, A-0828-14T4 (App. Div. Sept. 8, 2016). Further, a determination as to the date when the L family were no longer homeless is necessary in order to resolve the competing claims for tuition reimbursement. Accordingly, the matter was remanded to the OAL for further proceedings consistent with the Commissioner's 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.

269-22
OAL Dkt. No. EDU 01693-22
Agency Dkt. No. 7-1/22

New Jersey Commissioner of Education

Final Decision

Board of Education of the Bordentown Regional School District, Burlington County,

Petitioner,

v.

Raymond Marini, Interim Executive County Superintendent, New Jersey Department of Education, Board of Education of the Northern Burlington County Regional School District, Burlington County, and Z.L. and T.L., on behalf of minor children, J.L. and B.L.,

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 respondent Northern Burlington County Regional Board of Education (Northern Burlington) and the reply thereto filed by petitioner Bordentown Board of Education (Bordentown).[1]

The L. family resided in Chesterfield, which is part of the Northern Burlington school district, until they lost their housing due to financial hardship. They moved in with T.L.'s mother in Bordentown.[2] The children continued to attend school in Northern Burlington, and Bordentown

[1] The other respondents, ECS Marini and Z.L. and T.L., did not file exceptions or a reply.

[2] The record is not clear when the family moved in with T.L.'s mother. In making the homelessness determination at issue in this matter, ECS Marini indicated that the family was displaced in April 2017, and the ALJ based her decision on that date. However, a note from T.L.'s mother to Northern Burlington, stating that the family is living with her, is dated October 13, 2014. The ALJ indicated that this date was an error, but it is not clear to the Commissioner how the ALJ reached that conclusion. Still other documentation indicates that the family began

assumed responsibility for the cost of their tuition and transportation for the 2018-2019 and 2019-2020 school years. On October 14, 2021, after Bordentown challenged the family's homelessness status, Interim Executive County Superintendent (ECS) Raymond Marini issued a determination that the family was still homeless. Bordentown filed an appeal challenging this ECS decision and seeking a determination that Bordentown had become the family's permanent residence, and that Bordentown is not responsible for the cost of educating the children for the 2020-2021 school year and future years.[3]

Following motion practice, the Administrative Law Judge (ALJ) found that the Bordentown home is a fixed, regular, and adequate place to live and that the children can no longer be considered homeless. The ALJ noted that the family has lived in Bordentown for five years and has no plans to relocate.[4] The ALJ indicated that the family has full access to the Bordentown home's bathroom and kitchen,[5] and that all members of the family have a bed. Accordingly, the ALJ

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living in Bordentown in June 2017. Notably, none of the documentation in the record that was completed by the family provides the date on which they relocated.

[3] The petition also sought an order that Northern Burlington be required to repay to Bordentown the costs of tuition and transportation for the 2018-2019 and 2019-2020 school years. This request for relief was apparently incorrectly included during a period of transition of the Board's counsel. It was not briefed during motion practice, nor was it specifically addressed in the Initial decision. Bordentown formally withdrew this request for relief in its reply to Northern Burlington's exceptions.

[4] It is unclear how the ALJ reached the conclusion that the family has no plans to relocate. That statement, which is represented as a direct quotation in the Initial Decision, does not appear in any of the questionnaires completed by the family. Furthermore, even if the ALJ did not intend for the statement to be a direct quotation but instead inferred that the family had no plans to relocate based on their length of stay in Bordentown or from other evidence, the family has repeatedly stated that they intend their residence in Bordentown to be temporary and has not made any statement that the Commissioner interprets to mean that they have no plans to relocate. To the extent that this information may have been presented during oral argument – of which the Commissioner was not provided a recording or a transcript – the Commissioner notes that argument does not constitute evidence.

[5] While the family described difficulties related to having six family members sharing one bathroom, from which the ALJ may have inferred that they have full access to the bathroom, none of the questionnaires mention anything about the kitchen.

concluded that the children have become residents of Bordentown and that Bordentown has no financial responsibility for their attendance in Northern Burlington.

In its exceptions, Northern Burlington argues that the L. family did not participate in this matter and that there is insufficient information about their living situation to support a finding that they are no longer homeless. In particular, Northern Burlington notes that correspondence sent from Z.L. to Northern Burlington indicates that he is constantly looking for adequate employment and housing, contradicting the ALJ's finding that the family has no plans to move back to Northern Burlington. Northern Burlington further contends that the ALJ did not make a determination as to exactly when the family's living situation transformed into a fixed, regular, and adequate residence, such that the ALJ may only have intended her finding to be prospective. Finally, pointing to existing case law, Northern Burlington argues that Bordentown would have been financially responsible for the children's education if they had attended school in Bordentown, and that Bordentown should therefore be required to reimburse Northern Burlington for the costs of the children's attendance in Northern Burlington.

In its reply, Bordentown argues that the ALJ adopted the version of facts submitted by Northern Burlington and found that, even under that most favorable version, the facts do not support a finding that the family continues to be homeless after so many years of residing in Bordentown. According to Bordentown, the family's residence with T.L.'s mother is adequate and has become fixed and regular. Finally, Bordentown notes that it is currently under its targeted enrollment and would not be required to hire additional staff to educate the L. children in its schools, such that there would be no costs associated with the children's attendance in Bordentown.

Upon review, the Commissioner is constrained to remand this matter, as she is unable to determine from the present record whether the L. family is homeless. Under the McKinney-Vento Act, homeless children are defined as "individuals who lack a fixed, regular and adequate nighttime residence," which includes "children sharing housing with other persons due to loss of their own housing, economic hardship, or a similar reason." 42 *U.S.C.A.* § 11434a. Similarly, under state law, homeless children are defined as "child[ren] or youth who lack[] a fixed, regular and adequate residence pursuant to *N.J.S.A.* 18A:7B-12 and *N.J.A.C.* 6A:17-2.2," which includes children living in the "residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own." *N.J.A.C.* 6A:17-1.2 and 2.2.

Thus, conducting a homelessness evaluation to determine whether a child's home is considered fixed, regular and adequate requires a fact-specific analysis and "cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality." *M. O'K. v. Board of Education of the Borough of Cresskill, et al*, Commissioner Decision No. 325-14, decided August 12, 2014 at 3, *aff'd*, A-0828-14T4 (App. Div., September 8, 2016). In conducting such a fact-specific inquiry, the Commissioner must consider the totality of the circumstances, as "[t]he reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant." *Ibid.*

The Commissioner has previously addressed the fact-specific nature of a homelessness inquiry. In *M. O'K., supra,* following the foreclosure of their home in Cresskill, the O'K family occupied the bottom floor of their relatives' house in Little Ferry, which consisted of one small bedroom and a common area, without a bathroom or kitchen. The parents and two of the children shared the bedroom, while their third child slept in the common area. At the time of the litigation, neither parent was employed, and the family's sole income consisted of Social Security Disability

benefits. During the pendency of the litigation, the O'K family represented that they were actively searching for a house in Cresskill. The Commissioner found, and the Appellate Division affirmed, that the O'K family became homeless due to the foreclosure of their home in Cresskill, and although they had been deemed domiciled in Little Ferry as a result of their residence in the district for over one year, they continued to remain homeless due to their shared living conditions and the parents' economic hardship.

In contrast, in *State-Operated School District of the City of Camden, Camden County v. C. Ann Volk, Executive County Superintendent, New Jersey Department of Education, and E.H., on behalf of minor child, K.M.*, Commissioner Decision No. 172-17R, decided June 20, 2017, the family relocated from Voorhees to Camden due to economic hardship that prevented them from continuing their lease. In the Camden residence, the family was able to use the entire residence and was not relegated to a portion of the home that would otherwise be considered inadequate. E.H., the children's mother, argued that the residence was inadequate because the siblings had to share a room, which the Commissioner found was not uncommon. Furthermore, given E.H.'s ongoing employment at an annual salary of $65,000, the Commissioner was not persuaded that she was unable to find suitable housing in Voorhees, particularly in light of her testimony that she had stopped looking for apartments. The Commissioner found that the family was not residing in the Camden residence of out necessity and that it qualified as a "fixed, regular, and adequate" nighttime residence, such that the family was not homeless. *Ibid.*

Similar to *Volk*, in *J.G., on behalf of minor children, T.G. and C.G. v. Board of Education of the Township of Edison, et al,* Commissioner Decision No. 125-20, decided June 15, 2020, the G. family moved in with J.G.'s mother in Edison after being evicted from their home in Milltown. The family was able to use three of the four bedrooms, the kitchen, bathrooms, all common areas, and utilities

in the Edison home. J.G. and his wife were both employed, with an income of $71,000 a year, but they did not pay rent or contribute to housing costs, other than food and a storage facility. While they stated that their intent was to move back to Milltown, there was no documentation of their search for a new home, and J.G. admitted that he had not submitted a rental application in at least six months. The Commissioner found that, while J.G.'s intention may be to eventually move back to Milltown, the totality of the facts and circumstances demonstrate that the family is no longer homeless.

Here, the Commissioner cannot determine on the present record whether the L. family is homeless because it is unclear if the family is residing in the Bordentown home out of necessity or whether it has become a permanent residence. The Commissioner has no information on the current status of Z.L. and T.L.'s employment, their salaries, or any other sources of income to determine whether they are able to afford to rent or purchase another home. Nor is there any information in the record to demonstrate whether Z.L. and T.L. have made any efforts to find a permanent home in Northern Burlington. While the Commissioner acknowledges that Z.L. and T.L. have not participated in this matter to date, the fact remains that they are the only source of information about their living situation and financial circumstances, and thus their participation through discovery or testimony is critical to a determination in this matter. Furthermore, the fact that the family has lived in Bordentown for years[6] does not alone demonstrate that they are no longer living there out of necessity, especially when weighed against their stated intent that the

[6] The precise number of years should be clarified on remand, based on information provided by the family about the actual date they relocated to Bordentown. The Commissioner notes that the ALJ dismissed Northern Burlington's request for reimbursement from Bordentown for dates prior to October 2017, when Northern Burlington notified Bordentown that the family had relocated. The Commissioner does not reach the issue of whether this dismissal was proper. However, even if the ALJ is correct that Northern Burlington was not entitled to reimbursement from Bordentown prior to the notification, the date on which the family relocated is nonetheless relevant to a determination of whether their home in Bordentown is fixed and regular.

living situation is temporary.[7] Therefore, further information is necessary to determine whether the home is fixed, regular and adequate such that J.L. and B.L. are no longer homeless under state and federal law. If the family is no longer homeless, it is also necessary to determine the date when they were no longer homeless, in order to resolve the competing claims for tuition reimbursement.

Accordingly, the Initial Decision is rejected, and the matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 19, 2022
Date of Mailing: October 19, 2022

[7] While a family's intent to move is generally insufficient on its own to support a finding that they are homeless, *see, e.g., K.L. and K.L. o/b/o minor child M.L. v. Bd. of Educ. of the Borough of Kinnelon, Morris Cty.*, Commissioner Decision No. 315-08 (July 22, 2008), *aff'd, K.L. v. Bd. of Educ.*, 2010 *N.J. Super. Unpub.* LEXIS 11 (App. Div. 2010), intent can be relevant in determining whether the family is remaining in their current location out of necessity. If the family intends to move, and has been actively attempting to move but has been unsuccessful in doing so because of continued financial hardship, the family may be homeless. *See M. O'K., supra.*

270-22
State Board of Examiners Dkt No. 1819-194
Agency Dkt. No. 2-4/22A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Kathleen Valencia, State Board of Examiners,
New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, March 7, 2022

For the Respondent-Appellant, Joshua Nahum, Esq.

For the Petitioner-Respondent State Board of Examiners, Sydney Finkelstein, Deputy Attorney General (Matthew J. Platkin, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Kathleen Valencia's appeal of the Order of the State Board of Examiners (Board), dated March 7, 2022, suspending her Teacher of Social Studies Certificate of Eligibility with Advanced Standing, Teacher of Elementary Grades K-8 Certificate of Eligibility with Advanced Standing, and Teacher of Social Studies Certificate for two years.

Appellant is a tenured teacher in the Union City School District (Union City or the district). Union City filed tenure charges against appellant and, following an arbitration, the Arbitrator determined that appellant had engaged in conduct unbecoming a teacher when she made derogatory comments about students and their housing.[1] The charges stemmed from a videotaped recording of appellant with an undercover operative of Project Veritas who posed

[1] Several other charges against appellant were not substantiated.

as the concerned sister of a fictitious Union City teacher in order to obtain damaging statements from appellant. The video was later published on YouTube. In the video, appellant is seen calling students in the district "dirtbags" and "scumbags" and referring to student homes that she had visited as a home instructor as "shitholes." The Arbitrator found that, given the mitigating circumstances, including appellant's "long and blemish-free record, her exemplary service as a Union City teacher, and her expressed remorse," termination was too harsh a penalty. Instead, the Arbitrator ordered that appellant would not receive any back pay for the period she was on leave and would forfeit her salary increment for the 2018-19 school year.

Thereafter, the Board issued an Order to Show Cause as to why appellant's certificates should not be revoked and transmitted the matter to the Office of Administrative Law. The Administrative Law Judge (ALJ) found that appellant had engaged in conduct unbecoming a teacher but concluded that the conduct was "not sufficiently flagrant" to warrant action against her teaching certificates. The Board agreed with the ALJ that the conduct was unbecoming but disagreed as to the penalty and determined instead that the conduct warranted a two-year suspension of her teaching certificates. The within appeal followed.

On appeal, appellant argues that the *Fulcomer* factors weigh against suspension or revocation. *In re Fulcomer,* 93 *N.J. Super*. 404 (App. Div. 1967). According to appellant, the comments were said in a private conversation that was secretly recorded and she never meant for students to hear them. Further, she argues that she made the statements in an effort to comfort a visibly distraught woman and did not intend to cause harm by her actions. She maintains that she had never used this language previously. Considering the mitigating factors,

appellant contends that she has had a stellar teaching record for fifteen years with high performance evaluations, even after the tenure proceeding. Appellant also argues that, given that she was returned to work more than two years ago, action against her certificates now would cause a disruption to the students and the district.

Appellant contends that suspension of her certificates is unprecedented under the law. To the extent that teachers have been suspended for making disparaging comments, appellant agues that they have been suspended for not more than 120 days, citing two tenure matters. *See, In the matter of the Tenure Hearing of Adelphia Poston,* Commissioner's Decision No. 362-06, dated October 19, 2006 (120-day suspension for referring to a student's mother as a "dyke"); *In the Matter of the Tenure Hearing of Lauren Cooke,* Commissioner's Decision No. 503-10, dated November 22, 2010 (120-day suspension for referring to a teacher using racial epithets). Additionally, appellant argues that the Board of Examiners should not be permitted to act against a teacher's certificate when the teacher retained his or her job following a tenure proceeding. Appellant maintains that there is no case law to support a teacher retaining tenure and then having his or her certificates revoked for the same conduct. Accordingly, appellant asks the Commissioner to vacate the Order of Suspension.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her 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. 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).

After a comprehensive review of the record, the Commissioner finds that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct. At the outset, the Commissioner notes that the Board – whose statutory authority is derived separately from that of the panel of Arbitrators – can act against a teacher's certificates regardless of the penalty imposed by an Arbitrator in a tenure proceeding, and the Board is not constrained by the Arbitrator's penalty determination. *See, In the Matter of the Certificates of Nicholas Cilento,* Commissioner's Decision No. 131-22, dated June 23, 2022 (issuing a two-year suspension of the appellant's certificates after an Arbitrator issued a three-month suspension in a tenure proceeding). In this matter, it is undisputed that appellant used derogatory language about students, referring to them as "dirtbags" and "scumbags" and their homes as "shitholes." While appellant contends that the comments were secretly recorded, not meant to be heard by students, and made in an effort to calm a distraught woman, such arguments do not negate the lack of judgment she demonstrated in making the comments about her students. Regardless of whether Project Veritas made respondent's derogatory language public, a private exchange that included the same comments would be no less unbecoming conduct.

With respect to the appropriate penalty, the Commissioner disagrees with the Board that a two-year suspension of appellant's certificates is warranted. The Commissioner notes that the Board's Order of Suspension did not provide reasoning for why appellant's conduct warranted a two-year suspension rather than an alternate length of time. Nor does counsel for the Board explain why two years is the appropriate amount of time for appellant's suspension. Upon review of relevant case law, the Commissioner finds this matter analogous to *In the Matter of the Certificates of Brett Holeman,* Commissioner's Decision No. 130-22, dated

June 23, 2022. In that case, the appellant was found to have engaged in unbecoming conduct when he made disparaging comments about his superiors and colleagues, accepted counseling fees from parents, sent emails that contained profanity and advised his supervisor against referring cases to him. Noting that appellant had no record of previous discipline or inappropriate conduct, the Board found that a six-month suspension of appellant's certificate was the appropriate penalty. In this matter, appellant used derogatory language about students, similar to Holeman's disparaging comments about superiors and colleagues and his use of profanity. Holeman also had an additional charge for accepting counseling fees, which does not exist in appellant's case. Both appellant and Holeman had the mitigating factor of no previous discipline, and appellant has an unblemished teaching record. Accordingly, the Commissioner finds a six-month suspension to be the appropriate penalty in this matter.

Accordingly, the decision of the State Board of Examiners suspending appellant's teaching certificates is modified with respect to the duration of the penalty, for the reasons stated herein.[2]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 19, 2022
Date of Mailing: October 19, 2022

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

271-22
OAL Dkt. No. 03411-22
Agency Dkt. No. 71-4/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Jolisa Johnson, Board of Education of the Township of Piscataway, Middlesex County.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that respondent's resignation from employment with only five days' notice justifies suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, the Board's motion for summary decision is granted, and respondent's teaching certificates are 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.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 19, 2022
Date of Mailing: October 19, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 03411-22
AGENCY DKT. NO. 71-4/22

IN RE SUSPENSION OF THE TEACHING CERTIFICATE OF JOLISA JOHNSON.

David B. Rubin, Esq., for petitioner

Brian M. Cige, Esq., for respondent

Record Closed: June 30, 2022 Decided: September 12, 2022

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Piscataway Township Board of Education ("Board" or "petitioner") seeks an order suspending the teaching certificate of respondent Jolisa Johnson ("respondent") for failing to provide adequate notice of resignation, in violation of her employment contract and N.J.S.A. 18A:26-10.

The issue to be decided is whether, in this education matter in which the Acting Commissioner of Education, on application of the Piscataway Township Board of

Education, issued an order to show cause why respondent's teaching certificate should not be suspended for unprofessional conduct under N.J.S.A. 18A:26-10.

FACTUAL DISCUSSION

The following facts are not in dispute and as such I **FIND** as **FACT** that the Board appointed respondent to serve as a preschool teacher for the period September 30, 2021, through June 30, 2022. Certification of Sousa at ¶ 2. Respondent was assigned to the Children's Corner Preschool in the Piscataway Township School District (the "District"). Ibid. The employment contract respondent signed required her to provide 60 days' notice of her intent to terminate the contract. See Sousa's Ex. A.

Respondent submitted a letter of resignation dated February 28, 2022, indicating her intent to leave Children's Corner Preschool effective April 28, 2022, so that she could "focus on [her] upcoming commitment to graduate school." Petitioner's Ex. A; Respondent's Ex. A. This initial letter of resignation complied with respondent's obligation to provide 60 days' notice. Certification of Sousa at ¶ 3. On March 13, 2022, respondent notified her school's principal, via email, that she had found another opportunity that better aligned with her career goals and that her last day at the school would be that Friday, March 18, 2022. Ibid. Respondent was advised during a meeting the following day that she was required to continue working for the remainder of the 60-day notice period or she would risk suspension of her teaching certificate. Id. at ¶ 4. Nevertheless, respondent stopped going to work after March 18. Ibid. The Board accepted respondent's updated resignation date at its meeting on April 14, 2022. The District's Director of Human Resources, Catherine Sousa, communicated that acceptance to respondent by letter dated April 19, 2022. Petitioner's Ex. B; Respondent's Ex. B.

On April 1, 2022, the Acting Commissioner of Education, on application of the Board, issued an order requiring respondent to show cause why her teaching certificate should not be suspended. Respondent filed a certification opposing the suspension. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on April 29, 2022.

On June 30, 2022, petitioner filed its motion for summary decision. That same day, respondent submitted a brief letter in lieu of a more formal cross-motion, comprising respondent's letter of resignation, the letter from the District, and the certification that responded previously submitted.

Petitioner argues that a one-year suspension of respondent's teaching certificate is appropriate because respondent's "abrupt[,] early departure caused the district a hardship." Petitioner's Brief at 2. With only five days' notice, "the district had to disrupt the schedule of a Master Teacher and an English-as-a-Second-Language teacher who had to provide classroom coverage while the district scrambled to find a full-time replacement." Ibid. According to petitioner, "[t]he Commissioner of Education has established a one-year suspension as the presumptive consequence for failing to fulfill the . . . notice-of-resignation requirement." Petitioner's Brief at 5. A lesser penalty is imposed only if there are "compelling reasons." Ibid.

Respondent's counsel characterizes the suspension sought as being one of "indefinite term." See Respondent's Letter Brief. Respondent does not dispute that she left the school's employ before her contract expired or that she provided inadequate notice of her resignation. She also does not dispute that she was warned of the consequences for leaving her teaching position prematurely. Instead, she emphasizes that she was "transparent and forthright with the moving party regarding [her] immediate goal of seeking continuing education opportunities." Certification of Johnson at ¶ 2. She says the Board was "not unaware" of her need to leave before the expiration of her employment contract or "the changes in circumstances requiring [her] to leave even earlier." Id. at ¶ 3. She points to the letter from the District accepting her earlier end date and offering best wishes, seemingly suggesting that the Board condoned her premature departure. Id. at ¶ 4.

Respondent insists that she did not intend "to take any action which would have a negative impact on [her] teaching certificate." Id. at ¶ 5. "[U]nder the circumstances," she concludes, "either the Order to Show Cause . . . should be denied or, if the Commissioner determines that some period of suspension is necessary," the suspension should be for "a minimum term." Id. at ¶ 7. Respondent does not attempt to explain why her

circumstances should mitigate any penalty that is assessed or why she was unable to honor her initial notice of resignation.

LEGAL DISCUSSION

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he 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). When the motion "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." Ibid.

This standard is substantially the same as that which governs motions for summary judgment in civil litigation. Contini v. Bd of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995). In other words, a court must ascertain "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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." L.A. v. Bd. of Educ. of Trenton, 221 N.J. 192, 204 (2015) (internal quotes and citations omitted).

I. Petitioner's motion for summary decision should be granted because respondent has not set forth specific facts showing that there is a genuine issue to be litigated.

N.J.S.A. 18A:26-10, applicable to non-tenured certificated staff, provides that:

> Any teaching staff member employed by a board of education . . . , who shall, without the consent of the board . . . cease to

> perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.
>
> [N.J.S.A. 18A:26-10.]

"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 Bd. of Educ. v. Leinen, 94 N.J.A.R. 2d (EDU) 405, 407 (citing reference omitted).

The sufficiency of notice is dictated by the terms of the parties' employment contract. In re Suspension of the Teaching Certificate of Schvamberg, EDU 09828-13, Initial Decision (January 21, 2014), adopted, Comm'r (March 5, 2014) https://njlaw.rutgers.edu/collections/oal/html/initial/edu09828-13_1.html. In most cases, the Commissioner has imposed the maximum one-year suspension of a teaching certificate for leaving without adequate notice. See, e.g., Green v. School Dist. of Mount Holly, EDU 0733-02, Initial Decision (Sept. 5, 2002), adopted, Comm'r (Oct. 25, 2002) https://njlaw.rutgers.edu/collections/oal/html/initial/edu00733-02_1.html; In re Suspension of the Teaching Certificate of Montalbano, EDU 3588-00, Initial Decision (April 24, 2001), adopted, Comm'r (June 11, 2001) https://njlaw.rutgers.edu/collections/oal/html/initial/edu3588-00_1.html; Penns Grove-Carneys Point v. Leinen, 94 N.J.A.R.2d (EDU) 405. "In rare circumstances in which the Commissioner has seen fit to lessen the suspension period, it was for compelling reasons." Bd. of Educ. of Borough of Alpine v. Yuz, EDU 1116-06, Initial Decision (July 17, 2008), adopted, Comm'r (September 23, 2008) https://njlaw.rutgers.edu/collections/oal/html/initial/edu01116-06_1.html (citing In re Rogers, 1989 S.L.D. 1962 (May 16, 1989), adopted, Comm'r (June 21, 1989)).

"Compelling reasons" have been found, for example, where matters of significant public interest were involved and where constitutional issues were implicated. See Bey v. Bd. of Educ. of Newark, 93 N.J.A.R.2d (EDU) 288. The Commission also declined to suspend a teacher who went above and beyond to ensure a smooth transition by

developing a program through the end of the year and meeting with her successor to put the program in place. Bd. of Educ. of Black Horse Pike Regional School Dist. v. Mooney, 1984 S.L.D. 810, adopted, 1984 S.L.D. 821. A suspension of less than a year was imposed on a teacher of handicapped children who switched jobs for "noble" reasons—to work with more severely handicapped children at a state facility. In re Rogers, 1989 S.L.D. 1962 (May 16, 1989), adopted, Comm'r (June 21, 1989).

Here, it is undisputed that respondent left the District before the expiration of her 60-day notice period. Far from offering compelling reasons or extenuating circumstances to explain her premature departure, respondent pleads that she got a better job opportunity. Her sudden exit disrupted the school environment in precisely the manner the law was designed to prevent. Moreover, her implicit argument that the Board consented to her resignation, such that her nonperformance was excused, is belied by the fact that the Board did not act to accept her resignation until nearly a month after she stopped working, when rejecting her resignation would have been unavailing. Viewing all evidence in the light most favorable to respondent, no rational factfinder could find in her favor. Therefore, petitioner's motion for summary decision should be granted.

CONCLUSION

Since all material facts are undisputed, the Board is entitled to summary decision in its favor. Accordingly, petitioner's motion is appropriate under these facts and should be **GRANTED**.

Therefore, I **FIND** as **FACT** that there are no genuine issues of material fact requiring a hearing. I **CONCLUDE** that petitioner's motion for summary decision is appropriate and should be **GRANTED**.

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

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

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

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

September 12, 2022
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: September 12, 2022

Date Mailed to Parties: September 12, 2022

DJB/cb

272-22

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

----------X

Agency Docket No. 189-10/21

In the Matter of Tenure Hearing
Of Joseph Putrino and the Montclair
School District, Essex County.

OPINON AND AWARD

----------X

Issued: October 18, 2022

ARBITRATOR
Joseph Licata, Esq.

APPEARANCES

FOR THE PETITIONER
Isabel Machado, Esq.
Machado Law Group

FOR THE RESPONDENT
Robert M. Schwartz, Esq.
Schwartz Law Group, LLC

PROCEDURAL HISTORY

On September 20, 2021, Superintendent Dr. Jonathon C. Ponds submitted to the School Business Administrator/Board Secretary Nicholas Cipriano, a Notice of Tenure Charges against Dr. Joseph Putrino ("Respondent"), Principal of Renaissance Middle School, on behalf of the Montclair Public School District ("Petitioner"). On September 20, 2021, Cipriano served Putrino the Statement of Tenure Charges and Statement of Evidence Under Oath, with supporting documents and an affidavit supporting the Charges. On October 7, 2021, Petitioner's attorney, Isabelle Machado, Esq. filed with the New Jersey Department of Education a Certification of Determination together with an October 6, 2021 Board Resolution adopting the Tenure Charges against Putrino. Also filed was a Statement of Tenure Charges and Statement of Evidence Under Oath with supporting documents and an affidavit supporting the Statement of Tenure Charges[1] and Statement of Evidence Under Oath dated September 20, 2021; and, lastly a Certification of Service upon Putrino and his attorney, Robert M. Schwartz, Esq.

Based on two specifications, Petitioner charged Respondent with Conduct Unbecoming and Other Just Cause within the meaning of N.J.S.A. 18A:6-10. The first specification alleges that Respondent showed a racially offensive video on September 2, 2020 during a convocation presentation to staff which was available by livestream. The second specification alleges that Responded created a schedule for teachers which fehEARING ll significantly short of the 1250 minutes of weekly pupil contact time allowed under the provisions of the 2018-2021 Collective Bargaining Agreement between Petitioner and the Montclair Teachers' Education Association. Petitioner seeks Respondent's dismissal from employment.[2]

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[1] Hereinafter referred to as "the Charges".

[2] Respondent is on a paid suspension pending the results of this proceeding.

On October 27, 2021, Respondent filed an Answer with the New Jersey Department of Education. On November 3, 2021, the New Jersey Department of Education, Office of Controversies and Disputes, designated the undersigned to hear and decide this matter pursuant to N.J.S.A. 18A:6-16. Subsequently, pursuant to N.J.S.A. 18A:6-17.1(b)(3), Respondent filed a Witness and Evidence Disclosure.

On February 2, 2022, the parties stipulated to a "Protective Order" concerning copies of correspondence sent in by a parent of a Montclair Board of Education student; any document concerning student information, student name, or student records; and any document containing employee confidential, personal, medical, social and/or private information. The parties further stipulated that the confidential document/information shall only be used in the pending matter and shall not be used in any other matter in the absence of further Order.

On February 8, 11 and 15, 2022, the parties' representatives exchanged email communications concerning certain discovery issues which arose between them. As a result of the exchange, Petitioner agreed to withdraw Paragraphs 7-10 of the Charges pertaining to allegations surrounding a 2019 N.J. Superior Court Complaint.

On February 17, 2022, Respondent filed a letter seeking dismissal of the Charges with respect to a portion of Paragraph 13, which alleges:

> "During Dr. Putrino's presentation, numerous staff members, District parents, as well as members of the public, objected to and were offended by the video. As a result, the video was stopped by District administration." (See, Ex. G through K, and O through P.)[3]

Respondent contends that such dismissal was warranted due to alleged insufficiencies regarding the Sworn Statement of Evidence, Exhibits O and P; namely, that Exhibits O and P were

[3] Petitioner's exhibits are referenced by letters. Respondent's exhibits are referenced by an "R" followed by the number of the exhibit.

anonymously sent emails which do not meet the general standards set forth by the undersigned in Tenure Matter of Noelle Gordon, Agency Docket No. 24-1/18 or the more specifically applicable ruling of Arbitrator Arnold Zudick in Tenure Charges of Brett Fetty Agency Docket No. 173-7/19 (rejecting reliance on anonymous statements).

In addition, based on the same arbitral precedent, Respondent sought to dismiss Paragraphs 20-23 pertaining to a "Renaissance Middle School 2020-2021 Teachers' Schedules Audit". The basis for Respondent's motion regarding Paragraphs 20-23 is that Exhibit S does not contain pertinent information necessary to support a Tenure Charge and/or to enable cross-examination. For example, Respondent alleges that Exhibit S does not contain the identification of teachers, class assignments, or even the school year at issue.

However, one day prior to the first day of hearing, in an attempt to cure a portion of the defects noted in Respondent's February 17, 2022 letter, Petitioner replaced its originally filed Exhibits O and P (which redacted the names and email addresses of the senders) with the originally received emails that did identify the complaining individuals. Respondent objected to the belated attempt by Petitioner to cure the alleged defects. In addressing the objection and resolving the evidentiary dispute, the undersigned directed Petitioner to restore the originally filed Exhibits O and P containing the redacted email addresses and names of the senders. However, Dr. Ponds was permitted to testify that the emails he originally received contained names and email addresses and, thus, were not sent anonymously.

On February 18, 2022, the undersigned presided over the first day of hearing in this matter.[4] The parties completed opening statements and the direct and cross-examination of Dr. Ponds.

[4] All hearing days were conducted pursuant to Zoom videoconferencing and were transcribed by a certified court reporter. In total, the hearing encompassed 1,952 transcribed pages.

On February 23, 2022, Petitioner filed an opposition to the motion limited to Respondent's objection over Exhibit S of the Sworn Statement of Evidence and seeking dismissal of Paragraphs 20-23 of the Charges. On February 27, 2022, the undersigned requested a copy of Petitioner's answer to Respondent Interrogatory #21. On the same day, Respondent filed a reply letter brief and provided the undersigned with a full set of Petitioner's Answers to Respondent's Interrogatories.

On March 1, 2022, the undersigned issued a decision on the Respondent's Motion to Dismiss the scheduling infractions Charge. Respondent's motion was denied for the reasons set forth in the undersigned's decision. The motion decision was filed with the Office of Controversies and Disputes on the same day.

On March 2, 2022, Respondent filed a motion to exclude two witnesses for the reason that neither was on Petitioner's original witness list. Petitioner opposed the motion.

On March 3, 2022, a second day of hearing was held. The March 2, 2022 motion to exclude two witnesses filed by Respondent was resolved on the record. The parties also completed the testimony of Dr. Ponds.

On March 4, 2022, a third day of hearing, Petitioner adduced the testimony of Diane Anglin (a non-District employee) and Rodney Jackson, a teacher at Renaissance Middle School.

On March 10, 2022, a fourth day of hearing, Petitioner presented the testimony of Major Jennings, Principal of Buzz Aldrin Middle School and Acting Principal at Renaissance.

On March 11, 2022, a fifth day of hearing, Petitioner presented the testimony of Damen Cooper, Human Resources Personnel Director. Following the completion of Cooper's testimony, Petitioner rested its case in chief subject to rebuttal.

On March 23, 2022, a sixth day of hearing, Respondent adduced the testimony of Ketty White, a second grade teacher at Nishuane School.

On April 19, 2022, a seventh day of hearing, Respondent presented the testimony of Erika Pierce, Principal Glenfield Middle School; Shashana Smiley, an Administrative Assistant/Secretary assigned to Montclair High School (previously Renaissance Middle School); Susan Weintraub, a non-District employee who held the position of PTA President for Northeast Middle School and Glenfield Middle School; Javon Pleasant, a non-District employee and former graduate of the Montclair Regional School District; Ibn Shakoor, a non-District employee; and, Beth Calamia Scheckel, a non-District employee and former PTA President of Renaissance Middle School.

On April 27, 2022, an eighth day of hearing, Respondent testified on direct examination.

On April 28, 2022, a ninth day of hearing, Respondent's direct examination and cross-examination were completed.

On May 10, 2022, a tenth day of hearing, cross-examination, redirect examination and recross-examination of Respondent were completed. In addition, Respondent offered the testimony of Naomi Kirkman, a retired school principal at Branford School. The parties completed Kirkman's testimony.

Finally, on June 14, 2022, an eleventh day of hearing, Respondent adduced the testimony of Dr. Matt Jennings, who was offered to testify in response to the scheduling Charge. Petitioner called two rebuttal witnesses, Chris Graber, Director of Technology, Montclair Public Schools and Dr. Ponds, whereupon the evidentiary portion of the records was completed.

Pursuant to the briefing schedule established, the parties' respective representatives filed initial briefs on August 3, 2022, and reply briefs on August 17, 2022.

EXHIBIT DISPUTE

Subsequent to the filing of briefs, a dispute arose when Petitioner contended that certain exhibits identified by Respondent were not admitted in evidence.

Specifically, Petitioner, in a letter to the undersigned dated August 18, 2022, stated:

> Dear Arbitrator Licata:
>
> As you are aware our office is counsel to the Petitioner, Montclair Board of Education ("District"). Kindly accept this correspondence in response to Respondent's final proposed exhibit list. Various exhibits listed in Respondent's Exhibit List were not admitted into the evidence during the hearing.
>
> More specifically, the District objects to the following exhibits:
>
> - Ex. R16 Montclair Public Schools Website articles – Bates stamped 144-148; 169- 172.
>
> During the hearing, Arbitrator Licata you ruled that pages Bates stamped 144-148; 169-172 were not admitted into evidence. See, T. 1212:23-1214:25; 1216:6-1218:14.
>
> - Ex. R19 9/7/20 Letter of Support, including Beth Scheckel, Bates stamped 204, 205- 207, 209, 2026.
>
> Respondent's proposed language is unclear. Only certain pages of Ex. R19 were admitted with the caveat discussed during the hearing. As such, the use of the word "including" is inaccurate and same should be revised to "limited to". Additionally, page Bates stamped "2026" is inaccurate.
>
> - Ex. R22 Josh Pray Statement.
>
> Ex. R22 was never admitted into evidence. Ex. R22 was introduced during the hearing but was not moved into evidence. See T. 220:17-25.
>
> - "Ex. R26 MEA agreement (Ex. PQ)".
>
> During the hearing, Arbitrator Licata you ruled that "Ex. R26 is not in. Exhibit PQ is." See T. 1437:19-20.
>
> - "Ex. R31 Reopening Plan Bates stamped 441".
>
> Based on our review of the transcript, R31 Bates stamped 441 was shown

during the hearing. See T. 1425:15-25. However, we have no record of same being admitted into evidence.

- "Ex. R32 CV of Dr. Matthew Jennings/Report".

Based on our review of the transcript, Ex. R32, CV of Dr. Jennings was marked for identification, but we have no record of the CV or report being admitted into evidence.

Respondent replied on August 26, 2022.

Dear Arbitrator Licata

This is in response to Ms. Machado's letter of August 19, 2022.

After receiving Ms. Machado's letter, I went back and reviewed the transcripts. Ms. Machado is correct with most of her points. In this regard, I wish to apologize for any confusion my error may have caused.

More specifically, in reviewing the transcript as to Exhibit R-16, this was admitted except for the pages Bates stamped 144-148 and 169-172.

As to R-19, pertaining to the Scheckel letter, Bates stamped 204, it was admitted "subject to the previous colloquy." T.1123:22-23. The colloquy can be found on the preceding pages. Referring to the letter, Arbitrator Licata stated:

"...I don't know to the extent that this letter goes to his character, and she's listed as a witness, as a character witness." T.1121:23-25; 1122:1

"it does talk about his character and what she's been testifying to so far about restorative justice program, and its turnaround at the school. So I'm going to allow it." T.1122:11-15

Also, as to the documents in R-19, Bates stamped 204, 205, 206, 207, 209, 226, they were admitted at T.179:23 T.181:19 and T.189:24-25; T.190:1-3

As to R-26, this was also listed as Exhibit Q.

R-31 is the District's remote learning plan. The portion of the document Bates stamped 441 represents the virtual schedule at Renaissance for the 20-21 school term which is also found in R-30 of the Renaissance Staff Bulletin, Bates stamped 428 and admitted into evince at T.1425: 5-12. Dr. Ponds testified that R- 31, Bates stamped 441 was a "snapshot" of the Renaissance schedule and he acknowledged that this was put out in the District - wide reopening plan for 20-21. T.375:11-20

While R-31 does not appear to have been entered into evidence, this was through inadvertence. Given Dr. Ponds' testimony that R-31, Bates stamped 441 was a snap shot of the Renaissance virtual schedule for the 20-21 school term, and given that the schedule is the same as in R-30, 428, which was admitted into evidence, it is respectfully requested that this be allowed into evidence.

With respect to R-32, representing the CV for Dr. Jennings, this was marked for ID at T.1768. At T.1805: 11-23, Arbitrator Licata found Dr. Jennings to be qualified as an expert. This being the case, I would respectfully ask that the CV be allowed into evidence inasmuch as Dr. Jennings testified as to his expertise and the Arbitrator qualified him as an expert.

With regard to R-22, the Josh Pray statement, it was marked for identification. See T.220: 19-20. Dr. Ponds said he was not sure if he looked at the statement, but there was a "chance that he read it." T.220: 23-25. We intended to introduce it into evidence just to show that Mr. Pray's message was to illustrate the frustration of many parents during the lock-down in having to work and take care of their children at the same time and the new-found appreciation for what teachers do every day. It represented a message that was understood by several witnesses, including Ketty White, Erika Pierce, Shashana Smiley, Ibn Shakoor, and Javon Pleasant. They all testified that they saw the video as relatable. More specifically, Ms. White, Ms. Pierce and Ms. Smiley also testified that it spoke them as parents when, during the period of the lock down, they had to work remotely and at the same time teach and occupy their children. We intended to introduce it into evidence. Apparently, this did not occur. Accordingly, I am respectfully requesting now that you consider allowing this document to come in as evidence just to show that the intended message of the video corresponded to how the Respondent's witnesses characterized their view of the video.

Petitioner replied on August 31, 2022.

Good Morning, Arbitrator Licata:

The District objects to Respondent's request to submit new exhibits into evidence months after both sides have rested and submitted their post hearing briefs. The Board has not been permitted or sought to unilaterally add new exhibits into evidence.

The request is further even more concerning since same includes a request to include R-22 as an exhibit, without any testimony that it is even a statement by Josh Pray or an opportunity to cross examine the alleged author of the statement. Josh Pray did not testify in this matter and in fact no one testified that R-22 was even a statement made by Josh Pray.

Thank you.

(8/31/2022 at 9:13 a.m.)

After fully considering the post-hearing evidentiary dispute, I enter the following rulings:

Ex. R16 Montclair Public Schools Website articles – Bates stamped 144-148; 169-172 (Will Not Be Admitted).

This matter was resolved during the hearing as follows:

Bates 144-148

> ARBITRATOR LICATA: We have Dr. Putrino's testimony describing the event. He was in the picture. I mean, if it's not written by Dr. Putrino, I think you have enough with his testimony, identification of the events, that we could move on and sustain Isabel's objection to that extent.
>
> MR. SCHWARTZ: So 144 to 148, the document itself is not coming in, the pictures are not coming in?
>
> ARBITRATOR LICATA: We have the witness' testimony about what the event was and who the people are (Tr. 8, p. 1214, lines 1-13).

Bates 169-172

> ARBITRATOR LICATA: All right. Look, I mean, in terms of these exhibits, the same ruling I had before is that Bob has the testimony, Dr. Putrino has described the event. Nobody is disputing he received those awards or that's not him in the picture. It wasn't photo-shopped. So I'll sustain the objection and take Dr. Putrino's testimony and identifications of people in the photo and that he received the award. I don't know what more the article would add anyhow to that. But I'll sustain the objection (Tr. 8, p. 1217, line 17 through p. 1218, line 4).

Ex. R19 9/7/20 Letter of Support, including Beth Scheckel, Bates stamped 204, 205-207, 209, 2026 (admitted with clarification)

Petitioner claims Respondent's proposed language is unclear. Certain pages of Exhibit R19 were admitted with the caveat discussed during the hearing. As such, the use of the word "including" will be deleted. I agree. Additionally, I concur that Bates stamp "2026" is inaccurate. However, Bates Stamp 2026 is conformed to Bates Stamp 226 based on the Transcript.

Exhibit R22 Josh Pray Statement (will not be admitted)

Petitioner submits that Exhibit R22 was introduced during the hearing but was not moved into evidence. Respondent replies that it intended to introduce it into evidence just to show that Mr. Pray's message was to illustrate parent's frustrations of parents during the lockdown. Respondent respectfully requests the admission of Exhibit R22. Unlike other statements (emails) which were admitted based on Dr. Ponds' testimony that he either did receive or likely received the email (if properly addressed to his email account), the Pray statement was not similarly validated or otherwise authenticated. Additionally, because the video also reveals the message underlying Pray's performance, and because Pray is obviously critiquing his own children's remote learning study habits, Respondent's asserted need to have the Pray statement in evidence expressing the obvious is not compelling. Thus, without authentication, I concur with Petitioner. Exhibit R22 will not be admitted.

Exhibit R26 MEA agreement (Ex. Q).

(Exhibit R26 is stricken and replaced with Exhibit Q).

Exhibit R31 Reopening Plan Bates stamped 441
(Admitted)

Petitioner is correct. Exhibit R31 was discussed during Dr. Putrino's testimony, but not moved into evidence. In accepting this document, however, I observe both parties developed the record to such an extent that the document should be admitted to give context and any needed clarification to the testimony. The extent of discussion by both attorneys and Putrino is set forth below:

By Mr. Schwartz

> Q. The next document I would like to show you, Dr. Putrino, is R-31. It's Putrino 31. It starts on Bates Stamp 431. I'm sorry, 430. And it is dated

August 2020, and it's titled remote learning plan. Can you tell us what this is, please?

A. This is the document that the District sent out to parents and posted on the website as the Montclair's remote learning plan.

Q. I'll show you what is Bates Stamped 441 of R-31. Have you seen this before, Dr. Putrino?

A. Yes.

Q. Can you tell us what this particular page is? And again, I'm on Bates Stamp Page 441.

A. This is my District approved remote learning schedule set to be put in place for the 2020-2021 school year (Tr. 9, p. 1425, line 14 through p. 1426, line 12).

By Ms. Machado

MS. MACHADO: Can you put up Exhibit 31?

ARBITRATOR LICATA: Is this R-31?

MS. MACHADO: Yes. Putrino 31. Go to the Renaissance schedule, which is 441, if anybody is looking at the Bates Stamp.

Q. You would agree with me that this schedule does not show how many minutes each teacher is actually teaching students; correct?

A. On this schedule, no.

Q. And looking at this schedule, there would be no way for somebody looking at this to be able to say how many minutes each teacher is teaching; accurate?

A. Correct.

Q. And you would also agree with me, looking at the schedule, you can't tell, nobody would be able to tell how many students are in any particular teacher's classroom or class; correct?

A. You're correct. That's not the function (Tr. 9, p. 1458, line 23 through p. 1459, line 20).

By Mr. Schwartz

> Q. Dr. Putrino, I show you R-31. And R-31 is the Montclair Public School Remote Learning Plan, and it says August of 2020. Do you know -- and it's Putrino 430. Do you know who put this out?
>
> A. The District (Tr. 10, p. 1665, lines 18-23).
>
> ***
>
> Q. And the Montclair reopening plan that's been marked as R-31, that came out when?
>
> A. Also the 21st. Later that afternoon. (Id., p. 1667, lines 4-6).

The in depth discussion of the exhibit by both sides supports admission of the document.

Lastly, I observe, a portion of this virtual schedule is also found in Exhibit R30 which is in evidence.

Based on the foregoing, I will admit Exhibit R31.

Exhibit R32 CV of Dr. Matthew Jennings/Report (admitted in evidence)

Petitioner is correct. Exhibit R32, the Curriculum Vitae of Dr. Jennings was marked for identification, but not moved for admission. However, the document will be accepted since (1) it was the subject of both direct examination and extensive *voire dire;* (2) it gives background or context to the testimony of Jennings concerning his education and experience; and (3) the testimony of Jennings – apart from the CV – was more heavily relied upon in the undersigned's ruling to qualify Dr. Jennings as an expert witness regarding the planning and creation of school schedules:

> So I'm going to admit the witness, qualify him as an expert, recognizing that there are varying degrees of expertise. And as we go along in the proceeding, cross-examination can certainly bring out further flaws, if any, with respect to the findings and conclusions that Dr. Jennings has made.

So I'm satisfied initially based on his experience of reviewing schedules, creating some master schedules, that the topic of scheduling would be something he would be able to assist me with. So I'm going to allow the testimony, and of course, as we go through it, there could be cross-examination of what his testimony actually is (Tr. 11, p. 1805, line 15 through p. 1806, line 4).

In light of the foregoing, the final lists of exhibits admitted in evidence are as follows:

PETITIONER'S EXHIBIT LIST

Ex. A	June 19, 2012 letter from Dr. Patterson confirming Respondent's employment.
Ex. F	September 2, 2020 convocation video.
Ex. G	September 2, 2020 email from Alecia Wells, District teacher, to Dr. Ponds.
Ex. H	September 2, 2020 email from Margaret R. Sáraco, District teacher, to Dr. Ponds.
Ex. I	September 2, 2020 email from Rodney Jackson, District teacher, to Dr. Ponds.
Ex. J	September 2, 2020 email from Mike Chiles, retired District staff, to Dr. Ponds.
Ex. K	September 2, 2020 email from Natale Burrell, District teacher, to Dr. Ponds.
Ex. L	Video of the September 2, 2020 Board meeting and Ms. Anglin's statement.
Ex. M	September 2, 2020 TAPINTO Montclair article, *Montclair NAACP Demands Immediate Action After 'Racist' and 'Offensive' Video Shown to District Staff.*
Ex. N	September 2, 2020 letter to Respondent from Mr. Cooper regarding administrative leave.
Ex. O	October 29, 2020 email from Parent, Shani Stephens (S.S.), to Dr. Ponds.
Ex. P	November 9, 2020 email from Parent, Deborah Guzman Meyer (D.M.), to Dr. Ponds.
Ex. Q	2018-2021 Collective Bargaining Agreement between the Montclair Board of Education and the Montclair Education Association.
Ex. R	District Principal Job Description.
Ex. S	2020-2021 Renaissance Middle School Teachers' Schedules' Audit Documents.
Ex. T	May 10, 2021 MHS Daily Announcements.

Ex. U — May 11, 2021 Montclair Local article, *Montclair Schools 'Deeply Regret' Honoring Ultra-Nationalist Rabbi Meir Kahane.*

Ex. V — September 7, 2020 Email chain between Major Jennings and Dr. Ponds, Kalisha Morgan, and Damen Cooper.

Ex. W — July 9, 2020 Email Chain between Dr. Putrino and Dr. Ponds.

Ex. X — Dr. Putrino's Public Instagram Page.

Ex. Y — Full video of September 2, 2020 convocation.

Ex. Z — July 15, 2020 E-Mail Chain between Dr. Putrino and Dr. Ponds.

Ex. AA — July 16, 2020 E-Mail from Dr. Kelisha Morgan to Dr. Putrino, etc.

Ex. BB — Excel Sheet from Dr. Matt Jennings with additional column added by Isabel Machado, Esq.

RESPONDENT'S EXHIBIT LIST

Ex. R10 — 6/19/20 Letter, Our Lady of the Valley Divine Mercy Café.

Ex. R11 — Glenfield Happenings.

Ex. R13 — 7/15/20 letter from MPA.

Ex. R14 — 8/12/20 letter from MPA.

~~**Ex. R16 — Montclair Public Schools Website articles – Bates stamped 144-148; 169-172.**~~

Ex. R17 — Renaissance Middle School.

Ex. R18 — Evaluations – Mini Observations.

Ex. R19 — 9/7/20 Letter of Support, ~~**including**~~ Beth Scheckel, Bates stamped 204, 205-207, 209, 2026.

~~**Ex. R22 — Josh Pray Statement.**~~

Ex. R23 — Meir Kahane, Bates stamped 287-288.

Ex. R24 — Scheduling docs.

Ex. R25 — Art work.

~~Ex. R26 MEA agreement~~ (Ex. PQ).

Ex. R27 Montclair Principals Association CBA.

Ex. R28 Commendation letter from for Superintendent Parker.

Ex. R29 Text messages from Chris Graber -Bates stamped 420.

Ex. R30 Renaissance Staff Bulletins.

Ex. R31 Reopening Plan Bates stamped 441.

Ex. R32 CV of Dr. Matthew Jennings/Report.

Ex. R33 2/5/21 Kirkman letter.

Finally, the undersigned's Opinion and Award is issued in accordance with N.J.S.A. 18A:6-17.1 and the American Arbitration Association Labor Arbitration Rules.

THE ISSUES

"Did Petitioner have just cause to seek the dismissal of Dr. Joseph Putrino, a tenured employee of the Montclair School District based on charges of conduct unbecoming and other just cause? If not, what shall be the remedy?"

SUMMARY OF THE POSITIONS OF THE PARTIES

Petitioner's Initial Brief

On September 2, 2020, in the midst of the COVID-19 pandemic and the aftermath of the devastation gripping the country after the murder of several African American citizens including that of Mr. George Floyd, Respondent choose to present a racially offensive and hurtful video to all staff members in the District, as well as members of the community.

During a virtual convocation, in his capacity as the president of the Montclair Principals Association ("MPA"), Respondent displayed a video which depicted a series of horrifying racial stereotypes about the African American and Black community, including that of the angry Black man. One of the most dangerous stereotypes about the Black community. The video further reinforced negative racial stereotypes which portray African American and Black parents as

uneducated, unintelligent, unable to care for their own children and reliant on the government to do so. The video also reinforced negative racial stereotypes which portray African American and Black students as cheaters and connected to drugs.

Understandably, staff members and members of the community, including the Montclair chapter of the NAACP, were offended by the perpetuation of the horrifying racial stereotypes. Even Respondent's own organization, the MPA, removed him from his president's position and publicly denounced his action.

Although the Respondent's full video was not shown during the convocation, as the Superintendent of Schools was able to stop the video, the remainder of the video remains equally troubling. It mocks the District's COVID-19 safety protocols, and demeans the head custodian, who is African American, by having him mop after each step taken by the Respondent. The video continues to a scene of a thermometer being swung at staff and books being thrown at stuffed animals sitting at desks, who apparently represent students.

After being placed on administrative leave, it was also discovered that Respondent had overstaffed his building by giving teachers partial schedules. Under the contract with the Montclair Education Association, teachers are to work 1,250 minutes. Renaissance Middle School teachers were scheduled to work significantly less, costing the District hundreds of thousands of dollars.

In September 2020, Montclair Public Schools needed reassurance. During a time when District staff members were anxious and fearful of COVID-19, the staff did not need the public mocking of the safety protocols. In September of 2020, the District needed leadership from its principals, not to have the staff be demeaned. In September 2020, the District needed, and continues to need, a building leader who is capable of understanding the dangers of racial stereotyping and is able to comprehend when his actions will perpetuate such harmful stereotypes.

Respondent, unfortunately, has proven that he is incapable of being that leader. Respondent has unfortunately shown that he is incapable of being a responsible administrator who can unite the school and not further damage, divide, and hurt the community.

Respondent's behavior further undoubtedly negatively impacted the morale and efficiency of the Montclair Public Schools. No reasonable person could argue that Respondent's behavior meets the implicit standard of good behavior or the degree of self-restraint and controlled behavior expected of public-school employees. When an educator perpetuates racial stereotyping which is negatively perceived, even if a single incident, nothing short of dismissal is warranted. In re Chaki, No. A-2430-11T3, 2013 N.J. Super. Unpub. LEXIS 2032 (App. Div. Aug. 13, 2013). Furthermore, where an educator perpetuates a stereotype, even if in jest, same constitutes unbecoming conduct warranting dismissal. See In the Matter of the Tenure Hearing of Mark Blasko, Cherry Hill School District, Camden County, 1980 S.L.D. 987 (Initial Decision), 1980 S.L.D. 1002 (Commissioner Decision). As noted by the Commissioner, when racial stereotyping is involved, that kind of behavior cannot be condoned and requires nothing short of dismissal. Id. at 1003.

Accordingly, Respondent's behavior clearly constitutes unbecoming conduct requiring his termination from the school district.

Respondent's Reply Brief

The Respondent asserts that with respect to the issue of the video and the convocation, the Board is attempting to go beyond what is in the Charges. As they relate to the convocation video issue, the Charges are limited to the allegation that the video was inappropriate because it portrayed a "Black man yelling angrily about his children's virtual learning experience." Since the filing of the Charges, the Board has gone beyond what is in the pleadings. It has characterized the video as racist, depicting an "angry Black man" stereotype, and it has sought to have

considered as part of this proceeding portions of the video not shown at the convocation, nor referred to in the Charges. Respondent asserts that this proceeding should be limited to what was pled in the Charges.

As to the "angry Black man" theory of its case, the Board has sought to substantiate its position through personal subjective opinion testimony and through journals and articles referenced in its brief, which have not been vetted for accuracy or bias, and which were not introduced or referred to in the hearing of this matter. That the Board's position as to the video is predicated on personal subjective opinion, is borne out by the testimony, even from Dr. Ponds, who acknowledged that not everyone shared his interpretation of the video.

As for the Respondent's witnesses, they all disagreed with the Board's characterization. These witnesses included Ketty White, a long-time teacher, Erika Pierce, an administrator, and Shashana Smiley, a secretary. They all testified that they found the video to be relatable because it showed the challenges of having to conduct work-related activities, while at the same time having to homeschool their children, which was the video's intended message. None of them said that they were offended by the video. Ibn Shakoor and Javon Pleasant, former students of Dr. Putrino's when he taught in Jersey City, presented testimony as to Putrino's character. But, when asked on cross-examination what they thought of the video, they said it was relatable and funny and not offensive.

Given this disparate reaction, Respondent asserts that the Charges as they relate to the video cannot rest alone on the personal subjective opinions of Dr. Ponds or the opinions of the Board's witnesses. Respondent contends that with different reactions to the video, as was evidenced by the testimony, to make the leap that showing the video was racist or racially offensive, there needs to be a showing of intent. However, the testimony demonstrated that Ponds and Mr. Cooper, who

was charged with investigating this matter, ignored or disregarded the issue of intent, so much so that they were not interested in what Mr. Pray intended in making the video, and completely discounted Dr. Putrino's apology in which he sought to explain that in showing the video he never intended to offend anyone.

As to the video's impact on the District, the only people Dr. Ponds said he spoke to regarding the video were Mr. Cooper and Board members. When Cooper conducted his so-called investigation of the video, he never spoke to staff. Respondent asserts that without hearing from staff there is no credible evidence to substantiate that the convocation video had a negative impact on the District, particularly given the testimony of the staff members who testified for Respondent, all of whom stated that they did not see the video as offensive in any way.

Further, there is nothing in the record to suggest that prior to the convocation, the video, which had been on-line for months, was seen either as racist or as racially offensive. Accordingly, before the convocation, there was no notice, implicit or otherwise, that the video was seen for anything other than what it was intended to be; a statement of appreciation of teachers for what they do, presented in what was thought to be a humorous way.

Even though Dr. Ponds testified that following the convocation he had asked Mr. Cooper to conduct an investigation of the video issue, effectively there was no investigation. In addition to not speaking to staff about the video, Cooper testified that he only reviewed Dr. Putrino's personnel file one time on September 2, 2020, that he only skimmed his evaluations and that he never spoke to Putrino.

Also, in bringing these Charges, in addition to not making any inquiry as to intent, the Board ignores that Dr. Putrino, who only learned that he was to participate in the convocation a couple of weeks before, called the superintendent to ask if he wanted to review what was to be

presented. The superintendent chose not to do that. He didn't see a need to review everyone's presentation even though he was new to the District. Further, no consideration was given to Putrino's more than 20 years of unblemished service.

As to the cases cited by the Board, they all pertain to overt discriminatory acts or statements that are not analogous to the situation being presented in this matter which, as stated, is based exclusively on the interpretation of the video by the Board's witnesses. There was nothing in the video itself that spoke to race. It's only connection to race was that Mr. Pray happens to be African American.

With respect to the scheduling issue, here too the evidence does not match up to the allegations. The Charges were predicated on Exhibit S which, because it did not contain a single teacher name, could not be vetted for accuracy. The Charges alleged that no teacher taught the required 1250 minutes per week, but the MEA contract only provides that teacher pupil contact time shall not *exceed* 1250 minutes. The Charges speak to an "audit of the 20-21 schedule," but Mr. Cooper's review was of the schedule of the 2019-2020 school term. The Charges state Cooper's audit was conducted in February and March 2021, but he testified he performed the audit in September and October 2020.

Further, the audit was woefully lacking in rigor. Mr. Cooper testified that his audit was limited to the Genesis documents that he was provided by Mr. Jenkins. He never went into Genesis to verify the accuracy of what Jenkins had given him. He never looked at the master schedule. He never contacted Dr. Putrino to get an explanation of what he had done with the schedule. He did not include duty periods in his analysis, though this was required by the MEA contract for determining pupil-teacher contact time. His audit as reflected in Exhibit S which was presented to the Board for its consideration contained significant arithmetical errors which were never

corrected and never reported to the Board. Lastly, Cooper either ignored or was not aware of the assessment of the schedule by the former superintendent, Dr. Kendra Johnson, who, in November 2018 and June 2019 called it "masterful," "strategic" and "focused." (R-18)

The burden of the Board is to prove these Charges, in which it seeks to terminate Respondent's employment by a preponderance of credible evidence. For the reasons set forth in his submissions, Respondent asserts that the Board has not met this burden. Accordingly, he respectfully submits that the Charges need to be dismissed.

Respondent's Initial Brief

The Charges stem from an incident that occurred on September 2, 2020 in which the Respondent showed a video at a District convocation that contained a skit by a comedian, Josh Pray. The skit which was intended to be comedic spoke to the frustrations of Pray and many others at having to home school their children because of the lock down caused by the pandemic. As a result, in the skit Pray expressed for himself and for many others, a new-found appreciation for teachers and all they do.

However, the Pray video was not well received by the superintendent, Dr. Ponds and perhaps by some others too. About two minutes into the video when it was shown at the convocation Ponds had it shut down. He didn't view it as the positive message that it was intended to convey; that the pandemic and the resulting quarantines helped to make parents realize the difficult job it is to teach our kids and sometimes to have to control our kids. But, clearly this was its intent as evidenced by the statement issued by Mr. Pray as well as the testimony of Dr. Putrino and others in this matter. Instead, Ponds saw the video as portraying an African American man channeling what he described, and what counsel for the District described in her opening

statement, as an "angry Black man" stereotype, though it is not clear that there is such a stereotype, and even if there is, it's not clear what it is or what it means.

To this, shortly after learning of the controversy in Montclair, Mr. Pray issued a statement in which he repeated his appreciation for teachers and what they do, expressed surprise and outrage that some would think that he was denigrating his own children, and was at a loss as to how his video thanking and appreciating teachers with "heartfelt fervor" was "racist" or "offensive." Pray said in his statement that "In a time where it feels like all we have are heated and rash decisions, the Montclair Public School System has made yet another heated and rash decision based on the color of my skin. I am completely bewildered as to why my race was brought into this conversation." (See Ex. R22) Again, the only connection the video had to race was that Pray happens to be African American.

Dr. Ponds readily acknowledged that his determination that the video was racist was because of his "interpretation" of how Mr. Pray portrayed himself, which again, he said was as an "angry Black man" (Tr. 1, p. 170, lines 1-11 through p. 171, lines 1-3) It was this "interpretation" that led the superintendent to say at the virtual convocation that there is no place for racism in Montclair, a comment which, if nothing else, helped to shape the opinion of some others who were in attendance. It was this interpretation that led Ponds to place Dr. Putrino on administrative leave a couple of hours after the video was shown with no opportunity given for Putrino to explain his intent for showing the video. That is because Ponds was not interested in hearing what Putrino had to say. His interest was solely to remove Putrino from the premises regardless of his intent in showing the video and regardless of his history as an educator and as a person.

Though Dr. Ponds' decision to place Dr. Putrino on administrative leave was all but immediate, it took him and the Board over a year to file the Charges, presumably because they

were searching for other reasons to help substantiate Putrino's dismissal. When they were filed, the Charges alleged three discreet events which Ponds and the Board alleged constituted "unbecoming conduct" and "other just cause" warranting Putrino's dismissal from Montclair with which he has been employed since 2000 (Tr. 8, p. 1143, lines 21-25; and Ex. A attached to the Charges).

After the Charges were filed, but before the hearings commenced, the Board decided to withdraw one of the allegations in the Charges having to do with a claim by certain African American teachers who asserted in a 2019 New Jersey Superior Court complaint that they had been treated unfairly with respect to an appointment to a Geometry class. The outcome of this complaint is not known.

With respect to the September 2, 2020 convocation and the Pray video, the Charges allege that Dr. Putrino exhibited "unprofessional conduct unbecoming of a certificated staff member" warranting his termination. (Paragraph 19 of the Charges). However, though he said that he found the video to be racist and a portrayal of an angry Black man (Tr. 1, p. 170, lines 1-11 through p. 171, lines 1-3) Dr. Ponds also acknowledged that notwithstanding his "interpretation" there were other views that supported the use of the video (Tr. 1, p. 170, lines 1-11 through p. 173, lines 5-9). In this regard, there were a number of witnesses who testified that they not only didn't see the video as racist, but that it channeled in a humorous way their own frustrations during the pandemic at having to work remotely from their homes, while at the same time having to deal with their children who were also stuck at home in a remote environment.

That there were such disparate views of the video, and that Dr. Ponds acknowledged that he was acting on his "interpretation" of the video, by itself should result in a dismissal of the Charges as they relate to the video. As removal from employment is the most drastic employment

action a board can take, a conduct unbecoming case such as this one should not be based on one's interpretation of words or actions. Rather, a conduct unbecoming case should be limited to conduct that is so egregious, so clear on its face, that it requires immediate dismissal; that the conduct being complained of is so beyond the pale that it cannot be corrected with warnings or progressive discipline. In re Young 202 N.J. 50, 66 (2010) "In making the determination that one is guilty of unbecoming conduct the employee must be shown to lack fitness to discharge the duties and functions of one's office or position." Id. In the Matter of Michael Smurro, Agency Docket #100-6/21 at page 17. (Attached as Ex. I) That wasn't show here – at all. At worst, there was testimony that people were offended by the video, but this does not demonstrate a lack of fitness to hold office or conduct unbecoming; certainly not without mal intent.

There was no mal intent here. But that didn't appear to matter to the superintendent who signed off on the Charges and Statement of Evidence without having had a conversation with Dr. Putrino to determine his intent in showing the video. He was not interested in having such a discussion. Had such a conversation taken place the superintendent would have learned that Dr. Putrino's showing of the video was an attempt through humor to demonstrate the craziness of the times and the value of what teachers do every day. Had he or the Board reached out to Mr. Pray, they would have heard first-hand what Pray's intent was in creating the video – an intent which had nothing to do with race. Had he truly conducted an investigation, the superintendent would have known that showing the video was not intended to offend anyone and in fact, as the witness testimony supports, was not deemed offensive by the people who saw the full version of the video before the convocation. Had the superintendent conducted an investigation he would have learned that Putrino was a 20-plus-year veteran of Montclair, that he was a trusted and respected principal, who for many years served as the President of the Montclair Principals Association (MPA), that

he had never had any disciplinary action brought against him, and that throughout his career he received only effective or better than effective evaluations. Had he conducted an investigation the superintendent would have learned that Putrino's entire career has been a model of inclusivity and commitment to the values of diversity.

But, instead, Dr. Ponds chose to react without investigating because he was not interested in hearing from Respondent, or, for that matter, from anyone who was not offended by the video. And, by making Dr. Putrino the villain in the story line that he wanted to convey, Ponds was deflecting his own negligence in not sitting down with the presenters of the convocation, including Putrino, beforehand to review and plan what was to be presented and what was to transpire at the convocation.

The other allegation in the Charges has to do with the teacher schedules at the Renaissance School. This portion of the Charges is equally lacking in substance. The allegation is that after a "detailed review" of the teachers' schedules at the Renaissance School where Dr. Putrino had been the principal since 2018, it was determined that teacher-pupil contact time was much less than what was set forth in the MEA contract – which had a limit of 1250 minutes per week (Ex. Q). A presentation to this effect was made to the Board by Mr. Cooper, the Human Resources Director. At the direction and with the approval of the superintendent, as part of this presentation Cooper submitted to the Board what is now Exhibit S, a document that was attached to the Charges. This exhibit is said to show that the teacher-pupil contact time was dramatically under the contractual limit of 1250 minutes per week which, according to the allegation, cost Montclair a sum approximating "$767,447.00" (Paragraph 21 of the Charges)

The testimony that was given by Mr. Cooper as well as the Respondent's expert, Dr. Matthew Jennings, amply demonstrates that Exhibit S is problematic in many respects. While it

lists 29 teachers who are alleged to have had too little pupil contact time, it does not list a single name of a teacher. Therefore, it was virtually impossible to cross-check for accuracy the information it contains. In addition, it contains significant arithmetical errors which even Cooper acknowledged, but at no time did he seek to correct them or advise the Board that the information he provided in his presentation was incorrect. And according to Jennings, the expert retained by the Respondent on the scheduling issue, Exhibit S is woefully incomplete because it does not include advisory periods or duty periods, all of which should have been included as teacher-pupil contact time.

The failings of Exhibit S are all the more stunning because of the stakes involved; which is nothing less that the professional career of Dr. Putrino. None of this appears to have been of any concern to Dr. Ponds, who, when first told of the alleged scheduling issue by Major Jennings, the person who had been named as the Putrino's replacement at the Renaissance school a few days before, responded almost gleefully to Jennings' email, stating "outstanding work." (See Ex. V). He appears to have accepted as fact what Jennings had reported without so much as inquiring how his conclusion came about. His reaction only further demonstrates that his agenda was limited to dismissing Putrino.

Moreover, that the Charges characterized the investigation of the schedules as "detailed" when it was at best cursory and incomplete, also was of no concern. As with the video issue, while there was supposed to have been an investigation, nothing of the sort actually took place. The so-called investigation conducted by Mr. Cooper was limited to receiving and reviewing documents that he was given by the interim principal of Renaissance, Mr. Jennings. No further review took place. No conversation with the Respondent occurred. No conversation with the teachers occurred. No inquiries were made. And all but ignored was that a prior superintendent, Dr. Kendra Johnson,

had labeled the very same schedule that was now a part of Charges for dismissal, as "masterful." (Ex. R18, Bates stamped 198) As with the video, the intent here was to find fault, regardless of the evidence.

Lastly, as Dr. Ponds' subjective view of the video cannot and should not be the barometer on which to view the Charges in reference to the video, and because the District's findings as to the scheduling issue is so woefully lacking in analysis and so inaccurate and incomplete, the Charges must be dismissed.

Petitioner's Reply Brief

Respondent's post hearing brief further demonstrates his lack of fitness to hold the position of a principal within the Montclair School District. After days of testimony regarding the pain and hurt caused by the racial stereotypes which Respondent disseminated, Respondent's brief alleges that "it is not clear" that there is an "angry Black man" stereotype. The angry Black man stereotype has been acknowledged and examined in numerous news articles, studies, and court decisions. A simple google search of the angry Black man stereotype returns 5,070,000 hits. Moreover, during the hearing various witnesses testified extensively regarding the angry Black man stereotype and its impact on Black men. Yet, Respondent still doesn't recognize that the stereotype exists. Racial stereotypes, such as the angry Black man stereotype, are real, hurtful, and dangerous. Respondent cannot serve as a school principal when he is unable to even admit that racial stereotypes are real. How can Respondent serve as a principal and not continue to perpetuate racial stereotypes if he refuses to even recognize that there is a stereotype?

Respondent's brief further alleges that "[w]hether showing the ... video at the convocation was a mistake, can be debated." Again, after hearing about the pain and hurt caused to the African American staff and community, Respondent's brief will not even recognize that his actions of

perpetuating the racial stereotypes was a mistake. Respondent cannot serve as a school principal and disseminate racial stereotypes. Respondent cannot serve as a principal and be willfully blind to the pain and hurt caused by his actions.

Respondent's brief also alleges that staff members, parents, and community members being offended by the video, does not demonstrate a lack of fitness to hold office or conduct unbecoming, without what he labels as "mal intent". Same is not the standard. When an educator introduces racial stereotyping, which is negatively perceived, dismissal is warranted regardless of the educator's intent. See In re Chaki, No. A-2430-11T3, 2013 N.J. Super. Unpub. LEXIS 2032 (App. Div. Aug. 13, 2013)(noting that even if intent of the educator was to enhance her lessons, same does not "cure the shock and upset felt ..."); In the Matter of the Tenure Hearing of Mark Blasko, Cherry Hill School District, Camden County, 1980 S.L.D. 987 (Initial Decision), 1980 S.L.D. 1002 (Commissioner Decision)(noting that where an educator perpetuates a stereotype, even if in jest, "[t]he Commissioner cannot condone the use of ethnic materials, jokes, or actions that ridicule any racial group directly or by implication"); In the Matter of the Tenure Hearing of George Zofchak, Board of Education of the City of Trenton, Mercer County, 2002 N.J. AGEN LEXIS 564 (disregarding allegations that educator had no intention of making a racial statement); In the Matter of the Tenure Hearing of Ward Campbell v. Board of Education of the Princeton Regional School District, Mercer County, 1993 N.J. AGEN LEXIS 2064 (affirming dismissal of educator perpetuating stereotypes regardless of "his intent").

Respondent has shown that he does not have judgment to be a principal of a diverse school. His actions have adversely affected the morale or efficiency of the District. His actions, including his racially offensive video, further undoubtedly have a tendency to destroy public respect for public employees and confidence in the operation of public services. Respondent's perpetuation

of racial stereotypes cannot stand unrefuted and cannot be condoned. The Montclair School District needs a principal who will consider whether his actions will cause pain by perpetuating a racial stereotype. The Montclair School District needs a principal who after hearing all of the testimony in this matter, will not continue to allege that whether perpetrating the racial stereotype was a mistake is up for debate.

THE BACKGROUND OF WITNESSES

Dr. Johnathan Ponds

Superintendent of Montclair Public Schools for a year and a half (Tr. 1, p. 39, lines 14-23). Started July 1, 2020 (Tr. 1, p. 39, line 23).

Doctorate in Educational Leadership from Johnson and Whales (Tr. 1, p. 40, lines 2-4).

Certificate Advanced Graduate Studies in Leadership from Johnson and Whales (Tr. 1, p. 40, lines 4-7).

Certificate Advanced Education Leadership in education from Cambridge College (Tr. 1, p. 40, lines 7-9).

Master's Degree in Education for Special Needs from Cambridge College (Tr. 1, p. 40, lines 9-10).

BA in Political Science from Queens University in Charlotte, N.C. (Tr. 1, p. 40, lines 11-13).

Superintendent's Certificate (Tr. 1, p. 40, line 17).

Principal's Certificate (Tr. 1, p. 40, line 18).

Rowan University – Adjunct Professor teaching online classes in school improvement and instructional leadership (Tr. 1, p. 40, lines 21-21).

Rowan University – Adjunct Professor previously taught diversity and leadership in their doctoral program (Tr. 1, p. 40, lines 24-25).

Rowan University – Adjunct Professor in leadership for their master's program (Tr. 1, p. 41, lines 1-2).

Thomas Edison University - content expert as a consultant on supervising equitable organizations. Dr. Ponds explained that supervising equitable content understanding that diversity between your

students, parents, and teachers exists and bringing cultural responsive understanding (Tr. 1, p. 41, lines 7-25).

Member of the New Jersey Association of Superintendents of New Jersey (Tr. 1, p. 42, lines 6-7).

Board Member – Center of Leadership and Equality in Education (ELITE) (Tr. 1, p. 42, lines 6-12). ELITE trains leaders on how to be equitable and responsive to your children and your community and your colleagues (Tr. 1, p. 42, lines 18-24).

Given speeches on "equality and leadership" and "cultural responsive leadership" (Tr. 1, p. 43, lines 5-7).

Doctoral Studies Dissertation on cultural responsiveness, which Dr. Ponds summarized as teaching to a person based on their background, understanding their background and reflecting on your own personal biases and try to protect individuals from your biases when you teach them (Tr. 1, p. 43, line 13 through p. 42, line 3).

Given two speeches for the New Jersey Superintendents Association on leadership (Tr. 1, p. 44, lines 13-16).

Authored a paper published in Express and ACD Express on cultural responsiveness (Tr. 1, p. 44, lines 17-25).

Trained educators and leaders (one person in Moonachie) to take over the position of superintendent in a diverse environment (Tr. 1, p. 45, lines 1-4).

On cross-examination, Dr. Ponds testified that he began in the position of superintendent in Montclair around July 1, 2020 (Tr. 1, p. 148, lines 14-20). Prior to that, he was the superintendent in Moonachie, a one-building district with approximately 300 students (Tr. 1, p. 148, line 21 through p. 149, line 2). He held that position for five years (2015 through 2020) (Tr. 1, p. 152, lines 15-25).

Dr. Ponds was also a CA director in Boston, Massachusetts of a school within a school (Tr. 1, p. 149, lines 6-9). He was the director of a program where students were sent to a different school than their local school because of behavioral issues (Tr. 1, p. 149, lines 12-18). After holding that position for about a year, he became a dean or vice principal of Neighborhood Charter School in Dorchester, Massachusetts (Tr. 1, p. 149, line 19 through p. 150, line 1).

Dr. Ponds was also the principal in Malden Public Schools for four years (approximately 2008 through 2012) (Tr. 1, p. 150, lines 5-10). He then moved from Massachusetts to New Jersey and became the principal in North Brunswick from 2012-2015 (Tr. 1, p. 152-14).

Rodney Jackson

Mr. Jackson has a degree in history, a major in history, a minor in political science, and a minor in women's studies (Tr. 3, p. 461, lines 4-6). Jackson has been teaching in Montclair for 21 years

(Tr. 3, p. 461, lines 6-7). He currently teaches at Renaissance Middle School (Tr. 3, p. 461, line 9). He taught in East Orange for two years prior to coming to Renaissance, where he has been for the last 20 years (Tr. 3, p. 461, lines 12-14).

At Renaissance, Mr. Jackson is a team leader for the 8th grade, he is a social studies teacher, and the co-founder of TURN (Teachers Undoing Racism Now) (Tr. 3, p. 461, lines 18-21). Jackson testified that TURN challenges teachers to examine their own racial biases and understand how those affect their teaching, and therefore affect student outcomes (Tr. 3, p. 463, line 14 through p. 464, line 2). He explained that TURN is a group of four or five teachers who, since 2017, have come together on their own time to educate teachers and administrators (Tr. 3, p. 464, lines 6-20). They also started the "Teachers Institute for Black Lives" which is a "teacher training teacher initiative to help teachers understand more about African American history" (Tr. 3, p. 465, lines 8-12).

Mr. Jackson testified that he worked with Dr. Putrino at Renaissance for two years (Tr. 3, p. 466, lines 6-9). During that time, they were both teachers when they worked together (Tr. 3, p. 466, lines 13-14).

Diane Anglin

Ms. Anglin graduated from Virginia State University with a B.S. in psychology (Tr. 3, p. 406, lines 12-14). She currently works for Parents, Incorporated in Newark, New Jersey (Tr. 3, p. 406, lines 16-17). She is also involved with a non-profit organization in Montclair called the Montclair Neighborhood Development Corporation which educates young children in career development (Tr. 3, p. 406, line 18 through p. 407, line 1) as well as another non-profit, Good Success Academies, on a per diem basis (Tr. 3, p. 407, lines 2-6). In addition, Anglin is also the chair of the education committee for the NAACP and also holds the Youth Council position for the Montclair NAACP (Tr. 3, p. 407, lines 12-19). She has been the chair of the education committee since 2020 (Tr. 3, p. 408, line 21). Anglin testified that the goal of the education committee is to make sure there is equity for all students, with the main focus on students of color (Tr. 3, p. 409, lines 5-8).

Ms. Anglin also testified that she was the president of the PTA for Hillside School (Tr. 3, p. 409, lines 21-22); that Dr. Putrino was the principal of both Glenfield (Tr. 3, p. 410, lines 9-10) and Renaissance Middle School when Anglin substitute taught at those locations (Tr. 3, p. 410, lines 10-12).

On cross-examination, Ms. Anglin testified that she had pleasant interactions with Dr. Putrino, and basically only exchanged hellos and brief pleasantries (Tr. 3, p. 446, line 22 through p. 447, line 11).

Major Jennings

Mr. Jennings is employed by the Montclair Board of Education as the Principal of Buzz Aldrin Middle School (Tr. 4, p. 520, line 25 through p. 521, line 3). He attended American Internal College in Springfield, Massachusetts and received a BS in business administration, with a

concentration in personnel management (Tr. 4, p. 521, lines 10-14). He also has a master's degree in transportation management that he earned while working for Burlington Industries (Tr. 4, p. 521, lines 15-17). In addition, Jennings also attended Montclair State University, where he received a Master of Arts, focused on administration, education leadership (Tr. 4, p. 521, lines 17-20). He has a teacher's certification, a supervisory certification, and a principal's certification (Tr. 4, p. 521, lines 23-25).

Mr. Jennings is a member of the Montclair Principals Association and has worked with Project Oasis, which is a summer program to help struggling youth where they attend classes and a basketball league (Tr. 4, p. 522, lines 4-14). Jennings has been employed by the Montclair Board of Education for approximately 30 years; he was a technology teacher (Mt. Hebron/Buzz Aldrin), a "house leader" (Buzz Aldrin), the head basketball coach (Montclair High School), and prior to that the JV basketball coach, girls varsity volleyball coach, assistant principal (Mt. Hebron/Buzz Aldrin), acting principal (Renaissance), and principal (Buzz Aldrin) (Tr. 4, p. 522, line 18 through p. 523, line 11).

Mr. Jennings testified that he has known Dr. Putrino for at least 20 years (Tr. 4, p. 526, line 21).

Damen Cooper

Damen Cooper is employed by the Montclair Board of Education as a personnel director for the past two years (Tr. 5, p. 674; lines 3-11). He has a bachelor's degree in psychology from Central State University in Ohio, a master's degree in special education, and a master's degree in administration supervision from New Jersey City University (Tr. 5, p. 674, line 24 through p. 675, line 4). In addition, he holds a certification as a special education teacher, a psychology teacher, a supervisor, a principal, and a school administrator (Tr. 5, p. 675, lines 7-11).

Mr. Cooper taught in the South Maplewood School District as a special education teacher (Tr. 5, p. 676, lines 14-16). This is where he began his career in teaching, the South Orange-Maplewood School District in 1997-98 (Tr. 5, p. 735, line 24 through p. 736, line 3). He was then employed by New Jersey State Department of Education as a special education monitor for the State (Tr. 5, p. 676, lines 12-14). This was his second position in education for approximately two and one-half to three years (Tr. 5, p. 736, lines 10-14).

Mr. Cooper was previously both education supervisor and assistant principal for approximately eight to ten years for the City of Jersey City (Tr. 5, p. 675, line 22 through p. 676, line 8). He worked in the City of Jersey City after Maplewood and the NJ Department of Education; he held the position of assistant principal there for about five years (Tr. 5, p. 736, line 8 through p. 737, line 5). Cooper was also previously employed by Montclair as the high school assistant principal for six years (Tr. 5, p. 674; lines 12-20). In addition, he was also the principal of two different middle schools, in Summit (two and one-half to three) and Hackensack (two years) (Tr. 5, p. 676, lines 21 through p. 677, line 7). As the principal in Summit, Cooper created the master schedule. In Hackensack, he created about 90% of the master schedule (Tr. 5, p. 677, lines 11-13). He then returned to Montclair in his current role as the director of personnel. Cooper works with the entire District on all matters pertaining to personnel, leaves of absences, hiring, onboarding, and everything involving personnel since July 1, 2020 (Tr. 5, p. 677, lines 14-22).

When Mr. Cooper was hired to the position, the interim director of personnel, Dr. Purnell, was hired back as his mentor for the position because Cooper never served in a Human Resources position before (Tr. 5, p. 741, line 9 through p. 743, line 19). Cooper admitted that since he has been there, he has not hired anyone to a new position with no experience (as in his case) and then also simultaneously hired a mentor to assist them (Tr. 5, p. 744, lines 2-19).

Chris Graber

Mr. Graber is currently employed by Montclair Public Schools as the director of technology since 2018 (Tr. 11, p. 1889, lines 8-14). He is familiar with Dr. Putrino as the principal at Renaissance; he has had interactions with Putrino with regard to technology, day to day operations, and instructional technology (Tr. 11, p. 1889, line 24 through p. 1890, line 5).

Mr. Graber has his BA in history, an MA in educational technology, his ED, his EDS in education leadership, a principal certification and a supervisor certification (Tr. p. 1904, lines 3-10).

Ketty White

Ms. White has been employed by the Montclair Public School System for 17 years as a second grade teacher at Nishuane School (Tr. 6, p. 826, lines 6-15). She has been a second grade teacher for approximately 23 years (Tr. 6, p. 826, lines 16-18). She was previously employed in Newark (4 years) and Irvington (12 years) (Tr. 6, p. 827, lines 1-3). White has a BA in elementary education (pre-K through 8th grade) from Kean University, and she graduated in 1989 (Tr. 6, p. 829, lines 6-14).

Ms. White does not know Dr. Putrino personally, only as an employee of the District (Tr. 6, p. 829, lines 15-19).

Erika Pierce

Ms. Pierce has been employed by Montclair Public Schools for 17 years (Tr. 7, p. 894, line 22 through p. 895, line 1). She graduated from Hampton University in 1994, and Montclair State in 1998 (Tr. 7, p. 895, lines 5-6). She also received a second master's degree from NJPSA in 2012 or 2013 (Tr. 7, p. 895, lines 7-8).

Pierce started working in Montclair in 2005 as a high school English teacher (Tr. 7, p. 895, lines 12-13). She was promoted to Assistant Principal of Glenfield Middle School in 2015, where she worked under Dr. Putrino for four years (Tr. 7, p. 895, lines 14-16 & lines 19-21). In 2019, she was promoted to principal of Glenfield Middle School (Tr. 7, p. 895, lines 17-18).

Shashana Smiley

Ms. Smiley has been employed by the Montclair Public Schools for four years as a secretary (Tr. 7, p. 928, lines 10-17). She currently works in the Montclair High School (one year), but previously worked at Renaissance Middle School (three years) (Tr. 7, p. 928, line 19 through p.

929, line 1). Smiley testified that she was the main office secretary at Renaissance, not Dr. Putrino's secretary (Tr. 7, p. 929, lines 2-11).

Ms. Smiley graduated from Montclair High school in 2010 and received her associate's degree from Essex County College (Tr. 7, p. 930, lines 1-6). Smiley worked for her family's business, but after having two children and being a stay-at-home mom, she was in need of a job; she became a substitute teacher and then received a full-time position as a secretary (Tr. 7, p. 930, lines 12-23).

On cross-examination, Ms. Smiley testified that she is a 10-month secretary and starts September 1 and ends June 30 – but that she is permitted to start two weeks before September 1 and end two weeks after June 30 (Tr. 7, p. 940, lines 4-13).

Susan Weintraub

Ms. Weintraub testified that she has lived in Montclair for her entire life and went through all of her schooling at Montclair Public Schools and her four children have as well (Tr. 7, p. 991, lines 12-24). Weintraub served in the PTA throughout her children's tenure in public schools as the PTA president at Northeast School and then also at Glenfield School (Tr. 7, p. 992, lines 10-14). When she was the president of the PTA at Glenfield, Dr. Putrino was the principal (Tr. 7, p. 992, lines 15-17). Putrino had a vision of inclusivity which extended to parental involvement. He was active in trying to include under-represented people in the PTA so that it would be more representative of the student body (Tr. 7, p. 995 line 23 through p. 996, line 4). She testified that she worked with Putrino on this vision and that the end result was that the PTA became more inclusive (Tr. 7, p. 996, lines 5-10).

Javon Pleasant

Mr. Pleasant testified that Dr. Putrino was his home room science teacher in 8th grade, in the year 2000 (Tr. 7, p. 1007, lines 1-8). Pleasant is a revenue growth manager at Bimbo Bakeries, a subsidiary of Entenmanns, Thomas's English Muffins, Sara Lee, as well as other brand names (Tr. 7, p. 1013, lines 7-12). He works in a finance hybrid world where he focuses on pricing, margins, and revenue growth (Tr. 7, p. 1013, lines 12-15). He graduated Montclair State University in 2011 (Tr. 7, p. 1056, lines 23-24).

Ibn Shakoor

Mr. Shakoor testified that he currently works for the Jersey City Public School System as an attendance counselor (Tr. 7, p. 1069, lines 18-24). Shakoor went through the Jersey City Public School System and then graduated from Saint Peter's College with a degree in teaching (Tr. 7, p. 1070, lines 2-10). He has worked for the Jersey City School System for approximately six or seven years (Tr. 7, p. 1070, lines 11-14).

Mr. Shakoor testified on cross-examination that as an attendance counselor, he works with children who are truant, who have to go to court, and their parents who have to go to court to potentially pay fines if the child is under the age of 16 (Tr. 7, p. 1089, lines 2-7).

Beth Calamia Scheckel

Ms. Scheckel currently works for Ridgewood Public Schools as a middle school Latin teacher (Tr. 7, p. 1105, lines 10-14). She has worked there since September 2021 (Tr. 7, p. 1105, lines 15-17). Prior to working for Ridgewood, Scheckel worked for NJAT as the Associate director of global initiatives, and prior to that in the same position at Montclair State University (Tr. 7, p. 1105, lines 18-22). She worked briefly for Montclair Public Schools about eight years ago as a home instructor for a child who was out on medical leave (Tr. 7, p. 1105, line 23 through p. 1106, line 3).

Ms. Scheckel testified she does not know Dr. Putrino in any other capacity besides being the PTA president and as her son's soccer coach (Tr. 7, p. 1126, line 21 through p. 1127, line 3). She likewise only knows Putrino's wife because she was the assistant soccer coach (Tr. 7, p. 1127, lines 6-15). Their sons play on the same team but are not friends (Tr. 7, p. 1127, lines 16-21). Scheckel has never seen Putrino or his wife socially outside of games or a PTA meeting (Tr. 7, p. 1127, lines 22-25).

Dr. Joseph Putrino

Dr. Putrino began his educational career as an 8th grade science teacher in the Jersey City Public School System in 1999. One year later, in 2000 he began his employment in Montclair as a 6th grade teacher (Tr. 8, p. 1143, lines 21-25). Putrino remained a teacher until 2006 when he was promoted to be an assistant principal at the Hillside Elementary School (Tr. 8, pp. 1-8). In 2010, he was promoted to the title of principal, and he was assigned to the Northeast Elementary School (Tr. 8, p. 1144, lines 6-8). In 2013, Putrino was reassigned as the principal of the Glenfield Middle School where he remained until 2018. Then, in 2018, he was assigned to the Renaissance Middle School (Tr. 8, p. 1144, lines 9-13).

Dr. Putrino testified that while he served as teacher in Montclair, he received six nominations for the Weston Award for Excellence in Teaching and won the award in 2003 (Tr. 8, p. 1144, lines 17-20). In 2002, he received a fellowship from the Development Disabilities Council and in 2011 he was recognized as a Star of Essex County by the County Executive (Tr. 8, p. 1144, lines 21-25 through p. 1145, lines 1-2).

Dr. Putrino testified that in 2013, Dr. Penny McCormick (then superintendent) indicated to him that he was being assigned to Glenfield because of climate issues that had surfaced and as a result she thought the school needed an experienced principal (Tr. 8, p. 1146, lines 9-19). In 2018, Putrino was again reassigned, this time to the Renaissance Middle School.

Naomi Kirkman

Ms. Kirkman has a bachelor's degree from New York University and two master's degrees from Hunter College City University, New York (Tr. 10, p. 1716, lines 13-15). She was a teacher in Harlem, New York for four to five years before moving to New Jersey (Tr. 10, p. 1716, lines 18-22). Kirkman began teaching in New Jersey at Bradford School in 1999 as an elementary school

teacher (Tr. 10, p. 1716, line 20 through p. 1717, line 1). She remained a teacher for eight years before becoming the magnet coordinator for two years working at Montclair State University, after which she went back to the classroom (Tr. 10, p. 1717, lines 3-8). Kirkman became the principal of Bradford School in December 2008, with a start date of January 2009 (Tr. 10, p. 1717, lines 9-23). She retired January 31, 2021 (Tr. 10, p. 1717, line 24 through p. 1718, line 1).

Ms. Kirkman testified that she was a member of the MPA and attended MPA meetings, including virtual meetings in the summer 2020 (Tr. 10, p. 1718, lines 2-11).

Dr. Matt Jennings

Dr. Jennings testified that he was a teacher's aide at the Center School in Highland Park (Tr. 11, p. 1768, lines 13-14). He then was promoted to special education teacher in a self-contained class at the middle school (Tr. 11, p. 1768, lines 14-19).

Dr. Jennings then went to South Brunswick where he was a special education teacher for five years (Tr. 11, p. 1768, lines 20-22). He became the supervisor of instruction in New Egypt/Plumsted for one year and was then promoted to the director of special education student services (Tr. 11, p. 1768, line 22 through p. 1769, line 1).

Dr. Jennings then held the position of assistant superintendent in Berkley Heights for two years (Tr. 11, p. 1769, lines 2-3). After which, he held the position of superintendent for 12 years in Alexandria Township. He worked in Bloomingdale, and then concluded his career in Cranford as the director of human resources (Tr. 11, p. 1769, lines 5-8).

Dr. Jennings acted as interim principal when he was the assistant superintendent of schools for approximately six months when he was at Thomas P. Hughes School in Berkley Heights in 2005 (Tr. 11, p. 1784, line 22 through p. 1785, line 14). He left this position to become a superintendent (Tr. 11, p. 1785, lines 20-22).

Dr. Jennings has a doctorate in Educational Administration and Supervision from Rutgers and a Master's degree in education administration and supervision from Rutgers (Tr. 11, p. 1785, line 23 through p. 1786, line 2). He also has a Master's degree in curriculum instruction from Gratz College, and a Bachelor's Degree from Rutgers as well (Tr. 11, p. 1786, lines 2-4).

FINDINGS AND DISCUSSION

Part I

The September 2, 2020 Convocation Video

Dr. Putrino's Plan to Show the Josh Pray Video at Convocation

September 2, 2020 was the date scheduled for an annual convocation presentation. It would be the first for new superintendent, Dr. Johnathan Ponds. Due to COVID-19, the presentation was to be facilitated via Zoom and livestreaming to the public. A Local TV news outlet would also be privy to the convocation. Dr. Ponds planned on speaking first, followed by Dr. Putrino as MPA President, followed by the MEA President, and others. The entirety of the convocation was to last for about 40 minutes.

In preparing for the convocation, Dr. Putrino intended to present something meaningful about teacher appreciation and the tough year ahead with Covid protocols in the event hybrid or in-person learning returned. Putrino was known for his humorous presentations and his injection of humor into newsletters, staff bulletins, etc. This year, by happenstance, Putrino had previously received a video produced by comedian Josh Pray. He received it from his sister-in-law in March 2020 (Tr. 8, p. 1289, line 17 through p. 1290, line 2). In turn, Dr. Putrino's sister-in-law received it from Ketty White, a Black second grade educator. A group of teachers (most Black) were all talking about how funny it was (Tr. 8, p. 1290, lines 5-9). Specifically, those staff members included Ms. White, Principal Erika Pierce and Secretary Shashana Smiley.

In addition, Putrino knew that Pray's video went viral in the spring of 2020. In fact, the Pray video was used in commercials for YouTube and Google (Tr. 8, p. 1291, lines 2-8). It was also aired on "The Today Show". Presumably, if the video was widely perceived to be racist, one would assume that it would not have been shown on The Today Show or in commercials for YouTube and Google.

Dr. Putrino testified that everyone that watched the Pray video with him, or knew of it, characterized it as being very funny (Tr. 8, p. 1290, lines 3-5). Also, everyone he spoke to about the video had the same reaction; finally, someone brave enough to say that they appreciate teachers

and apologize for not appreciating them before (Tr. 8, p. 1290, lines 15-22). Putrino had not heard a negative thing about the video (Tr. 8, p. 1290, line 23 through p. 1291, line 1).

Finally, Dr. Putrino directly offered Dr. Ponds an opportunity to vet the video to see if it was in sync with the overall production of the convocation ceremony. Putrino testified that it was the tradition or practice that Dr. Parmer (former Superintendent) would hold a convocation team vetting meeting (Tr. 8, p. 1282, lines 1-16). Putrino was asked on cross-examination as to why the MPA did not vet the convocation video (Tr. 9, p. 1533, lines 6-13). Putrino responded:

> The videos or presentations that I conducted at the convocation were always vetted by the District and the District team. There was never a concern that the material was not vetted or included in some kind of review. This was the first school year that did not happen (Tr. 9, p. 1533, lines 14-19).

Dr. Putrino called Nina DeRosa, an administrative assistant in "central office" to find out if he could submit his video to the superintendent for vetting (Tr. 8, p. 1306, lines 11-19). Nina called him back shortly after and told him that Dr. Ponds was not going to have a meeting and just to submit it to Director of Technology, Chris Graber (Tr. 8, p. 1306, lines 17-20):

> Q: Did Dr. Ponds reach out to you at all to discuss the convocation before the convocation occurred?
>
> A: No.
>
> Q: So after you spoke to Ms. DeRosa, there was no communication from Dr. Ponds?
>
> A: Correct (Tr. 8, p. 1318, lines 4-10).

Ms. DeRosa informed Dr. Putrino that Dr. Ponds said he did not need to see the video (Tr. 10, p. 1669, lines 18-25 through p. 1670, lines 1-13). Dr. Putrino said he was "shocked" that the superintendent did not want to meet to go over the material prior to the convocation (Tr. 8, p. 1320, lines 22-25). Pursuant to Dr. Ponds' instruction via Ms. DeRosa, Putrino sent the video the following day to Mr. Graber. Putrino testified that Graber stated that he and another tech person

in the office "had watched the video and loved it" (Tr. 8, p. 1308, lines 1-3). This also was expressed in a text exchange Graber had with Putrino in which he wrote "Awesome job. Loved it." (See Ex. R29, Bates stamped 420).

Nearly two years after he wrote the text, Mr. Graber, who is currently not tenured in his position as a director, was called as a "rebuttal" witness. He would be the only White witness called to testify that he was offended by the video. Graber testified that when he sent the text, he was merely referring to the "clarity" of the video that Dr. Putrino had sent him, "not the content." As Director of Technology, Graber exclaimed, "I don't care about the content" (Tr. 11, p. 1902, lines 21-25 through p. 1903, lines 1-2). In simplest terms, I found Graber's testimony to be disingenuous and compromised by collateral events involving his continued employment and compensation.

Unambiguously, Graber commented in a text to Putrino – "Awesome job. Loved it." Unless Graber was intentionally lying to Putrino which, as a consequence, would present similar credibility concerns in this proceeding, I find, the phrase used by Graber plainly implies that Graber watched the video and "loved it". Further problematic for Graber, in my opinion, is that only three or four weeks before his testimony, he and Dr. Ponds met and discussed his salary and his tenure (Tr. 11, p. 1900, lines 8-16). By the time of his arbitration testimony, I further note, it would have been foolhardy for Graber to admit that he meant what he said in his text message, i.e., that he viewed the video and loved it.

In justification for not vetting the video and advising Dr. Putrino to talk to Mr. Graber, Dr. Ponds testified:

> If you're a leader in the District and you've been a leader in the District for a while, and you have a video to show, it's an assumption, it's a belief of mine, ... that you know the appropriateness to show it, of the type of video. I did not vet Ms. Jannah's speech. I did not vet the Union president's speech. And I don't make a practice to

> do so. I believe they should understand the professionalism they're going into. And in my career, anyone, even our last convocation guest who was the president of Bloomfield College, gave a speech or showed something, I did not vet it because I have an understanding that they know the level of respect and the level of professionalism to have to be in a place like this. So no, I didn't view it. And I don't believe that the superintendent should look at a Union leader or a leader in the District and have to vet everything they do or say. ... I need a level of trust. I need to have a level of trust with administrators. I don't vet what's shown in classrooms as a superintendent. I don't vet what a principal shows in their staff meeting as a superintendent. And my expectation is that there they have the judgment not to show anything inappropriate. And that they understand the level of respect they have with those positions (Tr. 1, pages 76-78).

However, during the convocation, Dr. Ponds – with no mention of Dr. Putrino's offer to vet the Pray video – stated, among other things, "***I'm sorry we didn't vet that before it came up . . .***" (Ex. F, at 0:42:10).

The Displaying of the Josh Pray Video From Start to Finish

In order to put matters in context, especially because a video has to be watched to be understood, I note that a characterization of Josh Pray's mannerisms bear significant similarity to Kevin Hart, i.e., animated, loud and, at times, intentionally speaking in an uneducated manner. Unlike Kevin Hart, however, Pray's popularity has been gained primarily on social media. Kevin Hart's fame and fortune has been widely achieved through stand-up and movies. While I am confident that most people have heard of Kevin Hart, I am equally confident that Josh Pray does not enjoy anywhere near the same level of name recognition. Thus, while it appears that a good number of teachers, administrators and staff knew of Josh Pray and had, in fact, previously seen the video presented by Dr. Putrino, it may be fairly stated that a good number of the same group witnessed the video for the first time when presented by a White school principal at convocation.

Against this backdrop, the undersigned's transcription of the Pray video is as follows:

Welcome and Introductions by **Morgan and Janna**

Exhibit F: Convocation Video 9-2-20

Hello I'm Dr. Putrino. Principal of Renaissance Middle School and President of the Montclair Principals Association. The MPA.
[Time 0:18]

Most people believe that the MPA stands for Montclair Principals Association. Well, it used to. Now because we're going full remote instruction, with the possibility of going back hybrid, we've renamed ourselves Montclair Planning Ahead.
[Time 0:32]

I would first like to acknowledge When we first went remote back in the spring it was very clear that there was some opposition from people who feel like teachers didn't do enough work. However, now, social media has given a platform for many families to express how they really feel about teachers now that they have their children at home.
[Time 0:50]

Comedian Josh Pray:

See, I ain't gonna be like most parents. Most parents ain't gonna be big enough to apologize to every educator and every after-school program person, that took care of our kids.
[Time 1:00]

Now, while everybody out there stressing and worrying about other stuff, and saying the kids are off weeks and stuff at the time... I'm gonna be the first to admit it.
[Time 1:07]

It's been two days and I want to go on record apologizing. I have been around my kids for 48 straight hours.
[Time 1:14]

I'm posed to educate these kids? To every teacher that when you ask me for extra pencils, or some papers, or I ain't responding to your emails, or you trying to tell me that my child was talking back... and I was like no he ain't - you just don't know how to teach my child, you need to calm down.
[breathing heavily]
[Time 1:28]

I'm gonna tell y'all... I apologize.
[Time 1:32]

I don't even know how y'all feed my kids. My children maybe ask me for something to eat like every 18 minutes. Every time you ask me, Mr. Pray, if you don't mind could you send some snacks for the class? And I be like, I don't know I ain't got the money, you use your salary. I apologize to you.
[Time 1:46]

My kids eat too damn much. I thought I ate?! I got a 9- to 13-year-old you put them together that's 22. They eat like a 22-year-old child in the first grade.
[Time 1:54] **Video Stopped Here According To The Memory Of Most Witnesses**

And then my 9-year-old, he want me to help with math questions, I don't understand what division is, man. All I know is if I take taxes and the government takes some of my money, that's all I know.
[Time 2:05]

I don't know no math, my 13-year-old asked me about history. I don't know, man. The only history I know is me and his Mama that's it.
[Time 2:14]

I apologize. I thought… I'm out of control.
[Time 2:19]

I thought teachers ain't do a good enough job at school. I thought my child should get straight A's like my childhood.
[Time 2:26]

And I want to have a meeting with teachers when school resumes, if ever resumes, I want to have a meeting with every teacher and ask how my child got A's and they class, because the education I see at home that boy ain't deserve no A's. He cheat! I watch when he goes back to school, I want y'all to watch him and watch him well. I know he'd cheating. You can't tell me he ain't cheating.
[Time 2:47]

And all they wanna do is get up, sit down, get up, sit down, get up, sit down. They go to the bathroom four or five times. What the hell they doing in the bathroom? Drinking the soap? Smoking the soap?
[Time 2:56]

Are they going down the drain? Water come up, water go down, water come up, water go down.
[Time 3:02]

To every educator out there, when I said I could home school my child, I can't home school my child. I don't got the patience to homeschool my child. If us as parents, we as parents have the audacity to drop 18 and 19 and 20 kids on ya'll at once! And ask y'all to raise our kids, look after our kids, sanitize our kids, educate our kids, feed our kids, protect our kids.
[Time 3:27]

One out of five ain't bad. One out of five is happening in my house. I ain't gonna tell you which one happening, but one out of five ain't bad. To every educator . . .**Video actually stops here - Dr. Ponds Asks To Pull The Video.**

Dr. Putrino and Dr. Ponds Convocation Video Commentary

After the video was pulled and Dr. Putrino recognized some people were offended, he apologized stating that he intended the video as humor, just as he had presented a humorous convocation piece the prior year. Shortly thereafter, Dr. Ponds, seemingly in violation of the MPA contract against public reprimands, made the following statement to hundreds, if not thousands, of convocation participants and those watching it via livestream, including a local news outlet:

> I want everybody to know from the bottom of my heart that I apologize for that video shown. **We are a district of inclusion. We care about all people. That will not happen in my administration anymore.** That will begin today. I love people. I love all people. **No one has the right to disparage anyone.** But, first I want to say I'm sorry we didn't vet that before it came up. **Next, I want to say it'll never happen again in my administration**. Together we will, and we can, make Montclair a special place.[5]

The Placement of Dr. Putrino on Administrative Leave (Three Hours Later)

Damen Cooper, a then relatively inexperienced human resources director, testified that Dr. Ponds called him about the convocation video (Tr. 5, p. 745, lines 16-19). Cooper called Dr. Putrino and told him that the superintendent thought his video was offensive and wanted him to report to central office immediately (Tr. 8, p. 1328, lines 6-15). Putrino replied that he had to first return to Renaissance School because he had a scheduled staff meeting. He represented that after the staff meeting he would report to central office. During the staff meeting, Putrino conducted a "restorative justice circle" and apologized to his staff to the extent he had offended anyone, and assured them that that was never his intent. Later, Putrino testified approximately **two out of his thirty** staff members stated they were offended.

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[5] Article 13, "Dismissal, Discharge and Discipline Procedures", section 13.2 states: "**Reprimand.** The parties agree that as a matter of practice any reprimand of a Principal with respect to his performance shall be made in confidence and not in public."

Present in the central office meeting were Dr. Putrino, Ms. Kuwabara, MPA, Dr. Ponds, Mr. Cooper, and Mr. Emidio D'Andrea (Tr. 8, p. 1353, lines 17-24). Putrino testified that no one was speaking (Tr. 8, p. 1354, lines 18-21). Putrino initiated the conversation, stating that he was sorry that he did not get to know Ponds and he apologized if the video offended him (Tr. 8, p. 1354, line 22 through p. 1355, line 2). Ponds did not respond to Putrino. He just looked at him (Tr. 8, p. 1355, lines 3-4).

Mr. Cooper testified that Putrino "tried to apologize" and when asked why he phrased it that way, Cooper said that he did not believe Putrino was sincere (Tr. 5, p. 698, lines 1-4). When he was asked why Putrino's apology was not sincere, Cooper illogically replied, "Because it wouldn't have happened if it was sincere" (Tr. 5, p. 698, lines 5-8). Cooper slid a piece of paper across the table at Putrino which stated that he was being placed on administrative leave (Tr. 8, p. 1355, lines 4-9).

Dr. Putrino viewed the letter as vague and asked why he was being placed on administrative leave (Tr. 8, p. 1355, lines 10-14). Dr. Ponds responded that he would be citing the anti-racism policy, and that was all he said (Tr. 8, p. 1355, lines 14-15). The anti-racism policy, if one exists, was not presented at the hearing. Putrino then asked Mr. Cooper who he needed to communicate with. Ponds interjected and said Putrino should communicate through the School Board's attorney or human resources (Tr. 8, p. 1355, lines 16-21). The meeting ended. Cooper, in his car, then followed Putrino back to Renaissance Middle School. Putrino retrieved the items requested by Cooper and gave them to him. This was the last time Putrino would be on school premises.

Mr. Cooper also spoke with Major Jennings immediately after Dr. Putrino was sent home on leave. Cooper asked Jennings if he could fill the position of acting principal at Renaissance Middle School (Tr. 5, p. 696, lines 1-3). Jennings agreed.

Dr. Ponds' Communication with the Montclair NAACP

Dr. Ponds next initiated a call to the Montclair NAACP to apologize. Ponds testified that now deceased NAACP President, Mr. Pelham asked for dates with respect to suspensions, student data, and academic progress (Tr. 1, p. 114, lines 18-23). Although it is not clear as to how Mr. Pelham would be entitled to such information, Pelham apparently harbored a concern that Dr. Putrino's presentation of the two to three minute Josh Pray video may be the "tip of the iceberg" on racial equality vis-à-vis students in the Montclair Public School District. Of course, if that were the case, this proceeding would have undoubtedly included charges to that effect. Ultimately, no charges were brought against Dr. Putrino alleging that he treated Black students disparately from non-Black students.

By 3:20 p.m. that same day, an article appeared in "Tap into Montclair", entitled: "Montclair NAACP Demands Immediate Action After 'Racist' and 'Offensive' Video Shown to District Staff." The article asserts that "Staff were taken aback by the video that 'depicted a Black man shouting angrily about his kids' virtual learning experience." The article contains an inflammatory and, based on this record, unsupported quote from Pelham: "Principal Putrino has a history of complaints of racial insensitivity during his tenure as a leader in the Montclair School District."[6] Pelham also called for immediate action against Putrino.

The September 2, 2020 Open Public Meeting of the Montclair BOE

Later that evening, Dr. Ponds made the following statements **in open session** at a Board of Education public meeting (facilitated via Zoom):

Dr. Ponds, Superintendent: Now I'd like to read a statement about a serious matter that happened today. On behalf of the Montclair Public Schools Administration and the Montclair Board of Education, I want to apologize to students, staff, parents, guardians in our community at today's

[6] No evidence was presented during the hearing to support this assertion. As will be discussed, this record shows that Dr. Putrino engaged in numerous activities both inside and outside of work in support of the Black community.

Welcome Back convocation, ***the staff showed a completely inappropriate and unacceptable video was broadcast which is inconsistent with our schools' strong values and ideas regarding diversity. The Montclair Public Schools, and I as your Superintendent, are committed to providing our staff and students with a school environment free of racism, prejudice and bias. The matter is being handled internally by central administration***.[7] I apologize and thank you. Lastly, I want to say goodnight and Mr. Major Jennings, the Acting Principal at the Renaissance Middle School, thank you Mr. Jennings and thank you families. Thank you Ms. Jannah.

[The remaining key speakers on the Putrino incident lent their support of Dr. Ponds]:

Ms. Jannah/Board of Education: Thank you Dr. Ponds. I also want to state unequivocally that speaking for the Montclair Board of Education, we support Dr. Ponds in this decision and in his leadership in this matter. Mr. Graber or Mr. Deandra, do we have a spokesperson from the MPA?

Mr. Graber or Mr. Deandra: Do you want to go right to public comment? Then go back and do Committee Reports?

Ms. Jannah/BOE: No, I think that person is available and we'd like to speak now, we could do that now, we could do public *********

Mr. Graber or Mr. Deandra: If you'd like we could bring on the Union representative.

Ms. Jannah/BOE: Yes.

Mr. Graber or Mr. Deandra: Okay. David you could bring on Dr. Anglin to speak?

David: Sure thing. Dr. Anglin, Dr. Anglin can you hear me?

Dr. Anglin/Principal and Acting President MPA: Yes, I can hear you.
David: Thank you.

Dr. Anglin/Principal and Acting President MPA:

Good evening Dr. Ponds, Board of Education, administrators, teachers, staff, students and community members. I'm Dr. Samantha Anglin, Principal of Hillside School and the Acting President of the Montclair Principals Association. The MPA membership did not vet, nor did we condone, the message that was delivered under the umbrella of the MPA today. I speak on behalf of my colleagues this evening to reaffirm our ongoing, unending commitment to the core values of diversity, equity and social justice in our schools and community. Now, more than ever, we believe it is our duty and obligation to work together to ensure that all children, families, staff and community members are recognized and treated with equality and respect. We join you in this important work. We will challenge words, we will push back, we challenge actions to the contrary

[7] Although Dr. Ponds did not identify Dr. Putrino, due to the events earlier in the day, it should have been abundantly clear to everyone that he was referring to Dr. Putrino.

and we stand before you to voice this commitment. We are fully committed to Dr. Ponds and the BOE's message. Thank you for your time and have a wonderful evening.[8]

David: Thank you Dr. Anglin.

Lastly, according to Dr. Putrino, and again inconsistent with the MPA contract, Dr. Ponds sent a memo to staff stating (1) that Ponds found the video offensive; (2) that there is no room for racism in Montclair; and (3) that the matter is being handled immediately (Tr. 8, p. 1360, lines 16-22).

The Lack of An Investigation

Due to the same day public commentary made by Dr. Ponds in two separate public forums, the immediate involvement of the Montclair Chapter of the NAACP, and the related Newspaper Article, Dr. Putrino's career as an educator and long term administrator with an unblemished work record effectively came to an end in less than a day. In short, by way of its actions and inactions, Petitioner had, in effect, signaled to the school district and the community at large that Putrino was guilty of committing a racist act and, hence, by implication, he was a racist.

Dr. Ponds and/or Mr. Cooper did not interview or meet with any of the people who subsequently submitted statements in support of Dr. Putrino. No contact was made with comedian, Josh Pray (Tr. 1, p. 220, lines 6-25 to 221, lines 1-2). Ponds was not sure if he read Pray's statement objecting to Petitioner's characterization of the video which involved Pray's two children (Tr. 1, p. 220 lines 22-25). Ponds testified on cross-examination that his investigation consisted of reviewing the video "a couple more times" (Tr. 1, p. 221, lines 4-5). Ponds never looked at

[8] Notably, the generalized commentary of the interim MPA President did not include an independent statement as to why the video was offensive and, if anything, it more heavily shows a sign of support for Dr. Ponds who, in turn, had already set the table on how the video and its presenter should be regarded. Also, Petitioner stated in post-hearing submissions that the MPA removed Dr. Putrino as President. This is somewhat misleading because Putrino was first placed on administrative leave and could not serve as MPA President.

Putrino's record. To the extent he received any information on this score, it was from Mr. Cooper (Tr. 1, p. 213, lines 8-15).

Mr. Cooper later testified that Dr. Ponds directed him to "review the personnel file" after seeing a portion of the convocation video, which was the only semblance of an "investigation" that was conducted prior to the removal action (Tr. 5, p. 750, lines 5-14). When asked if he was instructed to investigate how the video came about, Cooper responded "No" (Tr. 5, p. 750, lines 15-17). Mr. Cooper further testified that the determination to bring action against Dr. Putrino was made after he dissected the video with Dr. Ponds - a week after Putrino was placed on leave (Tr. 5, p. 755, line 16 through p. 756, line 13). However, charges were not brought for approximately another 13 months.

Mr. Cooper did not reach out to any staff member, student, parent or member of the public to ascertain their take on the video (Tr. 5, p. 750, line 25 through p. 751, line 8). When asked if he reviewed Dr. Putrino's performance evaluations, Mr. Cooper testified that he "skimmed" them (Tr. 5, p. 753, lines 20-21). Cooper could not answer how long he spent reviewing Putrino's personnel file (Tr. 5, p. 755, lines 10-12).

Finally, Petitioner's investigation, or lack thereof, did not include a review of Dr. Putrino's background on fostering inclusion and positive race relations, or any inquiry into why some Black staff members found the video humorous and not offensive.

The Filing of Tenure Charges

On October 7, 2021, Petitioner's attorney, Isabelle Machado, Esq. filed with the New Jersey Department of Education a Certification of Determination together with an October 6, 2021 Board Resolution adopting the Tenure Charges against Putrino. The first charge relates to the September 2, 2020 convocation video of Josh Pray presented by Dr. Putrino:

- On September 2, 2020, during a District-wide convocation viewable by both District staff and members of the public via Zoom, Dr. Putrino display(ed) a highly inappropriate video (Ex. F).

- The video, among other things, portrayed a Black man yelling angrily about his children's virtual learning experience. Ibid

- During Dr. Putrino's presentation, numerous staff members, District parents, as well as members of the public, objected to and were offended by the video. As a result, the video was stopped by District administration (Ex. G through K, and O through P).

- When Respondent showed the highly inappropriate video on September 2, 2020, he was President of the Montclair Principals Association ("MPA").

- As a result of Respondent showing the highly inappropriate video on September 2, 2020, he was removed from his position as the President of the MPA. As a result, Principal Samantha Anglin replaced Respondent as Acting MPA President.

The Scope of this Proceeding

The scope of this proceeding insofar as it relates to the charge of unbecoming conduct and other just cause regarding the September 2, 2020 convocation video must be limited to that portion of the video actually shown by Dr. Putrino, prior to it being switched off at Dr. Ponds' direction (which occurred in response to unquantifiable objections in the chat). Even with approximately 13 months to formulate and file charges, the portion of the video unseen or not displayed by Dr. Putrino was not specified as a basis for the tenure charges. N.J.SA. 18A:6-17.1 (3) (b) makes very clear that Petitioner's obligation when filing tenure charges is to specify the conduct complained about and to provide full disclosure of its evidence. "The employing board of education shall be precluded from presenting any additional evidence at the hearing.." The pertinent regulation which relates to this statute is N.J.A.C.6A:3-5.1 (b)(1). N.J.A.C. 6A:3-5.1(b) (1) specifically states:

> Charges shall be stated **with specificity as to the action or behavior underlying the charges** and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person(s) instituting such charges. Complete

> copies of all documents referenced in the statement of evidence shall be attached as part of the statement.

In addition, in the analogous context of civil service cases, where the ALJ/Commissioner dichotomy is the same as it was in the education context prior to 2012, an employee cannot be legally tried or found guilty on charges of which s/he has not been given plain notice by the Appointing Authority. Indeed, the de novo hearing following an administrative appeal is limited to the charges and specifications contained in of the Final Notice of Disciplinary Action. West New York v. Bock, 38 N.J. 500, 522 (1962), Dept. of Law and Public Safety, Division of Motor Vehicles v. Miller, 115 N.J. Super. 122 (1971); Borough of HohoKus v. Menduno, 91 N.J. Super. 482, 487-488, 221 A.2d 228 (App.Div.1966)(noting that a public employer can only find an employee guilty of offenses specifically mentioned in the charges); Hammond v. Monmouth County Sheriff's Dep't, 317 N.J. Super. 199, 206 (App. Div. 1999)(noting that an Appointing Authority's broadening of local-level charges on subsequent appeal would "surcharge the right to appeal with a cost which violates any decent sense of due process or fair play"); Grasso v. Borough of Glassboro, 205 N.J. Super. 18 (October 16, 1985) (the original charges may not be amended at a trial de novo so as to include new charges); Accord, Fabian vs. Town of North Bergen, (CSV 3198-97, Initial Decision (August 24, 1998), adopted, Merit System Board, (December 2, 1998).

Finally, arbitrators follow similar tenets of due process when addressing just cause in a disciplinary dispute. See, *Elkouri & Elkouri*, How Arbitration Works, 5th Edition, page 918; *Koven & Smith*, Just Cause -- The Seven Tests, 2d Edition, page 397.

In this matter, consistent with the foregoing, the scope of the proceeding must be limited to the following specifications contained in the tenure charges:

- On September 2, 2020, during a District-wide convocation viewable by both District staff and members of the public via Zoom, Dr. Putrino display(ed) a highly inappropriate video (Ex. F).

- The video, among other things, portrayed a Black man yelling angrily about his children's virtual learning experience. Ibid

- During Dr. Putrino's presentation, numerous staff members, District parents, as well as members of the public, objected to and were offended by the video. As a result, the video was stopped by District administration (Ex. G through K, and O through P).

- When Respondent showed the highly inappropriate video on September 2, 2020, he was President of the Montclair Principals Association ("MPA").

- As a result of Respondent showing the highly inappropriate video on September 2, 2020, he was removed from his position as the President of the MPA. As a result, Principal Samanthaa Anglin replaced Respondent as Acting MPA President.

- Although Respondent's presentation was purportedly made on behalf of the MPA, the MPA's Acting President, Principal Anglin denounced the video. During the September 2, 2020 Board meeting, Ms. Anglin stated that "[t]he MPA membership did not vet, nor do we condone, the message that was conveyed under the umbrella of the MPA." She further publicly stated that "We are fully committed to Dr. Ponds and the Board of Education's message." (Ex. L).

- The Montclair Branch of the NAACP, President Al Pelham, issued a statement calling for immediate action (Ex. M).

- As a result of Dr. Putrino showing the highly inappropriate video on September 2, 2020, Respondent was placed on paid administrative leave (Ex. N).

- Respondent's actions constituted unprofessional conduct unbecoming of a certificated staff member.

Despite the express wording of the tenure charges, Petitioner asks the undersigned to rely on the remainder of the video not shown (involving a comedic skit produced, and starred in by, Dr. Putrino and other staff members. The video exaggerates what it will be like working under COVID-19 protocols. Petitioner asserts that this portion of the video not displayed also demonstrates that Putrino lacks the judgment necessary to continue as a certificated school

principal for two reasons: (1) it makes fun of Covid protocols during the pre-vaccination stage of the pandemic and (2) it, in part, shows evidence of racial bias.

In rejecting Petitioner's entreaty, I find that Petitioner had a statutory obligation to have proffered a tenure charge supported by a stated specification regarding Respondent's composition of the video. Instead, the entirety of the tenure charge pertaining to the September 2, 2020 convocation faults Dr. Putrino for "showing" or "displaying" the video to the convocation audience. That portion of the video pertaining to the Covid skit was not shown on September 2, 2020 and it never made its way into the tenure charges. In the end, no acceptable explanation was provided by Petitioner as to why it did not charge Dr. Putrino with planning to show the entire video - if it was at all concerned about the COVID-19 protocols skit. Indeed, Petitioner had its sites set only on the Pray video. That it now claims that the Covid video reflects racial bias, I find, is not persuasive.

For all these reasons, I reject Petitioner's belated attempt to discipline Dr. Putrino for the Covid portion of the video.

Additionally, I observe, Petitioner attempted to inject other anecdotal evidence into the proceeding which was not presented in the tenure charges or Statement of Evidence. As to the alleged "sins of the past", Petitioner refers to an improper tax deduction; sending out a periodic newsletter - which Dr. Putrino had no obligation to send out in the first place - with numerous typos; use of personal email 10-15 years ago to communicate with Shashana Smiley when she was a 6th grade student; providing Smiley with an internship after she graduated high school (9-10 years prior) without Board approval, but with the knowledge of central office; and allegedly reporting to work under the influence of alcohol (an allegation not sufficiently proven). With respect to the alleged sins of the present, Petitioner asserts that Dr. Putrino, who is a practicing artist, maintained

an online art gallery during his period of leave which included paintings of nudes. For the same reason I will not consider the Covid portion of the video, I will not consider new allegations based on evidence discovered during the midst of this proceeding.

Based on the foregoing, I find and conclude that this proceeding must be limited to the charges and supporting Statement of Evidence related to Dr. Putrino's displaying or presentation of the Josh Pray video.

Conduct Unbecoming and Other Just Cause

In the State of New Jersey, a tenured teacher shall not be dismissed from his position or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. It is acknowledged that as public role models, teachers, principals, and other administrators are "held to a higher standard of behavior than other employees and individuals in society." Matter of the Tenure Hearing of Darlene Donahue, OAL Dkt. Nos. 4379-03 and 6586-03 (Mar. 10, 2006), adopted, Agency Dkt. Nos. 177-6/03 and 285/03 (Commissioner of Educ. Apr. 24 2006), aff'd Docket No. 25-06 (State Bd. of Educ. Oct. 4, 2006); In the Matter of the Certificates of Hattie Black, OAL Dkt. No. EDE 5140-02 (March 12, 2003). Educators are "entrusted with the care and custody of children," they "must exercise a degree of self-restraint and controlled behavior unlike like most other types of employment." Matter of the Tenure Hearing of Darlene Donahue, OAL Dkt. Nos. 4379-03 and 6586-03 (Mar. 10, 2006), adopted, Agency Dkt. Nos. 177-6/03 and 285/03 (Commissioner of Educ. Apr. 24 2006), aff'd Docket No. 25-06 (State Bd. of Educ. Oct. 4, 2006) citing In re Tenure Hearing of Lucarelli, 97 N.J.A.R.2d (EDU) 537, 541.

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." 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 develops 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. 992) (citing Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). 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); In the Matter of the Tenure Hearing of Madhumita Chaki, Franklin Township School District, Somerset County, OAL Dkt. No. EDU 1529-11.

The TEACH NJ legislation, enacted in 2012, led to the replacement of the Office of Administrative Law and the Commissioner of Education with labor arbitrators required to be members of the National Academy of Arbitrators. It must be presumed that the legislature was aware of how arbitrators address and analyze just cause disciplinary cases, especially in the context of removal or dismissal. Consistent with the legislative enactment, it may be expected that the traditional arbitral factors relied on to evaluate the propriety of the removal or dismissal of a public employee will be brought to the table in addition to the precedent developed over the years by the Commissioner of Education prior to 2012. In fact, the only evidence of the legislature issuing substantive directives to the arbitration panel occurred in 2019, whereby arbitrator training was required on conduct unbecoming an employee, including, but not limited to, issues related to allegations of sexual assault and child abuse. N.J.S.A. 18A:6-17.1(a):

> (1) A review of tenure charge cases concerning conduct unbecoming by a school employee, including cases decided both before and after the enactment of P.L.2012, c. 26 (C.18A:6-117 et al.); and

(2) A review of the factors to be considered by arbitrators in deciding tenure charge cases concerning conduct unbecoming by a school employee including, but not limited to, the nature of the alleged offense and the impact, or potential impact, of the employee's conduct on the health and safety of students within the context of the school environment.[9]

In considering both arbitral and education law precedent, I note first that Petitioner must prove, by a preponderance of the credible evidence, that Dr. Putrino is guilty of some or all of the disciplinary allegations contained in the charges. See, West New York v. Bock, 38 N.J. 500 (1962); Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); Atkinson v. Parsekian, 37 N.J. 143 (1962); *Elkouri and Elkouri*, How Arbitration Works, 5th Edition, pages 930, et. seq. Here, I find, Petitioner has sufficiently proven that Dr. Putrino unwittingly displayed what turned out to be an inappropriate video for the purpose of the event, that the video offended at least some members of the Black community who watched it, and he ran the risk of offending others based on a confluence of factors (i.e., Putrino is White, the audience was mixed, and Josh Pray, who was unlikely unknown to those who were offended, at times, is speaking in an exacerbated and uneducated manner).

Having said this, however, this is by no means an obvious case where there exists only one reasonable interpretation of the Pray video. To illustrate, the uneducated speech Pray exhibits is highlighted in ***boldfaced italics*** below, whereas observations about perpetuating stereotypes based on the content of what Pray is saying are set forth under the undersigned's **"Comments",** below:

Comedian Josh Pray:

See, I ***ain't gonna be*** like most parents. Most parents ***ain't gonna*** be big enough to apologize to every educator and every after-school program person, that took care of our kids. [Time 1:00]

[9] The undersigned filed a certification with the Commissioner on September 17, 2020 acknowledging the completion of such training. Subsequently, supplemental training was required for cultural diversity and bias. The undersigned completed such training on October 4, 2022.

Now, while everybody out there stressing and worrying about other stuff, and saying the kids are off weeks and stuff at the time... I'm gonna be the first to admit it.
[Time 1:07]

It's been two days and I want to go on record apologizing. I have been around my kids for 48 straight hours.
[Time 1:14]

(Comment – This could be any parent having to change his or her life to monitor children while they learn remotely for the first time. It is not a dilemma unique the Black community).

I'm posed to educate these kids? To every teacher that when you ask me for extra pencils, or some papers, or ***I ain't*** responding to your emails, or you trying to tell me that my child was talking back... and I was like ***no he ain't*** - you just don't know how to teach my child, you need to calm down.
[breathing heavily]
[Time 1:28]

(Comment – Pray's portrayal of himself as a protective parent refusing to acknowledge the potential misbehavior of his children is commonplace in society, regardless of race).

I'm gonna tell ***y'all***... I apologize.
[Time 1:32]

I don't even know ***how y'all*** feed my kids. My children maybe ask me for something to eat like every 18 minutes. Every time you ask me, Mr. Pray, if you don't mind could you send some snacks for the class? And I be like, I don't know ***I ain't got the money***, you use your salary. I apologize to you.
[Time 1:46]

My kids eat too damn much. I thought I ate?! I got a 9- to 13-year-old you put them together that's 22. They eat like a 22-year-old child in the first grade.
[Time 1:54]

(Comment: Pray did not say that he can't feed his kids. In fact, he is with his children during an extended period of remote learning. Of course, he's feeding them. That Pray does not want to spend the money or does not have the money to send in snacks for the entire class does not mean he can't feed his own kids. He is simply stating his disbelief as to how much his kids eat now that he is home observing them during the school day).

And then my 9-year-old, he want me to help with math questions, ***I don't understand what division is, man***. All I know is I pay taxes and the government takes some of my money, that's all I know.
[Time 2:05]

(Comment: As Ketty White testified, parents of all races could experience the same challenge helping their kids with math as Pray. Ms. White tutors Caucasian students in math).

I don't know no math, my 13-year-old asked me about history. I don't know, man. ***The only history I know is me and his Mama that's it.***
[Time 2:14]

(Comment: Parents of all races could experience the same challenge as Pray trying to help their kids learn history, a course which they may have taken decades ago).

I apologize. I thought... ***I'm out of control.***
[Time 2:19]

I thought teachers ***ain't do a good enough*** job at school. I thought my child should get straight A's like my childhood.
[Time 2:26]

And I want to have a meeting with teachers when school resumes, if ever resumes, I want to have a meeting with every teacher and ask how my child got A's and they class, because the education I see at home ***that boy ain't deserve no A's***. He cheat! I watch when he goes back to school, ***I want y'all*** to watch him and watch him well. ***I know he'd cheating***. You can't tell me ***he ain't cheating.***

[Time 2:47]

(Comment: Pray is making this commentary because he is observing how his children are tackling or not tackling their assignments at home, eating every 18 minutes, going to the bathroom frequently, etc., and he is contrasting his observations of his children's homeschool habits with the A's his children received when instruction was in-person. This is not the same as saying that Black students who get As must be cheating).

And all they wanna do is get up, sit down, get up, sit down, get up, sit down. They go to the bathroom four or five times. What the hell they doing in the bathroom? Drinking the soap? Smoking the soap?
[Time 2:56]

Are they going down the drain? Water come up, water go down, water come up, water go down.
[Time 3:02]

(**Comment:** Pray's observation that his kids procrastinate by constantly getting up, wanting to eat every 18 minutes, and frequently using the bathroom has nothing to do with the fact that his kids are Black. And, I find, Pray did not say his kids are doing drugs in the bathroom. He made nonsensical spontaneous remarks about his kids drinking or smoking soap because they are in the bathroom every five minutes).

To every educator out there, when I said I could home school my child, I can't home school my child. ***I don't got*** the patience to homeschool my child. If us as parents, we as parents have the audacity to drop 18 and 19 and 20 kids on ***ya'll*** at once! And ask ***y'all*** to raise our kids, look after our kids, sanitize our kids, educate our kids, feed our kids, protect our kids.
[Time 3:27]

(**Comment:** Pray is not saying that he can't feed his kids or protect his kids. He admits that he cannot take over the education of his kids from teachers and he admits that he grows impatient monitoring the rest of their behaviors, whereas before they were in school. A parent of any race could be Pray in this situation).

One out of five ain't bad. One out of five is happening in my house. I ain't gonna tell you which one happening, but one out of five ain't bad. To every educator . . .**Video actually stops here - Dr. Ponds Asks To Pull The Video.**

Here, I observe, to the extent that there was a risk of offending members of the Black community, in my opinion, it had more to do with Mr. Pray's intentionally uneducated, exaggerated and exacerbated presentation designed to evoke humor much in the same way that Kevin Hart projects himself. Where Dr. Putrino became tripped up, in my opinion, involves the following factors: (1) Pray is Black and presumably is not knowingly perpetuating racial stereotypes as he speaks about his own children; (2) other Black educators found the video humorous; i.e., teacher appreciation; and (3) the Pray video was displayed in YouTube and Google commercials and even on the Today show. As to the mixed views of the Pray video among Black educators, it is noted that there is evidence of uncertainty expressed even by Petitioner's witnesses. Consider the following:

Petitioner's Witnesses

Dr. Ponds

Dr. Ponds believed that a portion of the video shown perpetuates a stereotype, known as the "Myth of the angry Black man" (Tr. 1, p. 79, lines 2-4). Dr. Ponds added, "[t]here are Black parents and students that attend the Renaissance School and that it is important to not perpetuate the stereotype of an angry Black man" (Tr. 1, p. 83, lines 2-18). Having said this, however, it is

noteworthy that Ponds, despite his vast education and experience in subjects of racial diversity, inclusion and sensitivity, did not stop the video on his own initiative. He did so in response to chats from other participants – none of which were preserved.

Additionally, Dr. Ponds testified that he viewed the Pray video up to ten times, but not more than 10 (Tr. 2, p. 266, lines 3-4). He also testified that he had "other people look at it to kind of gauge my judgment of it" (Tr. 2, p. 265, lines 20-21). He had his "wife see it and talk to me about it personally" (Tr. 2, p. 266, lines 6-7). Plainly, if the Pray video so obviously perpetuated racial stereotypes, then one would think Dr. Ponds need not have taken the trouble to view it so many times and enlist the eyes and ears of others in order to gauge his judgment after the fact. This is especially so given Dr. Ponds' professional background.

Rodney Jackson

When Mr. Jackson was asked what he recalled about the convocation, he testified that he was excited because it was Dr. Ponds' first convocation (Tr. 3, p. 467, lines 8-10). Jackson recalled that Dr. Putrino showed a video of an African American comedian who was dealing with the stress of home schooling his children during COVID-19 (Tr. 3, p. 467, lines 18-22). Jackson testified that he had not seen the entire video until being shown it at the hearing that day (Tr. 3, p. 475, lines 11-12). The video was played again, and then stopped at the point where Mr. Pray states he has two children whose ages add up to 22 (Tr. 3, p. 478, line 10).

Mr. Jackson was questioned about his reaction to the video when it first aired. Jackson testified that when he first saw the video he had no reaction (Tr. 3, p. 478, lines 21-22). This testimony is interesting as well because Jackson is the head of the District's "TURN" program and held out by Dr. Ponds as someone who was, in effect, a point person on race-related issues.

Jackson instead looked to other people on the Zoom and what they were writing in the chat to see other people's reactions (Tr. 3, p. 478, lines 23-25).

Mr. Jackson testified that in retrospect, he viewed the video shown as "inappropriate" (Tr. 3, p. 480, line 6). He testified that it was inappropriate because it did not paint parents in a positive light and reinforced negative stereotypes that they cannot take care of their children and are uneducated, emotional, and loud (Tr. 3, p. 480, lines 8-18; p. 481, lines 20-25; p. 482, lines 1-2).

Mr. Jackson was shown Exhibit I, his email to Dr. Ponds (Tr. 3, p. 489, lines 4-5). He said that in his email he referenced the video being racist, what he meant was that the convocation video was reinforcing negative stereotypes about Black parents (Tr. 3, p. 489, lines 20-22). Jackson added that there is a "long history" of the following stereotypes in this country; that Black people are loud, out of control, can't control their children, and are stuck in poverty (Tr. 3, p. 489, line 25 through p. 490, line 4).

However, on cross-examination, Jackson was asked about his email statement that he didn't think "many of us understood what the video was reinforcing" (Tr. 3, p. 489, lines 9-21). Jackson attempted to explain his email by stating "people did not see the hurt and the pain that others were feeling while it was being played (Tr. 3, p. 499, lines 1-5). Some thought it was humorous and others were offended" (Tr. 3, p. 499, lines 6-17).

Finally, Mr. Jackson admitted that the comedian was trying to be funny, and that the intent of the video was to appreciate teachers more but stated, ***without offering a single specific reference***, that there were a thousand other videos Dr. Putrino could have shown (Tr. 3, p. 504, lines 9-15). Jackson testified that he understood what Putrino was trying to do but that the video he showed was derogatory and highlighted everything negative about Black people and Black parents (Tr. 3, p. 504, lines 17-22).

Diane Anglin

Ms. Anglin knew that the video had been posted on social media and she believed she also saw the video on YouTube (Tr. 3, p. 417, lines 5-8). Nonetheless, Anglin personally thought the video was offensive (Tr. 3, p. 435, lines 19-21). Now deceased, Mr. Pelham, NAACP President, felt the video was offensive due to the climate at the time (George Floyd and Breyonna Taylor) (Tr. 3, p. 437, lines 9-18). Also, Mr. Pray's comments about division and math stood out to her (Tr. 3, p. 428, line 24 through p. 429, line 3). Anglin also said the video depicted "microaggressions" (which she did not define) and stereotypes (Tr. 3, p. 430, lines 5-13). Specifically, that the video added to the stereotype of the broken family (Tr. 3, p. 431, lines 22-24). There is insufficient evidence presented by the video which would lead one to conclude that the Pray family was "broken", that there was not a Ms. Pray or that his children weren't loved.

Ms. Anglin also opined that Pray portrayed himself as the "Angry Black man" (Tr. 3, p. 432, lines 13-16). Anglin testified that the stereotype of an angry Black man means that when Black men are passionate about something they are perceived as angry (Tr. 3, p. 432, line 23 through p. 433, line 1). Anglin was questioned about Pray saying the children were allegedly cheating. She said that was offensive because her son is questioned about whether he plays basketball, that he has a scholarship to Georgetown, and that he wants to lie and say he doesn't play basketball - but that he does actually play basketball (Tr. 3, p. 433, line 19 through p. 434, line 1).

Ms. Anglin also believed that the video was offensive because it meant that if a Black child is doing well in school, it is assumed that they are cheating (Tr. 3, p. 434, line 25 through p. 435, line 6). Anglin was questioned about drinking the soap/smoking the soap, and she said that this

comment continues to add to the ignorance but then also said that it didn't make sense to her (Tr. 3, p. 435, lines 7-21).

Finally, Ms. Anglin was offended by the portion of the video where Mr. Pray states that he does not know how the school is feeding his kids – elaborating, there are Black and brown children who get free lunch (Tr. 3, p. 456, line 23 through p. 457, line 5). She testified that it adds to the pain that they cannot feed their children (Tr. 3, p. 457, lines 22-25). Anglin asserted it was ignorant to the fact that some children's only meal comes from the school (Tr. 3, p. 457, line 25 through p. 458, line 2).

Major Jennings

Mr. Jennings only witnessed part of the video on the day of the convocation and the entire video the day prior to his testimony (Tr. 4, p. 660, lines 2-8). Jennings was shown the video again and asked to recall the stop point (Tr. 4, p. 542, lines 10-15). Jennings testified that the convocation video was stopped at the end of Mr. Pray's rant when the words, "Case Closed! You are appreciated!" appear on the screen (Tr. 4, p. 546, line 12). Jennings then testified that when he saw the words, he didn't remember seeing the words, but "it was like right before then" that the video was stopped (Tr. 4, p. 546, lines 18-22). When asked again where the video was shut down, or how long it took Dr. Ponds to stop the video, Jennings later said "it was instantly" (Tr. 4, p. 552, line 7).

Mr. Jennings testified that the video was offensive to him because it "was stereotypical of Black men" (Tr. 4, p. 549, lines 9-10). And that they are portrayed as being out of control (Tr. 4, p. 549, line 12 to 550, lines 15-17). He went on to state that Pray portrayed "his little Black kids as cheaters" and that he doesn't know anything about history and wants his kids out of the house (Tr. 4, p. 550, lines 18-20). He also testified that the portion about feeding his children made him

feel like little Black kids eat a lot (Tr. 4, p. 550, line 25 through p. 551, line 1). Contrary to a finding that "the chat was blowing up", Jennings testified that he did not notice the chat (Tr. 4, p. 552, line 14).

Mr. Jennings also testified that people were upset and that he received an email for a restorative justice type activity the following day (Tr. 4, p. 552, line 23 through p. 553, line 4). There was a link to join a meeting with several staff members which gave an opportunity to share how they felt about the video (Tr. 4, p. 554, lines 7-13). During the restorative justice Zoom meeting, Dr. Putrino and Dr. Ponds were not present (Tr. 4, p. 556, lines 10-16). Jennings testified that some people expressed their dismay for the presentation, and others were not as upset (Tr. 4, p. 556, lines 19-21).

Damen Cooper

Mr. Cooper was involved with the convocation just to the extent that he was an attendee (Tr. 5, p. 680, line 9). Without showing the actual video presented by Dr. Putrino first, Petitioner showed Cooper the entire convocation video. Even Cooper testified that the entire video was not shown on that day; the first time he saw the entire video was a couple of days to a week after the convocation (Tr. 5, p. 687, lines 1-7). Cooper recalled that the video was stopped after discussions about the children eating.

Like Mr. Jennings, Mr. Cooper was not paying attention to the chat feature in the Zoom (Tr. 5, p. 689, lines 24-25). While watching the video, Cooper testified that he was angry, appalled, upset and embarrassed (Tr. 5, p. 690, lines 3-5). He added that he was embarrassed as a professional and representative of the school district; and that he was appalled as a Black man, as a father, the stereotype that was there. He said, "It frustrated me. It made me angry" (Tr. 5, p. 690, lines 8-13). Cooper asserted that the video reinforced a stereotype that African American men

are confused; that that is their dialect; that is way we have to work with our kids; and that they are not educated (Tr. 5, p. 690, lines 16-20).

Cooper testified that stating that African American men do not know how to do math is embarrassing (Tr. 5, p. 691, line 6). The statement about children cheating he said made him feel angry and hurt because his children do not cheat (Tr. 5, p. 691, lines 14-15).

Mr. Cooper further noted that the drinking the soap/smoking the soap comment was ridiculous and showed a stereotype that African American men don't know anything (Tr. 5, p. 691, lines 21-24).

Lastly, Mr. Cooper also testified that the grammar and enunciation the comedian used was offensive to him (Tr. 5, p. 691, lines 3-5).

Petitioner's Documentary Evidence

Exhibit G: Email from Ms. Wells
Email to Dr. Pond's claimed that she understood the message of the video and totally agreed with the message, but that it reinforced negative stereotypes of the President and others like him who want to portray African Americans in a certain way.

Exhibit H: Email from Ms. Saraco
Email to Dr. Ponds from a math teacher to thank him for stopping an incredibly offensive video and request that it be removed from any public presentation of the convocation.

Exhibit I: Email from Mr. Rodney Jackson
Mr. Jackson sent an email expressing that he was pleased that the video was stopped. ***But then goes on to state that he wished there was an opportunity to discuss why it was racist and noted that many of us don't understand what the video was reinforcing.***

Exhibit K: Email from Ms. Burrell
Ms. Burrell's email to Dr. Ponds notes that she feels the video was putting Blacks on display for entertainment. She felt the video was unprofessional and disrespectful and lacked regard for the diversity of students in Montclair.

Exhibit O: Redacted Email
This redacted email is to Dr. Ponds noting that a statement of support for Dr. Putrino will not be provided. Claims are being made that his or her child was discriminated against "under his [Dr. Putrino's] watch." Parent is claiming that a teacher told two Caucasian children not to play with his or her child because they were Black. He or she claims that when Putrino was the vice principal

he or she and another parent went to him with their concerns about this allegation. Parent claims that Putrino did not believe his or her children's claims. This email notes that the teacher was disciplined but they were not told how the teacher was disciplined. The parent also claims that assignments made President Obama look like a minstrel character which made her children cry. Parent claimed that they went to Putrino and complained, and that Putrino did not do anything and the teacher claimed that the images were political cartoons.

Exhibit P: Redacted Email
Parent is a person of color with students in the District as well as an educator (not noted whether an educated in District). Letter to Dr. Ponds notes that this parent is in agreement with the decision to investigate Dr. Putrino. Letter also notes that Putrino hired a teacher last year this parent believed to be "wholly incompetent" and noted that Montclair is a "highly coveted" District to work in. Parent raised questions about how this person was hired in the first place.

Exhibit J: Email from Mike Chiles
Email to Dr. Ponds noting that the video shown "was fine except your staff will internalize his message as they were being chastised for not responding to children like him." He noted that he could not be more disgusted with the convocation.

Exhibit M: Article re: NAACP
Article entitled "Montclair NAACP Demands Immediate Action after "Racist" and "Offensive" Video Shown to District Staff" dated September 2, 2020. ***This article notes that the President of the NAACP, Al Pelham, issued a statement claiming that Dr. Putrino had a history of racial insensitivity during his tenure with Montclair***. This article also references a law suit against Putrino and the school district claiming that only white teachers were given the opportunity to get additional pay for teaching additional classes. The article also noted that Putrino apologized for the video immediately and noted that if people were offended that was not his intent.

Respondent's Witnesses

Erika Pierce

Principal of Glenfield Middle School and the District's anti-bullying and harassment coordinator, Erika Pierce testified that during her time in Montclair she either participated or watched the convocations, including the September 2020 convocation (Tr. 7, p. 903, lines 6-12). Pierce's reaction to the video was that she "thought it was funny" (Tr. 7, p. 903, line 20): "I just thought it was funny because it really spoke to how I felt as a parent who was stuck in the house with their children, trying to work a full-time job and be a teacher at the same time" (Tr. 7, p. 903,

line 22 through p. 904, line 1). She did not find the Pray video racially offensive (Tr. 7, p. 904, lines 2-7).

Ketty White

Ms. White, a Black second grade educator, testified that she attended the September 2020 convocation (Tr. 6, p. 830, lines 13-15). White had seen the Pray video many times before the convocation on YouTube and testified that "everyone was sharing it" and that she "shared it with a lot of people. It was hilarious" (Tr. 6, p. 831, lines 8-19). "So teachers were just sharing funny things that we would find on YouTube. And he was one of the videos that was shared, that I think I shared it, as a matter of fact. Because when I saw it, I shared it" (Tr. 6, p. 831, line 22 through p. 832, line 1). Specifically, she shared it with most of her colleagues, the second grade team, on their group thread (Tr. 6, p. 832, line 406). The second grade team she shared it with was made up of seven or eight teachers, friends, paras, everyone that was in the education field (Tr. 6, p. 832, lines 6-13).

Ms. White added: "It was funny. It was something, it was a comic relief" (Tr. 6, p. 832, lines 12-13). White never received any negative feedback on the video (Tr. 6, p. 832, lines 14-15). She referred to the video as "creative and unique and funny" (Tr. 6, p. 832, lines 22-24). She did not find the video offensive or racially offensive (Tr. 6, p. 833, lines 1-5).

When the video was stopped, Ms. White did not know what happened, she thought it was a technical issue (Tr. 6, p. 833, lines 6-14). White testified that when she found out what happened, "we just thought it was ridiculous" and that we were "shocked" and "utterly shocked" because everyone in her circle had seen the video before and thought it was funny (Tr. 6, p. 833, lines 21-25). White's group didn't find any issue with the video (Tr. 6, p. 833, line 25 through p. 834, line 2).

Ms. White also testified that no one reached out to her regarding her reaction to the video, and that none of her colleagues told her that they were contacted either to be questioned as part of an investigation (Tr. 6, p. 834, lines 13-20).

Ms. White viewed the comments after Dr. Ponds apologized and was surprised by the comments (Tr. 6, p. 834, line 21 through p. 835, line 4). On cross-examination, White acknowledged that when she viewed the chat, she saw comments about "a stereotypical angry Black man" (Tr. 6, p. 852, lines 1-2).

On cross-examination, the Pray video was played and Ms. White, noticeably, laughed through most of it. Ms. White also reviewed the video prior to her testimony and said "it was still funny. I still laughed" (Tr. 6, p. 836, lines 11-16). She had previously viewed the video on YouTube (Tr. 6, p. 836, lines 20-22). White was asked if she recalled specific portions of the video about the father not knowing history, the children being cheaters, and drinking/smoking soap, all of which she recalled (Tr. 6, p. 853, lines 12-25).

> Q: Let me ask you this way. Is it your position that you don't, that you don't understand why somebody would find that offensive, that video?
>
> A: Yes, that's my position (Tr. 6, p. 854, lines 6-10).

Ms. White added that she has never heard of the Angry Black Man stereotype, that it is usually of an "Angry Black Woman" (Tr. 6, p. 854, lines 22-24). White also testified that if it was a woman in the video it would not have changed her opinion because "I didn't find him to be angry. To me, he wasn't angry" (Tr. 6, p. 855, lines 9-10). White viewed the video as a parent appreciating teachers and finding homeschooling challenging and difficult; and that "he just happened to be Black" (Tr. 6, p. 856, lines 3-9). The cross-examination colloquy continued:

> Q: And would you agree with me that that was an inappropriate video to show the entire staff of Montclair Schools?

A: No, I would not agree with you.

Q: So it's your opinion that that was an appropriate video to show all staff members; that's your position?

A: I shared it. I shared it with my friends. I shared it with my colleagues, and one of my friends is a principal. I shared it with a lot of people. So I didn't find it offensive (Tr. 6, p. 856, lines 10-20).

****

Q: Is it your testimony today that he [comedian Josh Pray] is not angry in that video; is that accurate?

A: In my opinion, he's frustrated. He's had enough. He's not angry. He's like, okay, I can't do this anymore. This is too hard. Like that's how it comes off to me.

Q: And in your opinion, that does not portray an angry Black man; is that accurate?

A: Yeah. That's accurate.

Q: And the comment, the whole video where he's talking about his, his parenting, right, is it your opinion that that video does not portray African American fathers as bad parents?

A: No, not at all.

Q: And is it your opinion, when he's talking about not knowing any math, not knowing any history, is it your opinion that does not portray African Americans as uneducated; is that your testimony?

A: Yes. Because I tutor a lot of Caucasian kids, and I have parents actually tell me that they were having problems with the new math and to help them to help their child with it. So, no. No, absolutely not. A lot of parents have problems helping their kids with the new math and the new technology and the new that. It's not just because he's a man of color (Tr. 6, p. 866, line 16 through p. 867, line 11).

Shashana Smiley

Ms. Smiley watched the convocation video on September 2, 2020 (Tr. 7, p. 932, lines 6-8). Smiley testified that she saw the Pray video, but also that she had seen it before September 2 because it went viral on Instagram or Facebook (Tr. 7, p. 932, lines 9-18).

Q: Can you tell us what your reaction was to the video?

A: I thought it was hilarious and I thought it was relatable as a parent who was working from home, while navigating homeschooling my son, and still trying to get the daily day-to-day activities done.

****

Q: Did you find it racially offensive, the video?

A: Oh, no. No, I didn't (Tr. 7, p. 933, lines 8-20).

Ibn Shakoor

Mr. Shakoor did not testify to the video at all on direct examination, the video portion was shown to Shakoor on cross-examination up until the line "to every educator out there, I want to apologize and let ya'll know..." (Tr. 7, p. 1079, line 18 through p. 1083, line 3).

Mr. Shakoor testified that he had seen the video before on YouTube or Instagram (Tr. 7, p. 1083, lines 5-10). Shakoor's first thought on the video was that it was relatable and funny (Tr. 7, p. 1083, lines 11-17). He did not find the video offensive, and did not see any kind of stereotype in the video (Tr. 7, p. 1083, line 22 through p. 1084, line 1).

Mr. Shakoor testified that he was not shown the video in preparation for the hearing but that he has seen the video many times (Tr. 7, p. 1084, lines 2-24). He has outside knowledge of the video and the comedian (Tr. 7, p. 1084, line 25 through p. 1085, line 2).

Mr. Shakoor testified that he was made aware that the video was shown to the entire staff of Montclair Public Schools and that he believes the video was appropriate (Tr. 7, p. 1085, lines 3-25).

Dr. Putrino

Dr. Putrino testified that he would not have shown the video if he knew people would be offended by it.

> Because I'm now aware that some people were offended. Again, you know, my whole purpose is to help people, not hurt people. Why would I choose that moment to knowingly hurt people? It just doesn't make sense. My goal was to make people laugh. The message in the video was appreciate teachers and remember to laugh when times are hard.
>
> If I would have known that that video was offensive to anyone, in any way, had a clue about that, I wouldn't have, I wouldn't have shown it. Up until that point, everybody I showed it to thought that video was funny and either passed it on or passed it to me (Tr. 9, p. 1576, lines 12-25).

He was asked if he thought the portion about drinking the soap and smoking the soap was appropriate; Putrino responded

> I don't think the comedian meant it to be inappropriate. I think the comedian was just kind of listing a bunch of things and saying whatever things came to his mind. I don't think he was trying to imply anything. And I understand that some people read into that and were offended by it, which to me is enough that I wouldn't have shown the video (Tr. 9. p. 1578, line 24 through p. 1579, line 7).

Respondent's Documentary Evidence

Putrino 204:
Email from the President of the Renaissance PTA, Beth Calamia Scheckel notes that Renaissance Middle School was a previously unpopular school until Dr. Putrino took over. Specifically, she noted that Putrino knows every child by name and welcomes them into school each morning. She also notes that Putrino is being used as a scapegoat for collective societal outrage against racism.

Putrino 205-207:
Email from Holly Shaw, mother of three children in the school system, as a letter of support for Dr Putrino. Shaw notes that a quick decision was made without an investigation, and that labeling someone a racist without a proper investigation a is very accusatory. She also noted that she had seen Mr. Pray's video before on the Today Show and was clearly vetted by producers of the morning news show. She encouraged the school to reinstate Putrino.

Putrino 209:
Email in support of Dr. Putrino from Lisa Wigdor, noting that her children previously were in schools where Dr. Putrino was principal. Wigdor noted that Putrino is energized, thoughtful, bright, organized, and competent. She asked him to reconsider his decision to remove Putrino.

Putrino 214:
Email from Shashana Smiley, an employee who was not offended by the video. Smiley noted that, through Mr. Pray's video, she noted that it expressed the difficulties facing parents trying to home school their children. She further noted that she has worked with Dr. Putrino for two years and that he has never shown any racial bias towards her or anyone that she knows. She attested that

Putrino is compassionate to students and staff of all races. She further noted that she did not find the video racist, while she understood that some may be offended, the video was not shown in a racist way. Smiley noted that she has known Putrino for 17 years and that he is a person of integrity.

Putrino 215:
Letter from Peter & Mary Anne Vaughn, noting that they have known Dr. Putrino for over 10 years and that he a is professional, dedicated, respectful and effective school administrator. They further stated that the idea that he is at all biased, racist or disrespectful to anyone is "simply preposterous." The letter goes on to state that Putrino's number one priority has always been the success of the schools. It also noted that Josh Pray is a very well respected, popular comedian who has done a series of honest and funny sketches on the challenges of homeschooling. They further asked to reconsider their actions taken against Putrino.

Putrino 216:
Email from Sue Weintraub, PTA President of Northeast and Glenfield Schools, provided a statement of support for Dr. Putrino, noting that he was professional, thoughtful appropriate, and decent.

Putrino 222:
Dr. Putrino was one of the best, if not the best, principals they have seen in Montclair Public Schools. They state that the fact that there was not an investigation or any ability to remediate is extremely concerning.

Putrino 226:
Email from Diane Garland, noting that her children formerly had Dr. Putrino as a principal. She worked with Putrino as a board member of the PTA for Northeast and Glenfield schools, when he was the principal there. She noted that Putrino cares and is involved in the community. She stated that she viewed the video and saw that the intent of it was to be humorous, as the video is of a funny, stressed-out father. She also noted that the father in the video could be any nationality or race, and that the message is to appreciate teachers.

Putrino 231-232:
Email from Louis D'Amico, retiree after 40 plus years of teaching music in Montclair, in support of Dr. Putrino, noting that Putrino was his immediate superior as the assistant principal of Hillside Middle School. He noted that when Putrino was in this role he was a disciplinarian and would give a gentle consequence. Putrino would put emphasis on why the bad choice was made and seek a reason. He also noted that Putrino loved the students and they loved him. He would ascertain the child's circumstances outside of school and follow up with the child to see how they were doing. He also was fully engaged with the student body and would play ball with them during recess.

Given the undersigned's analysis of the video which reveals commendable messaging but through Pray's comedic style which involves speaking exaggeration, exacerbation, speaking

loudly and, at times, in an uneducated manner, I cannot dismiss the charge since (for the above reasons) there was a risk of offending at least a portion of the convocation audience. Having said this, however, I find that two of the core allegations against Dr. Putrino cannot be sustained: (1) Pray's video perpetuating "The Myth of the Angry Black man" and (2) "During Dr. Putrino's presentation, numerous staff members, District parents, as well as members of the public objected to and were offended by the video. As a result, the video was stopped by District administration". (Ex. G through K, and O through P)".

The first accusation is pulled directly from the September 2, 2020 "Tap Into Montclair" Newspaper Article (Ex. M), i.e., that the video portrayed a Black man "yelling angrily about his children's virtual learning experience", a/k/a, the Myth of the Angry Black Man. Although the myth may not be known by everyone, a useful article on the subject – noted by Petitioner in its brief – is set forth below.

Emmanuel Acho on The Myth of The 'Angry Black Man' - Pan Macmillan[10]

Former NFL player and current Fox Sports analyst Emmanuel Acho explores the myth of the angry Black man, and the ways in which this damaging stereotype has been amplified and weaponized.

> To understand the Angry Black Man stereotype and why it's so harmful, we have to take a trip in the wayback machine to 1915. By this time, Black people had been legally free from enslavement for fifty years thanks to the Civil War and the passing of the Thirteenth Amendment. Two other amendments to our Constitution, the Fourteenth and Fifteenth, made Black people US citizens and gave Black men the right to vote, respectively. Things appear to be looking up for Black folks, right?
>
> Ah, no. In fact, by 1915, Black Americans had been stripped of many of the gains they made during Reconstruction – the short-lived period of racial progress made right after the Civil War. During Reconstruction, several Black men were elected to local, state and national office. Afraid of losing their grip on power, white people used laws, violence and downright dirty lies to regain control over Black people.

[10] https://www.panmacmillan.com/blogs/general/emmanuel-acho-myth-of-the-angry-black-man

One of the most enduring lies white people ever told about Black people is that Black men are predators out to harm white people. This myth is the granddaddy of the Angry Black Man myth. And D. W. Griffith made a fortune from this lie by using one of the newest inventions of his day – film – to launch one of the world's most dangerous and long-lasting slander campaigns.

Enter Griffith's film, the world's first blockbuster hit, *The Birth of a Nation.* Imagine being a kid in 1915 and going to a movie theater to watch the most anticipated film of the summer. You take your seat and begin shoving handfuls of popcorn into your mouth as the lights go down and the film begins to roll. The movie is a reimagining of the Civil War and the period after it, Reconstruction. As the film rolls along, you notice that the main Black male characters are actually played by white men wearing blackface. Even more shocking, those characters also happen to be the movie's primary villains. They are overly aggressive menaces and downright threatening, especially toward white women. At one point in the movie, a 'Black' man – played by a white dude in blackface – proposes marriage to a white woman. She's so distraught over the idea that she runs and jumps off a cliff. Triumphant music swells (it was the first movie ever to have a full orchestral score), and the audience breaks into applause. That's right. People all around you are clapping because the white woman in the movie would rather die than marry a Black man. What do you think their reaction and this film teaches you to believe about Black men? *The Birth of a Nation* was a huge success. Then-president Woodrow Wilson screened it at the White House and is said to have commented, 'it is like writing history with lightning. And my only regret is that it is all so terribly true.' In fact, the daring nature of the film rocked the country. Not only did it strengthen racist ideas about Black men across the fruited plain, it did so using cutting-edge film techniques like closeups and epic battles, ensuring it would also be a film people talked about for decades to come. Filmmakers and moviegoers in other parts of the world watched the film, picking up new film skills as well as infectious racist ideas.

The Birth of a Nation also inspired the rebirth of the Ku Klux Klan – a murderous white supremacist terror group. In the film, members of the KKK are depicted as heroes, riding in like the cavalry to protect Southern whites, white women in particular, from the clutches of menacing Black men. Many white people believed this myth. The murderous practice of lynching often had at its heart the goal of protecting the chastity of white women, or so white men claimed. Remember Emmett Till. The fourteen-year-old teenager was brutally murdered by two white men in 1955 after he was accused of whistling at a white woman. Decades later, the white woman who accused him, Carolyn Bryant Donham, admitted that Till never touched, threatened or harassed her. She had lied. And for that lie, Till, sadly, like so many Black men before him, paid with his life. This myth was used as a convenient excuse to harm any Black man or Black neighborhood white people deemed 'too uppity' (i.e., successful) for their comfort.

As with many myths, the Angry Black Man does have a kernel of truth to it. Not

> the systematic assault on white women – the anger. In the time of slavery, Black men, women, and children were regularly abused by white people. Now, imagine you were a Black man, a father, and a husband, and you had to watch your loved ones be brutally treated by a white master or overseer. Day in and day out. White men and women even had the authority to sell your children or your wife away from you. And there was nothing you could do about it. Try to imagine the kind of hurt and anger you'd feel if this happened to you or to your children. And this would go on for generations. Added to this agony is the reality that at any moment, your life, and the lives of your loved ones, can be taken by white mobs for almost any trumped-up reason. Especially if you are accused of touching, disrespecting, harassing or harming a white woman.
>
> Let's bring it back to the present. These destructive stereotypes and perceptions about Black people are still alive and well in America and still threaten the lives of Black people even today. Those intent on doing Black people harm weaponize these stereotypes by in turn 'weaponizing whiteness.' We've already seen an example of this, with the murder of fourteen-year old Emmett Till. More recently, you may have heard of Karen, or rather, Amy Cooper, who, on May 25, 2020, called the cops on a bird-watcher in Central Park because he wanted her to leash her illegally unleashed dog.
>
> Bring it back up to the present, and this is what makes a George Floyd possible, a Trayvon Martin – anytime someone has been seen as a threat because they've first been seen as Black . . .

Based on the video as the best evidence, in my opinion, Petitioner has failed to sufficiently show that that the Pray video portrayed a Black man **yelling angrily** about his children's virtual learning experience or, stated differently, that Pray was perpetuating the "Myth of the Angry Black Man". It is acknowledged that Dr. Putrino testified that he was aware of the Angry Black Man stereotype. Obviously, Putrino did not believe it applied to the Pray video. Nor do I. Indeed, I infer that Pray, a Black man, did not make the video involving his own Black children with the intent to perpetuate racial stereotypes. Rather, Pray, with comedic emphasis, projects himself similar to comedian Kevin Hart, i.e., exacerbated, winded at times and, in Pray's case, at his wits end over his daily observations of his own two children during remote learning. It is this experience which provides the foundation for his newly found gratitude toward teachers – which is the message clearly intended by Dr. Putrino. In fact, the end of the Pray portion of Dr. Putrino's

presentation leads into an on screen message, "Case Closed! You are appreciated!" (referring to the tremendous services teachers provide to students and their families).

That Mr. Pray speaks loudly does not mean that he is perpetuating anger or the "Myth of the Angry Black Man". Pray, for example, is not behaving in a manner which would cause anyone to feel intimidated, i.e., that he may become violent. It does not evoke the emotion propagated in Birth of a Nation, i.e., that harsh action must be taken against Blacks in order to protect Whites, White women in particular. That Pray states at one point that "I'm out of control" does not mean that he is even out of control due to anger. Putting aside the comedic context where any reasonable person would conclude that Pray is literally not "out of control", people certainly can be out of control due to a variety of emotions, e.g., anger, fear, joy, sadness, tiredness, or being exacerbated over a situation. At the very least, Petitioner has not sufficiently demonstrated that the Pray video unambiguously depicts an angry Black man any more so than it depicts an exacerbated man now responsible, for the first time, with monitoring his children's education every day during remote learning. Thus, based on the video alone, I find, Petitioner has failed to sufficiently demonstrate one of its core accusations against Dr. Putrino, i.e., that Putrino perpetuated the "Myth of the Angry Black Man".

As to the second specification, Dr. Ponds testified that when he viewed the comments in the chat, he had to stop the video because it was difficult for him to watch and also the chat was "really blowing up." When asked about what the comments stated, Ponds said that they were "pretty bad" but that he can't remember them (Tr. 1, p. 59, lines 20-22). Ponds further testified that the director of technology could not retrieve them (Tr. 1, p. 59, line 23 through p. 61, line 4). Thus, I find, the best evidence of gauging how many of the 1100+ convocation viewers expressed being offended prior to the video being shut down no longer exists.

In addition, Ms. Anglin testified that she was receiving text messages and emails during the video expressing outrage. However, either Anglin did not preserve the text messages and emails, she did not produce them, or she exaggerated. Again, the best evidence in support of Petitioner's allegation would have been the actual text messages and emails which, for reasons unknown, were not produced by Petitioner in its Statement of Evidence or otherwise.

Lastly, I observe, nothing precluded Petitioner from soliciting staff, parents or other member of the public to testify (or provide a written statement) as to having expressed offense or outrage during the convocation. Rather, after 13 months to piece its case together, Petitioner adduced the testimony of witnesses who brought forward the Tenure Charges (Dr. Ponds and Mr. Cooper), neither of whom expressed concern in the chat prior to the video shutting down; Rodney Jackson, who acknowledges that he had no reaction to the video, but recalls observing the chats; and Mr. Graber, who also did not express offense or outrage during the presentation and prior to the video being shut down. Although Petitioner introduced a handful of emails received from certain staff and members of the public, those exhibits reflect after-the-fact expressions of discontent over the video.

Also notable, while Petitioner remained free to argue that the Pray video had the potential of offending numerous staff members, parents, and members of the public, unfortunately the tenure charges filed speak in conclusory language, i.e., that numerous persons not only were offended and outraged, but they expressed their outrage prior to the video being shut down. Consequently, in the end, Petitioner must be held to its burden of proof and cannot rely instead on a mere assertion.

Based on the foregoing, due to an insufficiency of competent evidence or evidence which only leads to one reasonable conclusion, I dismiss those portions of the tenure charge alleging that Dr. Putrino showed a video of a Black man "yelling angrily" about his sons' remote learning

experience and that numerous people expressed outrage in the chats prior to the video being shut down.

In addition to the dismissal of two core allegations contained in the tenure charge, there are other significant factors of mitigation in support of a reduced penalty. Generally speaking, in evaluating the propriety of the dismissal penalty, relevant factors "include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct in the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring." In the Matter of the Tenure Hearing of Erroll Goodwater, School District of the City of Camden, Agency Docket Nos. 185-7/11 and 187-7/11 (April 27, 2012). The Commissioner has previously stated that "unfitness to remain a teacher is best demonstrated by a series of incidents but might be shown by a single incident if sufficiently flagrant". In the Matter of Norma Pollard, 96 N.J.A.R. 2d (EDU) 170 at 190.

Although the teacher in Pollard was found to have committed several offenses requiring dismissal from employment, the Commissioner found that even "the single allegation that respondent placed several pupils in a closet as punishment is sufficiently flagrant to warrant dismissal." Pollard, supra, at 190. Goodwater stands for the proposition that length of service alone is not reason to deny a penalty of termination if the act underlying the tenure charge is "sufficiently flagrant" under Fulcomer, supra, and Pollard, supra. However, arbitrators may rely on the teacher's prior record in determining the appropriate penalty if the past record is inherently relevant to the current offense. In the Matter of the Tenure Hearing of James Dunckley, Rockaway Township, 2018 *N.J. Super. Unpub. Lexis* 615 (App. Div. March 19, 2018); West New York v. Bock, 38 *N.J.* 500 (1962).

Initially, it must be observed that this matter stands on its own unique facts. Petitioner sees only racism in the video with little recognition as to the underlying messaging. Respondent does not see racism in the video at all, instead, believing that he showed a humorous video as a means to convey an important message to all teachers, regardless of race. The witnesses of each party espouse similarly mixed viewpoints of the video and there is implicit uncertainty even on the part of Dr. Ponds. Given these findings, I first note that this matter is clearly distinguishable from the precedent offered by Petitioner in support of the dismissal penalty.

For example, in Karins v. City of Atlantic City, 152 N.J. 532, 554 (1988), a firefighter was removed from employment for uttering a racial epithet at on-duty police officer during traffic stop. Specifically, Firefighter Karins was intoxicated. One white police officer pulled Karins over to the side of the road. A Black officer arrived on the scene as backup. Since the white officer knew that Karins was an Atlantic City firefighter, he was essentially treating him with kid gloves, i.e., lecturing him on the hazards of drinking and driving but not subjecting him to a sobriety test. When the white officer greeted the Black officer with "Hey Bro", Karins interjected, "***Oh no, don't start that nigger shit with me.***"

Karins bears absolutely no similarity to Dr. Putrino's showing of the Pray video which was perceived as offensive by some and humorous by others, including several Black educators and staff members. In contrast, no one could possibly find that using the "N" word in this context was humorous.

In Chaki, the Commissioner concurred with the ALJ's findings that:

> • ... Chaki made stereotypical and derogatory racial and ethnic statements to her first-period Honors Chemistry class at Franklin, including the following characterizations: African American students, and African Americans in general, as "lazy," or words to [*5] that effect; Hispanics as a labor force, or words to that effect; Caucasians as having average or inferior industry and means, or words to

that effect; and Asians as an intellectually and economically superior "brainpower," or words to that effect.

- At that time, Chaki also made reference to her personal economic status as being superior to others.

- Most if not all of the students were shocked and offended by Chaki's statements.

- The statements were entirely inappropriate in a classroom setting, and completely insensitive to the students.

(Initial Decision at 11-12.)

Here, unlike the teacher in Chaki who made generalized statements knowingly stereotyping all Blacks, Asians, Caucasians and Hispanics, Dr. Putrino did not make disparaging statements (alone or via Josh Pray) about anyone or even speak in generalities, expressed or implied, about all Black people. Nor is there evidence that Putrino directly offended students.[11]

Furthermore, this matter is inapposite to In the Matter of the Tenure Hearing of Mark Blasko, Cherry Hill School District, Camden County, 1980 S.L.D. 987 (Initial Decision), 1980 S.L.D. 1002 (Commissioner Decision). In that matter, the ALJ/Commissioner found that Blasko had engaged in three separate incidents of conduct which garnered laughs from his seventh grade students, but which were, nonetheless, deemed offensive: (1) Blasko directed students to raise their hands if they were Jewish and then directed them to return "Christmas candy" given out to the remainder of the class; (2) he called one Jewish student over and measured his nose with a ruler, exclaiming that he "would like to measure a Jewish kid's nose". He then went on to measure his own nose, exclaiming "look at mine; he then measured other students noses as they filed out of the classroom; and (3) speaking another time with the same student whose nose he measured, the student informed Blasko that he had secured a summer job. Blasko replied that he thought "Jewish

[11] In many tenure and non-instructional disciplinary cases, redacted student statements are provided to show (1) that the students witnessed an event and (2) how witnessing the event impacted them. As to the subject of student witnesses, this record is barren.

kids didn't have to work" and if they needed five or ten dollars you simply ask your parents." The Commissioner in Blasko, in rejecting the educators defense that it was a joke, noted that "[t]he Commissioner cannot condone the use of ethnic materials, jokes, or actions that ridicule any racial group directly or by implication"

Here, the undersigned's comments above are incorporated by reference. Moreover, the educator in Blasko was plainly addressing the size of a Jewish student's nose based on a stereotype of all Jewish men. Conversely, nothing in Dr. Putrino's presentation objectively leads one to believe that Putrino was consciously or unambiguously portraying (via Josh Pray) all Black men in any sense. Also, Mr. Blasko was unambiguously and without debate humiliating Jewish students in his class in a way that no one could possibly step forward and find humorous, save for a handful of seventh grade students, who likely did not know what emotion to express in real time. Thus, I find, the instant matter is significantly distinguishable from Blasko.

In the Matter of the Tenure Hearing of George Zofchak, Board of Education of the City of Trenton, Mercer County, 2002 N.J. AGEN LEXIS 564 is also opposite. A teacher was found guilty of, among five other charges, a sixth charge relating to the following remarks:

> I **FIND** that there is insufficient evidence to support a finding of guilt as to whether respondent is guilty of making defamatory statements to a student in September 2002 (P-30), when a student complained that Mr. Zofchak used childish and taunting language when disciplining the student. However, I **FIND** that on January 5, 1994, Mr. Zofchak said to the students in the Opportunity Room that they were "acting like monkeys and gorillas". I **FIND** that in February 1994, when students were discussing that a White Castle had been raided for the sale of illegal drugs, Mr. Zofchak stated that it should be called "Black Castle" instead of White Castle. I **FIND** that in April 1995, Mr. Zofchak, by his own admission and within the hearing of other school employees, referred to students as "fucking pigs" and "fucking animals" after some of them had thrown ketchup on Mr. Zofchak's shirt during lunchtime. Mr. Zofchak acknowledged that he was referring to the [*79] students. I **FIND** that these amount to the making of defamatory statements to or about students, and that respondent is **GUILTY** of this charge (Charge Two).

The dissimilarity between Zofchak and this matter is obvious. The statements of Zofchak are intentionally racist and expressly involve invidious characterizations of Blacks as a class.

Similarly, I find inapposite In the Matter of the Tenure Hearing of Ward Campbell v. Board of Education of the Princeton Regional School District, Mercer County, 95 N.J.A.R. 22 (Edu) 2011 (N.J. Adm), 1995 WL 507876 (made overtly racist comments to four students, sexist comments to another student and physically shoved another student, among other offenses).

In sum, the precedent provided by Petitioner – presumably the closest on point – involved use the "N" word; overt or intentional acts of discrimination involving generalized stereotyping of Blacks or Jews as a group; and misconduct which really has no reasonable counterpoint. In my opinion, such precedent stands in sharp contrast to Dr. Putrino's actions under the totality of the circumstances presented.

Independent of the precedent deemed inapposite, however, Dr. Putrino must take responsibility for those unquantified convocation viewers, including staff, who were hurt or offended. Also, Dr. Ponds was perhaps most hurt by the entire experience. Ponds was a new superintendent launching the official start of his first school year on the day of the convocation. Like the memory of newlyweds on the receiving end of a horrible wedding day toast, Dr. Ponds' memory of September 2, 2020 may fade, but it will likely never go away. Thus, even though Dr. Putrino did not realize that the Pray video could backfire on him, the hurt caused to at least some of the 1100+ and Dr. Ponds in particular cannot be minimized. Thus, even if liability is based solely "on the buck stops here" principle, the hurt caused must be factored in.

Having said this, I must reject Petitioner's attempt to amplify the seriousness of Dr. Putrino's offense by way of reliance on the murders of George Floyd, Ahmaud Arbery and Breonna Taylor. The assertion here is that somehow due to the tragic events which occurred from

February of 2020 through May 25, 2020, Dr. Putrino – even though he did not see the backlash coming - should have been more sensitive to the feelings of the Black community when he presented the Josh Pray video on September 2, 2020. Testimony from one of Petitioner's witnesses said that "Montclair was on fire during the summer." Although I would not have been upset if Petitioner omitted this line of argument in support of its tenure charges, the fact that it did leaves me no choice other than to address it. In doing so, the relevant timeframe of the protests over these tragedies must be placed in context.

On February 23, 2020, Ahmaud Arbery, an unarmed 25-year-old Black man was murdered by three civilians while jogging through a White neighborhood. On March 13, 2020, Breonna Taylor, a 26-year-old Black Woman was fatally shot in her apartment. On May 25, 2020, George Floyd was murdered by Derek Chauvin as aided by three other Minneapolis police officers. Montclair schools, a diverse school district in New Jersey, was very involved in the protests which occurred worldwide. In fact, people of good conscience, of all races, ethnicities, religions, etc., protested the injustices, especially after George Floyd. Dr. Putrino participated and even facilitated some of the activities in protest of George Floyd's murder.

However, it is clear that the protests calmed following the arrest and charging of Derek Chauvin. A New York Times timeline of protests over George Floyd's murder culminates on June 3, 2020 when charges were filed against Derek Chauvin and the other Minneapolis police officers.[12] The senseless killings of Arbery and Taylor were almost six months old by the middle of the summer of 2020 and had been somewhat overshadowed by the George Floyd murder. Thus, while the horrific acts of racism witnessed by the nation in 2020 will no doubt be etched in the

[12] The New York Times, "George Floyd Protests: A Timeline" by Derrick Bryson Taylor (November 5, 2021). https://www.nytimes.com/article/george-floyd-protests-timeline.html

minds of all concerned for many years to come, I find that the level of outrage burning prior to Chauvin's arrest had at least dropped off in terms of protests two to three months prior to Dr. Putrino's showing of the September 2, 2020 video.

Moreover, invoking the names of Floyd, Arbery and Taylor in the context of Dr. Putrino showing the Josh Pray video, if anything, diminishes the import of those tragedies. Dr. Putrino bears no resemblance to Derek Chauvin or the trio who killed Ahmaud Arbery. Similarly, I find, that an unknown portion of convocation viewers may have been offended by the words and mannerisms of a Black comedian cannot be possibility compared with the victims of murder at the hands of racists private citizens in Georgia, and at the hands of police officers in Minneapolis. Thus, for these reasons, I reject Petitioner's attempt to amplify the alleged severity of Dr. Putrino's offense by way of its unfortunate reference to the racially motivated or disparate treatment murders of Taylor, Arbery and Floyd.

In addition, since Petitioner elected to eschew any kind of meaningful investigation, it did not become privy to, let alone evaluate, several mitigating factors, such as, the reasonable opposite view of the video expressed by several Black employees of the District or Dr. Putrino's prior longstanding record of positive endeavors in the areas of race relations. Since the good faith opposite view of the video has already been addressed, I will next address Putrino's prior record in the area of race relations.

Arbitrators may rely on the teacher's prior record in determining the appropriate penalty if the past record is inherently relevant to the current offense. In the Matter of the Tenure Hearing of James Dunckley, Rockaway Township, 2018 *N.J. Super. Unpub. Lexis* 615 (App. Div. March 19, 2018); West New York v. Bock, 38 *N.J.* 500 (1962). Putrino's prior record is inherently relevant to the implicit allegations of racism underlying Petitioner's disciplinary

action against him. A review of his record in this area both inside and outside of his employment is more than commendable:

Dr. Putrino

Dr. Putrino, while Principal of Glenfield Middle School, hired Dr. Samanthaa Anglin, a Black woman, as his vice principal in 2013 (Tr. 8, p. 1146, line 7 through p. 1147, line 1147). Putrino had a role in having her hired as the assistant principal through his recommendation to Dr. Penny McCormick and Ms. Felice Harrison (Tr. 8, p. 1148, lines 4-9). Anglin subsequently became the principal of Hillside Elementary School (Tr. 8, p. 1149, lines 8-9). Mike Chiles called Putrino for a recommendation for the position. Putrino recommended Anglin (Tr. 8, p. 1149, lines 12-15) and that he gave Chiles a "history of her success and experience at Glenfield" (Tr. 8, p. 1150, lines 6-8). He further testified that it was clear that Anglin was "destined for leadership" (Tr. 8, p. 1150, line 9).

Erika Pierce, a Black woman, who testified that she found the Pray video to be humorous and not offensive, became Vice Principal after Dr. Anglin on Dr. Putrino's recommendation (Tr. 8, p. 1148, lines 17-19). Putrino, as the principal, was in charge of the committee to solicit candidates, and then also ultimately the one charged with making the decision of who to recommend to the superintendent and the Board of Education (Tr. 8, p. 1148, line 21 through p. 1149, line 1). Putrino testified that he recommended Pierce for the position of assistant principal following Anglin (Tr. 8, p. 1149, lines 3-5). Currently, Pierce is the principal of Glenfield Middle School (Tr. 8, p. 1150, lines 14-15).

Pierce further testified that Putrino was "a very inclusive leader" and that he was "dedicated to making sure all children could succeed and thrive in a comfortable learning environment" (Tr. 7, p. 896, line 23 through p. 897, line 1).

Ms. Pierce testified that restorative justice was implemented in Glenfield under Dr. Putrino:

> Q: Could you describe how that [restorative justice] played into the administration of Glenfield?
>
> A: So Dr. Putrino was one of the first administrators to be restorative justice trained. And so once he came back from that training, even though I wasn't trained at the time, I knew that RJ was the driver in how we looked at all disciplinary issues and also our relationships with students (Tr. 7, p. 897, line 19 through p. 898, line 2).

Ms. Pierce went on to explain restorative justice:

> A: So my understanding of restorative justice is that students are required to repair any type of harm that they caused based on their behaviours, and also to look more introspectively into their behaviours and why they did what they did. So if we had a student that, you know, had some type of disciplinary infraction and it was a conflict with another student, let's say, not only would they get a consequence for their actions, but they would also be required to go back to that student, or whoever, whatever staff member, whoever they got into a conflict with, and they had to make sure they were repairing the harm that they may have caused in the midst of the conflict (Tr. 7, p. 898, lines 7-22).

Ms. Pierce testified that she never saw any hint of bias by Dr. Putrino during her time working with him at Glenfield (Tr. 7, p. 901, lines 18-20):

> So a lot of our discussions were always based around discipline when it came to inclusion. Because a lot of times you will see with staff members that bias, implicit, whatever, would usually come out in disciplinary practices or during times of the day that were unsupervised.
>
> And so whenever there were disciplinary actions that were taken, like if a teacher brought a grievance to us, we would always discuss what would be the most fair consequence for the student by looking at all aspects. We would look at past behaviour.
>
> We would look at maybe their motivations for why they did what they did. Is the student classified; do they have this pattern of behaviour. Does this teacher have an issue with the student.
>
> It was a very well rounded and methodical approach to discipline as opposed to, oh, the student hurt somebody, we're just going to suspend him (Tr. 7, p. 902, lines 1-23).

Finally, Ms. Pierce testified that Dr. Putrino worked closely with the Montclair Neighbourhood Development Corporation as well as the NAACP, (Mr. Pelham was involved with both organizations) (Tr. 7, p. 906, line 18 through p. 907, line 7). She described the working relationship between Putrino and Pelham as "a positive working relationship and it was a partnership" (Tr. 7, p. 907, lines 12-13). All of this stands in sharp contrast with Pelham's unsupported September 2, 2020 statement that Putrino had a long history of racial insensitivity.

Dr. Putrino had a part in physical education teacher Yvonne Shannon, a Black woman, receiving the Governor's Educator of the Year Award for her work at Glenfield Middle School (Tr. 8, p. 1161, line 4 through p. 1162, line 4).

During Martin Luther King, Jr. Day (2020), Dr. Putrino went door-to-door and hosted a project called Light Up the Streets, donating hundreds of little white votive candles in paper bags; went door-to-door handing out supplies to draw or write messages on the bags (Tr. 9, p. 1440, line 21 through p. 1441, line 1). That night, everyone put their bags out on the curbs, and the streets in Orange, N.J. were lit up in honor of Dr. King and his message (Tr. 9, p. 1441, lines 2-5).

Dr. Putrino helped Shashana Smiley gain an internship with a special education teacher when Smiley was in college and he was the principal of Glenfield Middle School (Tr. 10, p. 1629, lines 7-12).

Dr. Putrino, as Principal of Glenfield Middle School, created a newsletter titled "Glenfield Happenings" in order to communicated with families about events at the school (Tr. 8, p. 1152, lines 5-18) (Ex. R11). In January 2014, Glenfield Happenings spotlighted Martin Luther King, Jr. and the "most important assembly" that they have all year (Tr. 8, p. 1153, line 19 through p. 1154, line 11). Dr. Putrino also highlighted Maya Angelou (Tr. 8, p. 1155, lines 1-2). Putrino testified that he "started a traditional where every year we would highlight a prominent person reflective of

Dr. King's message" (Tr. 8, p. 1155, lines 4-6). Putrino, who is an artist, further testified that in that particular year he had students paint a portrait of Maya Angelou (Tr. 8, p. 1155, lines 6-17). Putrino sketched out Angelou's portrait for the students to paint, and that he did that every year for whoever they were featuring (Tr. 8, p. 1160, line 24 through p. 1161, line 3). In 2017, for example, Putrino assigned students to do a live painting of a portrait of Barak Obama (Tr. 8, p. 1160, lines 16-23).

In January 2017, Dr. Putrino had Rabbi Israel Dresner, who was a freedom rider with Dr. King, come speak at the assembly (Tr. 8, p. 1157, lines 9-20). Putrino also testified about Glenfield Happenings discussing Dan Gill, a social studies teacher at Glenfield Middle School, come tell his story "Arthur's Chair" (Tr. 8, p. 1158, lines 7-21). Putrino testified that Dan's story, "Arthur's Chair," is about Dan growing up with a Black friend in a predominantly white neighborhood; Dan brought his Black friend (Arthur) to a party and the mother at the door said that Arthur could not come in because they didn't have a chair for him (Tr. 8, p. 1158, line 22 through p. 1159, line 6). Putrino testified that Dan did not attend the party and has since sought to use his missing chair as a symbol for always having a chair for every student in his classroom (Tr. 8, p. 1159, lines 7-10).

In addition, on an annual basis, Dr. Putrino hosts the Alpha Lambda Chapter of Alpha Phi Alpha fraternity competition for young male students to write an essay on the world today, as filtered through the eyes of Dr. King (Tr. 8, p. 1159, lines 18-23).

Dr. Putrino also had an assembly about the Innocence Project, where he had Gerald Richardson, a Black man, who was previously incarcerated for 30 years, come and speak to students about the challenges you can face in life, about life decisions, and resilience (Tr. 8, p. 1164, line 15 through p. 1165, line 2).

Dr. Putrino also discussed how he supported and grew African American Career Day in celebration of Black History Month (Tr. 8, p. 1166, lines 3-12). At African American Career Day, Putrino had upwards of 40 to 45 community members speak to the students about different career paths (Tr. 8, p. 1166, lines 13-15).

Dr. Putrino deemed it important to bring the story of Montclair to his students; to highlight Montclair's march to desegregate schools; to bring in speakers to speak about their experiences in the civil rights movement in Montclair; to bring in speakers about their experiences with "redlining" in Montclair (Tr. 8, p. 1169, lines 1-25; p. 1170, lines 1-25; p. 1171, lines 1-25; p. 1172, lines 1-25), etc.

Dr. Putrino testified that he was so inspired by African American Career Day at Glenfield Middle School, that when he became principal of Renaissance Middle School, he created the Black History Month celebration and "community building" (Tr. 8, p. 1168, lines 19-25). This particular event was held in October and was a community building activity, highlighting Montclair's diversity, its role in the Civil Rights Movement, and its unique strategy for desegregating schools (Tr. 8, p. 1169, lines 1-7).

Dr. Putrino used the advisory restorative justice period in the morning to have students discuss questions related to civil rights and diversity in Montclair for the duration of the month (Tr. 8, p. 1170, lines 2-9). Putrino invited 20 or so prominent people from the town, parents, grandparents, teachers, lawyers, actors, board president, NAACP representatives, etc. to come and speak to students regarding civil rights (Tr. 8, p. 1170, lines 10-22).

Dr. Putrino sent out a newsletter following the murder of George Floyd as an all-inclusive message to unify the school community and to make sure the community knew where the school stood on this issue (Tr. 8, p. 1176, line 16 through p. 1177, line 5).

Dr. Putrino implemented the same program at Renaissance that they had at Glenfield, the full school assembly for Martin Luther King, Jr. Day (Tr. 8, p. 1180, lines 13-20). Putrino would begin playing the "I have a Dream" speech over the intercom, and then students would do a silent march to the all-purpose room where they were met with the video of the speech, and then the assembly would start – with bands, guest speakers, and dancers (Tr. 8, p. 1181, lines 4-18).

Dr. Putrino also marched in the annual African American Heritage parade (Tr. 8, p. 1194, line 20 through p. 1195, line 2). Putrino created a weekly bulletin to send out to the staff at Renaissance Middle School (Tr. 8, p. 1219, lines 1-3). He wrote a poignant piece about the murder of George Floyd to punctuate the tragedy (Tr. 8, p. 1219, lines 12-20).

Finally, Dr. Putrino testified about the MPA caravan to highlight the community's feelings about the murder of George Floyd and against police brutality (Tr. 8, p. 1221, lines 7-16). The caravan was organized by Putrino and Gayl Shepard (former MPA president and restorative justice leader in the District) (Tr. 8, p. 1222, lines 20-24). Putrino also had the students make signs regarding how they were feeling in the aftermath of George Floyd to hang on the fence outside of the school (Tr. 8, p. 1222, lines 1-13).

Rodney Jackson

Mr. Jackson testified that he worked with Dr. Putrino at Renaissance for two years (Tr. 3, p. 466, lines 6-9). Both teachers when they worked together (Tr. 3, p. 466, lines 13-14). As the leader of TURN, Jackson acknowledged that Putrino was very supportive of Black Lives Matter week of action that they did at their school (Tr. 3, p. 466, lines 20-22, 495, lines 8-10 and p. 503, lines 7-10). Jackson acknowledged that Putrino was a part of their meetings, and that he helped organize the TURN meetings (Tr. 3, p. 466, line 23 through p. 467, line 1). Under Dr. Putrino,

Jackson received teacher of the year (Tr. 3, p. age 493, line 23 through p. 494, line 1 to 495, lines 8-10). He said he "believed" staff voted on it (Tr. 3, p. 494, lines 3-4).

When Dr. Putrino was principal, Jackson did not experience any issue or incident in which Putrino was not inclusive (Tr. 3, p. 502, lines 10-18). Putrino consistently tried to support racial justice and promote diversity and respect for diversity (Tr. 3, p. 502, lines 19-25). When Jackson was asked if Putrino implemented restorative justice at Renaissance, Jackson responded that he did not know – stating: "Did Dr. Putrino go to the District and say we want Renaissance to be a restorative justice school, I don't know if he did that" (Tr. 3, p. 507, lines 22-25). He acknowledged, however, "Renaissance is a restorative justice school and Putrino was the principal of it" (Tr. 3, p. 507, line 25 through p. 108, line 1). Lastly, Putrino and he together attended an MLK breakfast, a Saint Mark's breakfast, and an African American Parade (Tr. 4, p. 666, line 16 through p. 667, line 1).

Javon Pleasant

Javon Pleasant was asked to describe the impact Dr. Putrino had on him. Pleasant testified:

> He was excellent. I mean, I probably speak for the majority of the students who were in that eighth grade class, that graduating class. But, number one, he made science fun. He made the classroom feel safe. He made us feel like he was interested, genuinely and sincerely interested in our education and making sure that we're not only good people, but we're good students. He was my homeroom teacher, right, so we switched classes. But there was always this feeling when am I going to get back into Joe's class, right. It was fun to be there. It was just a, just a really great experience. And the impact he had on me, you know, obviously transcended into our relationship that we had beyond graduating from his class (Tr. 7, p. 1007, line 12 through p. 1008, line 4).

Mr. Pleasant testified that, "It felt safe to have conversations with him and to open up to him during that time" (Tr. 7, p. 1008, lines 23-25). Pleasant described his contact with Dr. Putrino during high school as follows:

> It was one of those things where he was just more or less checking in, how is the workload, you can do it. And that type of, you know, mentorship, you know. Because I was struggling, you know, coming from, I thought I was the top of the class in PS 41 and then went to a school that was way more rigorous and tough and way more demanding. So the times he would check in, it was more of how is school going, let me know if you need help with this, let me know if you need help with this, are you entering a science project this year? I've got some really cool ideas for you. It was always that type of relationship.
>
> You know, he knew the things that were kind of tough going on at home. So conversations would include how is mom, how are things at home. You know, just call me if you need someone to talk to. That type of thing (Tr. 7, p. 1038, line 7 through p. 1039, line 1).

He testified that having someone reach out to you through those high school years made him feel safe (Tr. 7, p. 1039, lines 18-22).

Mr. Pleasant testified that, after high school, he continued to have a relationship with Dr. Putrino, including attending barbecues at his house, meeting up to talk and have coffee, spending time with the Putrino family, e.g., attending Christmas parties and other small random events (Tr. 7, p. 1010, lines 14-22). Pleasant described Putrino as "a mentor" (Tr. 7, p. 1010, lines 22-23).

In fact, Mr. Pleasant had resided at the Putrino household in early 2006 because he was going through "personal stuff at home" and dealing with financial troubles (Tr. 7, p. 1010, line 25 through p. 1011, line 9). Pleasant had dropped out of school because he needed to work full time. He reached out to Putrino (Tr. 7, p. 1011, lines 14-19):

> And, you know, both him and his wife were just on the phone together on speaker. And I was just kind of explaining what was going on at home. Long story short, you know, at the end of the conversation, it wasn't my intentions, but Joe offered for me to come stay at his home for a short amount of time just to kind of get away from what I was going through and kind of get back on track, what I aspired to do from an academic standpoint (Tr. 7, p. 1011, line 22 through p. 1012, line 7).

Mr. Pleasant testified that he moved in with Dr. Putrino and readmitted himself back into Montclair State University (Tr. 7, p. 1012, lines 9-22). He stayed with the Putrinos for seven or

eight months that year in 2006 (Tr. 7, p. 1012, line 25 through p. 1013, line 1). After that, with Ms. Putrino expecting, Pleasant, on his own initiative, moved into an apartment (Tr. 7, p. 1013, lines 2-5).

On cross-examination, Mr. Pleasant testified that he had his own bedroom in the Putrino's house, and that Dr. Putrino's in-laws also lived in an apartment in the basement (Tr. 7, p. 1047, lines 10-23). He never paid rent or paid for food, but he tried to not take advantage of the situation despite them offering to buy groceries he preferred, etc. (Tr. 7, p. 1048, line 6 through p. 1049, line 6). He spent most nights at the Putrino's, but sometimes stayed at his mother's one night a week to be close to work/his girlfriend or for family gatherings (Tr. 7, p. 1049, line 8 through p. 1050, line 3).

Finally, Mr. Pleasant testified that the small amount of time he was able to stay with Dr. Putrino was "huge" because it allowed him to re-enroll in school. Otherwise, he may not have returned to school and graduated, and he may not have had the profession that he has now (Tr. 7, p. 1013, line 16 through p. 1014, line 11). Pleasant insisted that Putrino never exhibited any bias (Tr. 7, p. 1014, lines 12-14).

Shashana Smiley

Shashana Smiley knew Dr. Putrino prior to working at Renaissance. Putrino was her sixth grade science teacher when she was a student at Renaissance Middle School (Tr. 7, p. 929, lines 12-18). Smiley stayed in touch with Putrino after being his student (Tr. 7, p. 929, lines 19-21). She had a mentor-mentee relationship with him (Tr. 7, p. 929, lines 22-25).

On cross-examination, Ms. Smiley testified that after she was Dr. Putrino's student, she maintained contact with him via email (Tr. 7, p. 961, lines 4-21). She testified that she would visit Putrino during her lunch period when she was in 7th and 8th grade. Smiley explained that Putrino

saw that she was struggling with her home life and that she was able to honestly confide in him (Tr. 7, p. 963, lines 5-24). Smiley was asked about how often she stopped by his classroom. She testified that it was about three times per week in 7th grade and maybe one time per week in 8th grade (Tr. 7, p. 964, lines 1-20). In 8th grade Smiley would email Putrino if she was having a bad morning and that he would respond and offer words of wisdom (Tr. 7, p. 965, lines 3-7).

On cross-examination, Ms. Smiley was asked about how often she visited Dr. Putrino when she was in high school and why. Smiley responded:

> But the reason for my visits to Dr. Putrino was still for me to be able to still have a trusted adult in my life that was in the education system, that I could still talk to, that would offer me advice, that I could depend on.
>
> And I understand that you are asking these questions to test my credibility. But I will say this. I said it to Dr. Putrino more than once. If I didn't have a strong moral compass in my life, and that would be Dr. Putrino, there are so many times where I would be stepping off the wrong path, and he was there to guide me back on to say maybe that's not the best idea. Maybe you don't want to do that. Think about other options, think about your future. And so many educators now don't take the time to do that with their students (Tr. 7, p. 970, lines 6-23).

Ms. Smiley maintained contact with Dr. Putrino after she graduated from Essex County College (Tr. 7, p. 930, lines 7-9). Putrino is now the godfather of Smiley's first child, her son (Tr. 7, p. 931, lines 10-15). She testified that she asked Putrino to be her son's godfather because "he has a strong moral compass, and when I was a student at Renaissance, I was going through a lot of things. And he was the only staff member who took the time to notice what I was going through. I felt safe and protected. And ultimately, I wanted the same for my children" (Tr. 7, p. 931, lines 17-23).

On cross-examination, Ms. Smiley clarified that Dr. Putrino is actually the godfather of both her son and her daughter (Tr. 7, p. 974, lines 7-9).

She stated:

Q: So when was the next time after you graduate that you had contact with Dr. Putrino?

A: When I was pregnant with my son. So 2015.

Q: So how did that communication come about, did you reach out to him, did he reach out to you?

A: I reached out to him and I let him know that I was expecting with my then fiancé and now husband. And I told him, I had a very heart-to-heart conversation with him, a very in-depth conversation with him.

And I told him that I appreciated his guidance as a student. I appreciated his guidance in my life at that point. And what I wanted for my child was someone who would make them feel safe, create a safe space, a judgment-free zone, just as he had created for me. And I asked him if he would be willing to be my son's godfather. And he said yes.

I then asked him when I was pregnant with my daughter in 2017, if he would be my daughter's godfather. And he said yes.

And at that point, I was married and our families had communicated with each other (Tr. 7, p. 973, line 6 through p. 974, line 6).

Lastly, Ms. Smiley testified that Dr. Putrino never exhibited any bias (Tr. 7, p. 937, lines 4-10).

Ibn Shakoor

Ibn Shakoor testified that Dr. Putrino was his eighth grade science teacher in 1999-2000 (Tr. 7, p. 1071, lines 5-6). He credited Putrino as a teacher and a person:

We just connected with him. Well, speaking for myself, I connected with him. He was just like a genuine person. He used to stay after school, offer extra time. And we just kind of, like, were in sync.

So from there, after eighth grade, throughout my entire, not just my academic career, but even developing as a young man, we just always stayed in contact (Tr. 7, p. 1071, lines 6-15).

Mr. Shakoor testified that their contact was mutual (Tr. 7, p. 1071, lines 18-19). He stated that he was having aspirations to be an educator and being creative and that Dr. Putrino was both

of those things. Thus, Putrino was a valuable resource and a go-to person for Shakoor (Tr. 7, p. 1071, line 25 through p. 1072, line 5). Shakoor maintained contact with Putrino through going out to eat, social media, talking over the phone, and also a professional connection (Tr. 7, p. 1072, lines 14-18).

On cross-examination, Mr. Shakoor testified that he has had a relationship with Dr. Putrino for 20 years and that there were stretches of time where they would communicate and see each other more often, and then times when he didn't see him as much (Tr. 7, p. 1089, line 14 through p. 1090, line 1). That his contact would fluctuate since he was 13 or 14 years old (Tr. 7, p. 1090, lines 1-2). Between 2005 and 2020, Shakoor estimated that he saw Putrino maybe three to five times (Tr. 7, p. 1097, line 18 through p. 1098, line 1).

Mr. Shakoor testified that Dr. Putrino had brought him in as the keynote speaker for Women's Month or Black History Month to speak on culturally relevant content with positive messages (Tr. 7, p. 1072, lines 19-24 through p. 1073, lines 2-8).

Finally, Mr. Shakoor also testified that Dr. Putrino is his mentor for his doctorate (Tr. 7, p. 1073, lines 21-25).

Susan Weintraub

Susan Weintraub offered the following:

> Q: How would you, based on your observations, how would you describe Dr. Putrino's approach towards inclusivity? And by inclusivity, I mean taking into account the diversity of the student population and the parent population in the schools in which he was assigned?
>
> A: Well, I believe that Joe envisioned leadership in the PTA and at the school as needing to be representative of the population of the school. And when he had the opportunity to support in their promotions to assistant principalships, he absolutely, I feel, brought along women of color, because he honestly believes that you've got to have a seat at the table in order to even the playing field.

> And I believe that Dr. Putrino actively supported Sam Anglin and Erika Pierce, because he felt it was important to promote women of color who were very capable.
>
> And so I feel like Dr. Putrino's mindset about inclusivity is reflected in many ways, in inviting and promoting people to join the PTA of different backgrounds, in taking into account every student at his schools, and also promoted and supported minorities advancement in the school District (Tr. 7, p. 997, line 2 through p. 998, line 4).

Finally, on cross-examination, Ms. Weintraub acknowledged that her testimony was based on the time she was the president of Glenfield PTA (2011-2013) (Tr. 7, p. 998, line 25 through p. 999, line 6).

Beth Calamia Scheckel

Ms. Scheckel had been President of the PTA at Renaissance when Dr. Putrino last served as principal (Tr. 7, p. 1106, lines 9-13). She testified that Renaissance had children of different religions, races, socioeconomic status, and that they all felt like they were embraced as part of the Renaissance community (Tr. 7, p. 1115, lines 7-16). She said that Putrino "wanted to level the playing field for all students. Regardless of their heritage or their economic status or their level of intellect, he embraced all students" (Tr. 7, p. 1114, lines 15-24). As part of his effort to level the playing field, Ms. Scheckel testified that Putrino was able to secure a "Chromebook" for every student. . "And that is important in the bigger scheme of things, because there are some families in Montclair where the only tech they have at home might be like a mom's smart phone. And by having a Chromebook to take home, that allows students to have a more equitable foundation for technology" (Tr. 7, p. 1115, lines 24-24 through p., 1116, lines 1-9).

Ms. Scheckel also testified that what made Renaissance unique was that they implemented a restorative justice program and that was a big part of Renaissance's identity and what the PTA focused on also (Tr. 7, p. 1112, lines 6-16).

Restorative justice is a system that makes – that builds up the community. And then it's a way to build up the feeling of community, so then when there's some sort of transgression, there's already something to restore.

And it focuses on the obligation of the transgressor to make things right. And it also emphasizes the engagement of all of the people involved, teachers, staff, whatever community there is, including the students. It's a way to think of disciplining students in a different kind of way so that there is not an emphasis on, say, in school suspension, but rather a way to use discipline in the ancient way of what discipline means, which means to teach.

I can say that coming as a Latin teacher, discipline comes from the idea of being a student and being a teacher.

And in Montclair, you know, there are, like other Districts, there are times when it seems like the students who are being disciplined maybe were students of color or minority students. Restorative justice, to me, gives the population of the school a more level playing field and it emphasizes helping students rise up rather than pushing them down with a negative kind of discipline (Tr. 7, p. 1113, line 4 through p. 1114, line 7).

Although not directly related to the subject of race, one observation by former Superintendent Kendra Johnson stands out as to Dr. Putrino's acumen as a leader of Renaissance Middle School:

Date/Time 11/19/2018 7:45:00 AM

Oral Feedback Date 10/20/2019 10:00:00 AM

Focus Domain(s) of Focus: A. Diagnosis and Planning, B. Priority Management and Communication, C. Curriculum and Data, E. Discipline and Parent Involvement

Feedback

Dr. Putrino was masterful in organizing a redesign of Renaissance Middle School. He presented the proposed redesign at the November 19, 2018 Board Meeting (see the attached artifact). In particular, Dr. Putrino demonstrated the ability to create buy-in from a textured staff, a fractured parent group and a unique student community. He focused on rethinking the curriculum, presentation of physical school environment while also calming tensions with adult stakeholder groups. In one year, he was able to change a school

community around. This evaluator acknowledges and honors his talent and commitment in this regard.

In light of the foregoing, I find that a consideration of Dr. Putrino's prior work record and off duty endeavors are relevant factors of mitigation in relation to the penalty to be imposed in this matter.

Lastly, just cause entails the even enforcement of work rules, i.e., treating like offenses proportionately. This precept of just cause is also known as the prohibition against "disparate treatment." Where disparate treatment is demonstrable, arbitrators have the authority, if not the duty under just cause, to modify a disciplinary penalty. Disparate treatment is an affirmative defense. State of Ohio, 99 LA 1169, 1173 (Rivera, 1992); Shell Pipe Line Corp., 97 LA 957, 961 (Baroni, 1991). Thus, "[i]n order to prove disparate treatment, a union (or employee) must show (1) that he or she was treated differently than others and (2) that the circumstances surrounding his/her offense were substantially like those of individuals who received more moderate penalties. Genie Co., 97 LA 542, 549 (Dworkin, 1991). Where the union does prove that rules and regulations have not been consistently applied and enforced in a nondiscriminatory manner, arbitrators will refuse to sustain a discharge or will reduce a disciplinary penalty. Gemala Trailer Corp., 108 LA 565 (Nicholas, Jr., 1997); Schuller Int'l, 107 LA 1109 (Hockenberry, 1996); Mead Chilpaco Mill, 106 LA 1066 (Feldman, 1996); and, Geauga County, 106 LA 280 (DiLeone, 1996).

As stated by Arbitrator George Nicolau in Northwest Airlines, 89 LA 943, 953, different treatment is not necessarily disparate treatment; arbitrators have long held that circumstances must be considered and that a wide range of factors – length of service, prior work record, degree of culpability – can properly be taken into account; indeed, if those factors are not taken into account and "equal" treatment is imposed, that in itself might be disparate. See, e.g., Lockheed Martin Missiles & Space, 108 LA 482 (Gentile, 1997) (the instigator could be punished more harshly with

discharge, even though other employees received on warnings); Ramsey County, Minn., Sheriff's Dep't, 100 LA 208, 212 (Gallagher, 1992) (3-day suspension proper for deputy involved in automobile accident when penalty is assessed based on degree of fault); and Chanute Mfg. Co., 99 LA 20, 22 (Levy, 1992); S.B. Thomas, 92 LA 1055, 1057-58 (Chandler, 1989) (prohibition against disparate treatment only requires like treatment under like circumstances; these circumstances include nature of offense, degree of fault, and mitigating or aggravating circumstances); Fry's Food Stores of Ariz., 99 LA 1161, 1168 (Hogler, 1992)(discharge for sexual harassment upheld even though other employees charged with sexual harassment were only suspended or demoted); Southern Ind. Gas & Elec. Co., 90 LA 1311, 1314 (Dilts, 1988) (finding different penalties for same offense was justified because employees had different disciplinary records).

In the present matter, I am satisfied that Respondent has more than sufficiently demonstrated that he was treated in a disparate manner in relation to Assistant Vice Principal, Reginald Clark. While Dr. Putrino was out on paid leave, Clark, a Black assistant principal at Montclair High School, sent out a district-wide eblast celebrating the life of Meir Kahane for Jewish Heritage Month. Kahane is a documented racist and known terrorist. As may be expected, this action was met with outrage from rabbis and other members of the Jewish community. An ensuing newspaper article reported Clark's offense:

> Newspaper article entitled "Montclair Schools Deeply Regret Honoring Ultra-Nationalist Rabbi Meir Kahane" dated May 11, 2021, in which Meir Kahane was described as a "racist, violent terrorist." Kahane, who was honored as a part of Jewish American Heritage Month, founded a far right terrorist group that has been acknowledged by the FBI as such since 2001 as is designated as a hate group by Southern Poverty Law Center. The correspondence sent honoring Kahane noted that his group's purpose was to combat antisemitism; however, his group orchestrated countless terrorist attacks in the U.S. and abroad, and has engaged in intense harassment of foreign diplomats, Muslims, Jewish scholars and community leaders, and officials. In response to public outcry for honoring Kahane, the school issued "letters of correction." ***Congregation Shomrei Emunah Rabbi David***

> ***Greenstein noted that the choice to honor Kahane was "atrocious." Associate Rabbi and Director of Congregational Learning at Montclair synagogue Bnai Keshet Ariann Weitzman said she was "flabbergasted" when a congregant sent her the announcement email honoring Kahane because he's a "terrorist," Weitzman said. "To honor a racist, violent terrorist as a symbol of Jewish pride is confused to say the least."***

Dr. Ponds used tempered language when questioned about the incident. For example, he acknowledged that he did receive some calls ***"about the situation at the high school"*** (Tr. 1, p. 202, lines 9-12). Ponds testified that the rabbi he spoke with was upset and wanted to have a meeting about the situation (Tr. 1, p. 202, line 25 through p. 203, line 6). When asked if Ponds believed Clark's offense to be stirring the pot of antisemitism, Ponds responded that ***"anything that perpetuates a stereotype is bad"*** (Tr. 1, p. 203, lines 22-25). However, in my opinion, Ponds' answer was non-responsive to the question. Clark did not perpetuate a stereotype. He honored a known terrorist. Unlike the Pray video, there is no one who could reasonably express a reaction other than outrage to the Kahane publication.

Dr. Ponds also referred to Clark as "a young man", rationalizing that Clark may have pulled up information on Kahane from "Wikipedia" and accepted what was reported without exercising due diligence (Tr. 2, p. 331, lines 12-16). Not only is Clark's age irrelevant (he is an assistant principal) but how Clark missed even Wikipedia (or any other website) information about Kahane is perplexing. Indeed, this prominent paragraph about Kahane's life, taken from a conspicuously displayed Wikipedia page, reads:

> In 1968, Kahane was one of the co-founders of the JDL in the United States. In 1971, he co-founded Kach ("Thus"), a new political party in Israel. ***That same year, he was convicted in New York for conspiracy to manufacture explosives and received a suspended sentence of five years.***[5] ***In Israel, he was convicted for plotting to blow up the Libyan embassy in Brussels in revenge for the massacre of 11 Israeli athletes at the 1972 Summer Olympics in Munich, receiving a suspended sentence and probation.*** In 1984, he became a member of the Knesset, when Kach gained its only-ever seat in parliamentary elections. Kahane was boycotted across the aisles of the

> Knesset, and would often speak in front of an empty chamber. ***The Israel Broadcasting Authority similarly avoided coverage of his activities. The Central Elections Committee tried to ban Kahane from running in the 1984 elections, but this ban was overturned by the Supreme Court because there was no law to support it. In response, the Knesset approved an ad hoc law that allowed for the banning of parties that are "racist"*** or "undemocratic". In 1988, despite polls showing Kach gaining popularity due in part to the ongoing First Intifada, Kach was banned from entering that year's elections. https://en.wikipedia.org/wiki/Meir_Kahane

Similarly, a simple search Google search of "Meir Kahane" leads to several conspicuous drop down headings – one of which is, "Meir Kahane Assassin."

In conjunction with the Kahane incident, Dr. Ponds was questioned about a separate article reporting swastikas and graffiti in the school in 2019-20 (Tr. 1, p. 207, lines 7-12). Ponds admitted to being aware of one of the situations (Tr. 1, p. 207, lines 13-14). When questioned about whether naming Meir Kahane as the person to celebrate Jewish heritage month potentially exacerbated the problem, Dr. Ponds testified that he believed celebrating someone who does harm is wrong and could cause harm if you do not act proactively and address it quickly (Tr. 1, p. 207, lines 15-23).[13]

In addressing Assistant Principal Clark's misconduct, Dr. Ponds issued a District-wide email apology for honoring Kahane. The apology noted that it might be very painful and that "we deeply regret this eblast." Ponds noted that he was truly sorry for offending our families, staff, and community". Unlike Dr. Putrino, however, Assistant Principal Clark was given a forum to apologize and take full responsibility for honoring Kahane. In effect, Clark was given the benefit of the doubt where Putrino was not. And while Clark's apology was accepted by the administration, Putrino's apology was deemed insincere (based on Mr. Cooper's circular reasoning, which could have been equally applied to Clark i.e., if Clark was sincerely sorry for the incident it never would have happened in the first place).

[13] However, the harm was already caused by the District-wide publication of Kahane as honoree of Jewish Heritage Month.

In addition, Dr. Ponds confirmed that Assistant Principal Clark was not tenured at the time this incident took place nor is he currently tenured. Nonetheless, his contract was renewed (Tr. 1, p. 208, lines 2-20). It is believed that, in contrast to Dr. Putrino's dismissal action, Clark received a mere two to three day suspension and had to apology to the Jewish Community, in general, and to handle personally any further calls.

Dr. Ponds attempted to distinguish Assistant Principal Clark from Dr. Putrino by stating that Putrino "thought about it" and Clark just didn't do enough research (Tr. 1, p. 208, line 25 through p. 209, line 6). However, as stated previously, even cursory research would reveal that Meir Kahane was a known terrorist. Moreover, Clark did not testify and, hence, Petitioner's attempt to explain Clark's mindset was ultimately unavailing. Also, since Petitioner did not interview Putrino or conduct any meaningful investigation, Ponds was not in a position to judge how much time Putrino spent on vetting the video versus what Clark actually knew about Kahane.

Indeed, Dr. Putrino obtained positive feedback from members of the Black community prior to showing the video on September 2, 2020. Ms. White (a Black second grade teacher) provided the video to Putrino's sister-in-law who, in turn, provided it to him. Putrino also knew that the Pray video had been aired on the Today show, that it went viral, and that it was also featured in commercials on YouTube and Google. Thus, if anything, Putrino exercised far more due diligence than Clark without any negative feedback. Conversely, there appears to be no convincing reason why Clark did not discover the true identity of Meir Kahane prior to publicly celebrating Kahane for Jewish Heritage month.

In addition, I did not find persuasive Mr. Cooper's attempt to explain the minor discipline which Clark received. Cooper testified that he was not instructed to investigate Clark with regard to the article about Kahane. He also testified that he did not have any conversations with Dr. Ponds

regarding Clark's apology (Tr. 5, p. 762, lines 1-18). Cooper was aware that people in the community were upset to have Kahane featured in an article, but that he was not asked to do anything about it (Tr. 5, p. 762, line 23 through p. 763, line 6). Rather, Cooper testified that the Kahane issue was addressed "at the building level"; and, in contrast, he was instructed by Ponds to be involved in the convocation video and Dr. Putrino (Tr. 5, p. 763, lines 7-25).

Plainly, however, Dr. Ponds and/or Mr. Cooper – if they were so inclined – could have addressed Assistant Principal Clark directly, especially given the magnitude of the offense and the involvement of rabbis speaking on behalf of the Jewish community who were obviously offended. Indeed, it is disingenuous, to say the least, that Dr. Ponds was somehow bound by the judgment of a building principal on a matter of presumably of the same import as Dr. Putrino's alleged offense. In fact, the undersigned asked Mr. Cooper to assume that Putrino was an assistant principal at the time he showed the Pray video. The question posed was whether central office would have reviewed or reconsidered a letter of reprimand issued by Putrino's hypothetical building principal in response to the Pray video? Cooper responded that it could have (Tr. 5, p. 816, lines 18-24).

Additionally, in contrast to Dr. Putrino, who is a twenty-year educator with an unblemished record, Assistant Principal Clark was not tenured. Notwithstanding that Clark offended the Jewish community, Clark's contract was renewed. In contrast, Putrino was placed on administrative leave three hours after the convocation, public statements of a conclusory and reputationally damaging nature were made, and Petitioner's dismissal was etched in stone.

In the end, I am satisfied that Petitioner's treatment of Dr. Putrino was noticeably disparate in relation to its treatment of Assistant Principal Clark. In my opinion, Clark's offense should have been regarded by Petitioner as equally as serious. As noted previously, unlike the Pray video, there is no other school of thought over the offensiveness of the Kahane bulletin published by

Clark. That Putrino is a twenty-year educator and Clark a non-tenured assistant principal should have resulted in more, not less, favorable treatment of Putrino. That Clark's apology was enough for Dr. Ponds and Mr. Cooper, but Putrino's was viewed as insincere, is likewise unjustifiable. Ultimately, unless we are to conclude that an educator has more leeway when offending members of the Jewish community as compared to offending a portion of the Black community, I see no basis under just cause to justify Petitioner's widely disparate treatment of Dr. Putrino.

Finally, as to Petitioner's concern about reintegrating Dr. Putrino into the school district in light of the fallout from the September 2, 2020 video, i.e., the impact of returning Putrino to the school district, a few comments are in order.

First, the very task of reintegration would not have been nearly as difficult had Petitioner appropriately handled this matter in a private, rather than in a public way, i.e., had Petitioner avoided making contemporaneous public statements condemning the showing of the video as racist and promising to take quick action – which any reasonable person would construe as action against its presenter, Dr. Putrino. In fact, if Petitioner conducted a full investigation of Dr. Putrino's prior commendable record in the area of diversity and inclusion, and taken into account the opposite viewpoint to the Video, it had an opportunity to impose a lesser penalty than dismissal which could have allowed everyone concerned to move on. Instead, by analogy, it pulled the plug almost immediately.

Second, out of 1100+ viewers of the convocation video and after 13 months to prepare its case, Petitioner ultimately produced only a few witnesses and a few more emails than that objecting to the Pray video as racially offensive. The supporting statement by the interim MPA President at the open public Board meeting served more as a statement of support for a new superintendent than it did as a critique of the Pray video or Putrino's actions. In contrast, it is clear from this

record that Dr. Putrino enjoyed the support of staff and parents both prior to and after September 2, 2020. In fact, Dr. Putrino did take immediate action to ameliorate any hurt caused to his staff. Thus, given the foregoing factors, and with the passage of time, the size of the challenge may not be as daunting as Petitioner apparently believes.

Third, Petitioner prides itself on resolving interpersonal and social disputes via "restorative justice." Ms. Beth Calamia Scheckel testified that what made Renaissance unique was that they implemented a restorative justice program and that was a big part of Renaissance's identity and what the PTA focused on also (Tr. 7, p. 1112, lines 6-16). She described "restorative justice" as follows:

> Restorative justice is a system that makes – that builds up the community. And then it's a way to build up the feeling of community, so then when there's some sort of transgression, there's already something to restore.
>
> And it focuses on the obligation of the transgressor to make things right. And it also emphasizes the engagement of all of the people involved, teachers, staff, whatever community there is, including the students. It's a way to think of disciplining students in a different kind of way so that there is not an emphasis on, say, in school suspension, but rather a way to use discipline in the ancient way of what discipline means, which means to teach.
>
> I can say that coming as a Latin teacher, discipline comes from the idea of being a student and being a teacher.
>
> And in Montclair, you know, there are, like other Districts, there are times when it seems like the students who are being disciplined maybe were students of color or minority students. Restorative justice, to me, gives the population of the school a more level playing field and it emphasizes helping students rise up rather than pushing them down with a negative kind of discipline (Tr. 7, p. 1113, line 4 through p. 1114, line 7).

In fact, Dr. Putrino conducted a restorative justice session immediately after the acrimony unfolded and before being placed on leave. Dr. Putrino testified that 2 out of his 30 staff members expressed to him that they were offended. He directly apologized to them. In Exhibit I, an email

from Rodney Jackson to Dr. Ponds, Jackson expresses that he was pleased that the video was stopped. However, Jackson's email goes on to state that he ***wished there was an opportunity to discuss why it was racist and noted that many of us don't understand what the video was reinforcing.*** **Jackson conducted a restorative justice meeting the next day. He received mixed feedback as to who was offended and who was not offended.** Like Assistant Principal Clark, Dr. Putrino should be afforded an equal opportunity to apologize to those who still may harbor resentment which, in turn, would lead to a more productive reintegration.

In light of the foregoing, while I sustain the convocation video tenure charge, in part (to the extent set forth hereinabove), I find that the penalty of dismissal is not consistent with just cause based on (1) the dismissal of two of the core allegations; (2) Dr. Putrino's prior long-term unblemished employment history, which includes numerous anecdotes of him fostering inclusion and diversity, both within and outside of his place of employment; and (3) the unjustifiable variation in Petitioner's treatment of Dr. Putrino versus Assistant Principal Clark. Accordingly, I will modify the disciplinary penalty to the disciplinary penalty implemented for Assistant Principal Clark. Petitioner shall immediately offer reinstatement to Dr. Putrino as Principal of Renaissance School. To the extent that Putrino was suspended without pay for more than the Clark suspension, Petitioner is directed to provide corresponding back pay and all applicable benefits of employment. To the extent that Putrino has suffered no loss in pay, then he must be returned to his position at the conclusion of the Clark suspension without pay.

Lastly, I will retain jurisdiction to the extent that the parties dispute the precise penalty which was issued to Assistant Principal Clark.

Part II

Dismissal of Tenure Charges Pars. 20-23 (The 2020-2021 Schedule)

The second part of the tenure charges pertain to the 2020-2021 school schedule allegedly created by Dr. Putrino:

> 20. In or about February and March 2021, Petitioner conducted an audit of the teachers' schedules for the Renaissance Middle School. A detailed review of the teachers' schedules at the Renaissance Middle School allegedly revealed that no teacher is teaching the contractual allotted 1250 minutes per week. Moreover, it is alleged that there are numerous teachers teaching less than 1000 minutes per week. As a result, the Renaissance Middle School was allegedly overstaffed to the approximate cost of $767,447.00 to the District. This allegedly significant financial loss to the District did not result in more student contact time and/or smaller classes (Ex. S).
>
> 21. Pursuant to the 2018-2021 Collective Bargaining Agreement between the Montclair Board of Education and the Montclair Education Association, Article 8.1(i): "Pupil contact time is defined as the number of scheduled class minutes to which a teacher is assigned classroom instruction and/or supervisory duties. It specifically excludes homeroom and the ten (10) minutes before and twenty (20) minutes after school. The pupil contact time for classroom teachers assigned to the high school and the middle school shall not exceed 1250 minutes per week and 1500 minutes per week at the elementary school, average over the school year." (Ex. Q).
>
> 22. As Principal of the Renaissance Middle School, it is alleged that Respondent was responsible for preparing the teachers' schedules (Ex. R).
>
> 23. Thus, the alleged significant financial loss to the District, to the detriment of the students, by teachers allegedly being overstaffed, occurred during Respondent's appointment as Principal to the Renaissance Middle School.

In support of the tenure charges, Petitioner relied on Exhibit S, which sets forth a summary created by Damen Cooper based upon a schedule(s) he received from one of several potential sources (Cooper's testimony vacillated), i.e., Dr. Ponds, Major Jennings or "from the computer:"

Teacher Number	Minutes Taught	Missing Minutes	FTE %	Current Salary	Salary based on minutes worked per week	District Loss

Teacher 1	1017	233	81.36%	$84,185	$68,492.92	$15,692
Teacher 2	617	623	49.36%	$108,825	$ 53,716.02	$55,109
Teacher 3	822	428	65.76%	$78,093	$ 51,353.96	$26,739
Teacher 4	471	779	37.68%	$67,605	$ 25,473.56	$42,131
Teacher 5	978	272	78.24%	$103,368	$ 80,875.12	$22,493
Teacher 6	900	350	72.00%	$99,968	$ 71,976.96	$27,991
Teacher 7	900	350	72.00%	$99,968	$ 71,976.96	$27,991
Teacher 8	900	350	72.00%	$99,968	$ 71,976.96	$27,991
Teacher 9	864	386	69.12%	$68,585	$ 47,405.95	$21,179
Teacher 10	1020	230	81.60%	$111,740	$ 91,179.84	$20,560
Teacher 11	1059	191	84.72%	$111,250	$ 94,251.00	$16,999
Teacher 12	1020	230	81.60%	$111,740	$ 91,179.84	$20,560
Teacher 13	570	680	45.60%	$67,605	$ 30,827.88	$36,777
Teacher 14	960	290	76.80%	$67,930	$ 52,170.24	$15,760
Teacher 15	900	350	72.00%	$58,920	$ 42,422.40	$16,498
Teacher 16	648	602	51.84%	$90,741	$ 47,040.13	$43,701
Teacher 17	1020	230	81.60%	$64,670	$ 52,770.72	$11,899
Teacher 18	1020	230	81.60%	$78,857	$ 64,347.31	$14,510
Teacher 19	1020	230	81.60%	$106,023	$ 86,514.77	$19,508
Teacher 20	474	776	37.92%	$99,113	$ 37,583.65	$61,529
Teacher 21	1020	230	81.60%	$108,340	$ 88,405.44	$19,935
Teacher 22	1020	230	81.60%	$69,585	$ 56,781.36	$12,804
Teacher 23	1020	230	81.60%	$76,137	$ 62,127.79	$14,009
Teacher 24	996	254	79.68%	$92,617	$ 73,797.23	$18,820
Teacher 25	1074	176	85.92%	$60,870	$ 52,299.50	$8,570
Teacher 26	900	350	72.00%	$80,131	$ 57,694.32	$22,437

Teacher 27	900	350	72.00%	$96,017	$ 69,132.24	$26,885
Teacher 28	900	350	72.00%	$65,310	$ 47,023.20	$18,287
Teacher 29	240	1010	19.20%	$99,113	$ 19,029.70	$80,083
				$2,527,274	$1,759,827	$767,447

It is acknowledged that for each teacher numerically set forth in the color-coded summary chart, Exhibit S houses an attached document which purportedly sets forth the number of classes (basic and elective) taught during the week. For example, the first document following the color-coded summary chart purportedly aligns with Teacher 1 who earns $84,185.00 annually. The summary data alleges that Teacher 1 taught 1017 minutes per week in comparison to the 1250 minutes maximum. Subsequent pages follow in a similar manner for Teachers 2-29.

Pursuant to Dr. Putrino's motion to dismiss, on March 1, 2022, the undersigned issued a decision allowing Petitioner's Tenure Charges to go forward and preserving Putrino's objections:

> In conclusion, I find that Petitioner is entitled to attempt to make out its case against Respondent based on the evidence contained in Exhibit S. By the same token, Respondent is entitled to explore on cross-examination – without the necessity to testify himself – the purported deficiencies in Exhibit S, which both he and his expert have identified:
>
> 1. The data provided by the district in Exhibit S is incomplete. It is unclear what school year this data represents. Furthermore, none of the teachers' schedules indicate the teacher's name and only one indicates the subject area taught. This makes any analysis of district numbers very problematic.
>
> 2. Regarding the content of the district's data, essential information is missing. More specifically, the district analysis does not include assignments of duty periods and other supervisory assignments such as advisory classes, hall duty, student arrival and student dismissal. From the district's teacher contractual language, student supervision counts towards the number of assigned teacher minutes.
>
> 3. Data provided by the district is inaccurate. Schedules for Fridays are different than Monday through Thursday. Periods increase from 39 to 40 minutes on Fridays. Every schedule reviewed by the district did not account for

this difference. In addition, periods that are block periods on Monday through Thursday are 40 minutes and not 39 minutes.

4. When duty periods, advisory assignments and supervision assignments like hall duty and dismissal are included in the analysis, the number of teacher minutes is consistently much closer to the maximum number of 1250 minutes that may be assigned to a teacher in the Montclair School District.

Dr. Putrino testified at length about his formulation of the Renaissance Middle School ("Renaissance") schedule preceding Covid. Putrino was assigned to Renaissance in 2018 with the task of revamping the teacher schedule and improving enrollment (Tr. 8, p. 1239, line 13 through p. 1240, line 5). Renaissance's school day was longer than other schools, which required the schedule to be revamped. The school day went from approximately 8:00 a.m. to 4:00 p.m. (Tr. 8, p. 1242, lines 12-19). Putrino was asked to "collapse" the schedule by an hour so it would be more consistent with the school days at the two other middles schools, Glenfield and Buzz Aldrin (Tr. 8, p. 1243, lines 9-12).

The master schedule that Dr. Putrino had formulated was the "template of each grade's experience in the school day." The master schedule maps out the different courses during the day (Tr. 8, p. 1383, line 25 through p. 1384, line 13). Putrino testified that changing the schedule for a school is a "delicate process" because the "fear of change and all the little things that go along with it" (Tr. 8, p. 1363, lines 13-17). As a result, Putrino formed several committees to get input from all of the stakeholders: a student committee, a teacher committee, a parent committee, and a central office committee.

Dr. Putrino consulted each committee when formulating the schedule for Renaissance. Putrino estimated that he met with each of the committees approximately eight times during September, October, and into November 2018 (Tr. 8, p. 1363, line 20 through p. 1364, line 5). When he met with the individual committees, he let them "air out" their concerns regarding the

new schedule. He incorporated their suggestions to the extent that they fit within the parameters of the new schedule's requirements (Tr. 8, p. 1364, lines 18 through p. 1365, line 4).

Dr. Putrino described the bell schedule as the "map of each period in the school day" (Tr. 8, p. 1366, lines 17-20). For Monday through Thursday each period was 39 minutes, with a 2-minute break between each period (Tr. 8, p. 1367, lines 18-25). Both were to be included in pupil contact time because supervising hall duty is considered a supervisory duty (Tr. 8, p. 1368, lines 11-18). Periods 9 and 10 were for elective courses which were only 30 minutes. For Monday through Thursday, a 3-minute dismissal was allotted for exiting the building which counted towards supervisory time (Tr. 8, p. 1369, lines 1-9). Advisory periods, which were 20 minutes in length Monday through Thursday, also counted towards pupil contact time. Putrino's master schedule established advisory teams for each grade level (6^{th} through 8^{th}) and expressly noted that the homeroom teacher will lead the advisories (unless otherwise agreed upon by the team). In addition to taking attendance, the advisory period was devoted to Montclair's "restorative justice initiative" which was part of the curriculum (Tr. 8, p. 1371, lines 1-10). Putrino described restorative justice as a "practice that is supposed to increase... community by working on strengthening relationships between people so that you are less likely to make a bad choice about a person." It was a practice to help create a "community" which was useful to both students and staff. "The goal is to repair harm and reach consensus" (Tr. 8, p. 1343, lines 22-25; p. 1344, lines 1-13; p. 1345, lines 2-3).

On Fridays, the schedule was markedly different. The advisory periods were 45 minutes to "give room for more thorough discussions in the restorative justice setting... and to allow for assemblies and video presentations or larger lessons" (Tr. 8, p. 1372, lines 2-12). Students would participate in more "hands on stuff". The elective classes were extended to 120 minutes to allow

students to travel outside of school. "For example, a community service class takes place three consecutive periods in a row. Students board a bus and they travel to different locations in town where they donate their time for community service" (Tr. 8, p. 1370, lines 1-11). Finally, on Fridays, dismissal was four minutes instead of three minutes (Tr. 8, p. 1372, lines 13-18).

When Dr. Putrino put together the schedule for Renaissance that was to be implemented in the 2019-2020 school term, he included a full-day schedule, a half-day schedule, and a delayed opening schedule (Ex. R24; Tr. 8, p. 1376, lines 10-20). Every school was required to have these three schedules (Tr. 8, p. 1376, lines 15-16). Putrino followed the same practice while at Glenfield and Northeast elementary schools (Tr. 8, p. 1376, lines 21-25; p. 1377, lines 1-6). Once Putrino had a draft schedule, he sent it to central office. The central office is comprised of the business office and two of the "curriculum heads," who were in charge of determining whether the new schedule contained the "right number of minutes" for the subject areas involved (Tr. 8, p. 1365, lines 5-13). He then gave the proposed schedule to the MEA for its review to make sure that it complied with the contract (Tr. 8, p. 1365, lines 14-19). Putrino noted that the MEA quickly came back with what they saw as a 5-minute discrepancy during the arrival time, which was then adjusted. After that, the schedule was given to then Superintendent Kendra Johnson for her review and approval (Tr. 8, p. 1366, lines 1-2).

Superintendent Johnson, in a Mini Observation dated June 17, 2019, stated as follows:

Administrator Joseph Putrino

Observer Kendra Johnson

Date/Time 6/17/2019 11:00:00 AM

Oral Feedback Date 6/17/2019 1:00:00 PM

Focus Domain(s) of Focus: A. Diagnosis and Planning

Feedback
Dr. Putrino has been a leader in rethinking the program at Renaissance Middle School. Specifically, he has been deliberate establishing a new bell schedule that meets the current needs of the student population. While doing this work, he worked with this evaluator and the former MEA Grievance representative to address contractual challenges. To this end, this evaluator finds Dr. Putrino's approach to be strategic and focused. He is commended for his leadership acumen (Ex. R18).

The Board also approved the schedule. Dr. Putrino added that the Board and superintendent were "incredibly satisfied" with both the presentation and the schedule that he had created (Tr. 8, p. 1393, line 23 through p. 1394, line 3).

As will be discussed, Petitioner, though charging Dr. Putrino with alleged scheduling deficiencies for the 2020-2021 school year actually evaluated the aforementioned 2019-2020 in-person, full school day schedule which was reviewed and approved with special mention by Dr. Kendra Johnson and the Board. The 2019-2020 in-person schedule remained unchanged and in Genesis.

Due to the onset of Covid, as all building administrators were directed, Dr. Putrino created three schedules for the 2020-2021 school year – an in-person schedule (already created), a remote schedule, and a hybrid schedule. The remote schedule was a "condensed" version of the 20219-2020 master schedule having 27 minute periods and Office Hours at the end of the school day (Ex. R30 and 31; Tr. 9, p. 1560, lines 17-22). In formulating the schedules, Dr. Putrino testified that he volunteered to be on two of the three committees, the hybrid and remote committees. Lamenting the lateness of the District's decision to go remote, Putrino supplied his condensed schedule to central office and it was included in the Montclair Reopening Plan on August 21, 2020 (Ex. R31). However, because Dr. Putrino wanted his staff to see the schedule before it was released at 4:00 p.m. to the public, he sent out a staff announcement and attached the remote schedule (Ex. R30).

Dr. Putrino testified that importing teachers and students into the 2020-2021 schedule from Genesis was being handled by Student Advisement Counselor ("SAC") Whitney Gibbs and "the secretarial staff" (which turned out to include "Leigh Ann"). Putrino explained:

> Everyone sort of imports their parts. Joe Pellegrino, who was the central office Genesis Director, he was assisting us since this was a complete rebuild of the schedule. So the schedule was in Genesis. Teachers and courses were in Genesis. Student schedules were being populated at that time (Tr. 9, pp. 1461-1462).

However, Dr. Putrino explained, "We always have a few anomalies, red flags that pop up with electives that have too many kids or not enough kids. And in the first couple of days of school when staff is present, but students are not there, we usually make changes. Sometimes that includes reassigning a teacher to a class or adjusting the class size of a course" (Tr. 9, p. 1463).

As of September 2, 2020, his last day as Principal, Dr. Putrino was aware that the teachers' schedules had been constructed as well as teachers' assignments. He was told that those schedules were in Genesis and ready for the final step of matching students to those classes (Tr. 9, p. 1463, lines 16-24). Putrino acknowledged that looking at a schedule alone does not reveal how many students are in each of the classes. When asked whether he scheduled teachers with zero students, Putrino replied:

> I don't schedule teachers with zero students in classrooms. If they have zero students in their classroom, that anomaly is repaired when it's discovered. Sometimes an elective is unpopular. That elective can be collapsed and that teacher is reassigned. Or if an elective is not populating enough, sometimes we transfer kids in before schedules are released to balance the numbers. That happens across all three middle schools and the high school (Tr. 10, p. 1664).

In connection with Petitioner placing Dr. Putrino on leave, Dr. Ponds assigned Major Jennings as interim principal at Renaissance. Jennings has been an educator employed by the Montclair School District for approximately 30 years. Jennings was an assistant principal at Buzz

Aldrin Middle School. Subsequent to the 2020-2021 school year, Jennings was assigned as principal of Buzz Aldrin.[14]

Mr. Jennings estimated that there are 260 students and 30 staff members at Renaissance. During the summer of 2020, as Jennings confirmed, building administrators were instructed to develop three schedules, an in-person schedule, a remote schedule and a hybrid schedule (Tr. 4, p. 579, lines 21-25). As it turns out, neither the in-person nor hybrid schedule was used. Rather, students and teachers operated on a remote basis from home. It was not until April 2020 that a hybrid schedule, not relevant necessarily to this dispute, was implemented (Tr. 4, p. 581, lines 5-10).

Mr. Jennings acknowledged that the first step was to establish a master schedule, regardless of format, before students and teachers can be imported into the schedule (Tr. 4, p. 581, lines 21-25; p. 582, lines 1-5; p. 584, lines 16-25; and p. 585, lines 15-17). Jennings confirmed that Dr. Putrino had put in place a condensed schedule for remote learning which, in short, is a condensed version of the in-person master schedule. For example, if classes lasted 40 to 45 minutes under the in-person schedule, they were reduced to 27 minutes under the remote schedule (Tr. 4, p. 587, lines 2-9).

Mr. Jennings explained that once the master schedule is established, the building principal is responsible for assuring that teachers have an appropriate number of students in classes as well as a sufficient number of classes to teach in relation to the 1250-minute contractual limitation. Jennings discovered what he perceived to be deficiencies concerning the ratio of teachers to students and the number of classes taught by each teacher. Upon further inquiry, Jennings found out from Whitney Gibbs that the deficiencies detected by Jennings were due to the late arrival of

[14] The record is not clear as to who followed Mr. Jennings as interim principal at Renaissance Middle School in Dr. Putrino's absence.

the 2020-2021 condensed schedule. Ms. Gibbs and (Leigh Ann) specifically informed Jennings, "There's no way we can get this schedule out" (Tr. 4, p. 596, lines 16-24).

In light of the struggles of Ms. Gibbs and Leigh Ann in Dr. Putrino's absence, Counsel for Dr. Putrino asked Mr. Jennings whether he thought of calling Putrino to ask him for clarification or assistance about the implementation of the Renaissance remote schedule. In response, Jennings stated, "No, I was instructed I should not have any conversations with Dr. Putrino" (Tr. 4, p. 60, lines 18-25 to 622).

Mr. Jennings next asked Joseph Pellegrino (who is responsible for the Genesis software program) to run a report, such as, a list of teachers who have less than ten students, less than five students, or who appeared on the schedule but had no students assigned to a class (Id., p. 589, lines 15-22). On direct examination, Jennings was asked whether he had verified the information from Genesis provided to him by Pellegrino. Falling short of an affirmative response, Jennings testified, "I mean, I looked in Genesis, and I'm like why don't teachers have full schedules" (Tr. 4, p. 593, lines 14-18). In consulting with Pellegrino, the two tried to "clean it up, get rid of classes that showed zero students in those classes". As Dr. Putrino testified, such an anomaly had to be caused by a computer glitch in Genesis because he would never schedule a teacher to teach zero students. Nonetheless, after the zero student classes were eliminated, Jennings noticed that some teachers were teaching two or three classes out of a 10-period day, while others were teaching five or six (Tr. 4, p. 591, lines 1-23).

In sum, Mr. Jennings had discovered two distinct deficiencies from the data he obtained from Mr. Pellegrino: (1) some classes had far less students than others and (2) some teachers taught more classes than others. However, it became clear that Jennings did receive from school clerk Debra Aulderman "paper" copies of the projected remote and regular schedule that had been

created by Dr. Putrino (Ex. R30 and R24; Tr. 4, p. 635, lines 10-20). When asked more specifically what the concern was with the schedule, Jennings replied, "Well, you would think that you would be able to combine to make the class a little larger, and to just be more efficient with your schedule" (Tr. 4, p. 598, lines 16-25 through p. 599, lines 1-6). "You would – why would I want to have a teacher teaching three to five students, when potentially I could have 15 students in that class" (Tr. 4, p. 600, lines 1-11).[15]

However, Mr. Jennings was asked what happened to teachers who had classes that had zero students, i.e., specifically if he attempted to reassign them to other teaching duties. Jennings admitted, "There weren't really a lot of other teaching duties" (Tr. 4, p. 601, lines 23-25 to 602, lines 1-2). Jennings added that more operational challenges arose in April of 2021 when the schedule changed over to hybrid – and this was due to an inability to cover for absent teachers and a lack of substitutes because "no one wanted to come in the building" (Id., p. 602, lines 12-18). And while Jennings complained that teachers not having a full schedule were putting in timesheets to cover for absences, either they were entitled to do so or not under the MEA contract.[16]

In the end, teachers were not reassigned due to a lack of other teaching duties (absent the glitch where a teacher was assigned to a class with no students), each teacher had classes to teach, and each student had a full course load under the remote learning schedule. As to the concern that some teachers were teaching more classes than others, Mr. Jennings acknowledged that the MEA did not raise any complaint or file a grievance (this record reveals no such action by the MEA).

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[15] Interestingly, Jennings testified to his inability to fix the schedule based on the same concerns that Ms. Gibbs and Leigh Ann had relayed to him about implementing it correctly in the first place, i.e., "And you know, it's – a schedule is a very time consuming process. So we had to go with the schedule."

[16] Article 8, "Employees' Workload and Related Matters" of the MEA contract, Section 8.1 (a)(i)(b) states: "A full teaching load is considered the equivalent of 5 full classes per day at the high school and middle school level, and the equivalent of 6 full classes at the elementary level. An extra class taught at the middle school or high school in all subject areas will receive 1/5 of the person's FTE salary as additional compensation. . . .

In fact, Jennings was only able to identify one teacher who asked why some teachers were teaching six classes while science and social studies teachers were only teaching five (Note: this teacher did not make reference to a teacher having less than five classes and the MEA contract establishes five classes as a full class load).

On cross-examination, Mr. Jennings admitted that his focus was limited to the information contained in Genesis (as previously discussed). Jennings was then asked questions as to whether any other forms of pupil contact time were contained in Genesis (other than direct class instruction). In short, Jennings testified that lunch duty, advisory performed under the umbrella of homeroom, and hall duty would not show up in Genesis. Conversely, scheduled advisory periods (i.e., office hours as designated on Ex. R30) and in-class support duties would show up in Genesis.

On September 7, 2020 (which was one day prior to the start of the school year) Jennings decided to send the following email:

> **Sent:** Monday, September 7, 2020 5:08:35 PM
> **To:** Jonathan Ponds; Kalisha Morgan; Damen Cooper
> **Subject:** Schedule
>
> Dear Dr. Ponds, Mr. Cooper, Dr. Morgan
>
> I hope you are doing well. Over the past few days, I have been working towards getting Renaissance up and running for the first day of school. Nisha and I have been working on finishing the schedule, along with Whitney and Leigh Ann (from Renaissance). While working on the schedule, we came across some issues that I want you to be aware of. Nisha and I also met with Joe Pellegrino Saturday, who was kind enough to help us get a better understanding of the schedule and discuss possible solutions. Please see the bulleted list below regarding Renaissance's schedule.
>
> - There are 85 sections that have less than 10 students in each class.
> - Of those 85 sections, there are 69 sections that have 5 students or less.
> - Of the 69 sections with 5 or less students, there are 56 sections with two or less

students, and of the 56 sections, there are 24 sections with zero students in them.

- I've instructed the scheduling team to delete as many sections of zero as possible, and to allocate those teachers to other classes. Additionally, I've instructed them to try to balance the schedule as much as possible given the short amount of time.

- There are several staff members who appear to have "holes" in their schedules. (Ex. V).Some students are scheduled for the same teacher and class twice (two different sections), rather than being part of one class that meets on multiple days.

- We are short a Geometry teacher (as you know), but the Geometry section was offered and scheduled for the students.

- We are short a MAP teacher (as you know).

- **We have multiple staff members at Renaissance who are not teaching a full load of classes.**

It is apparent that there are some serious concerns with Renaissance's master schedule. I would like to discuss this further with you, and I believe Joe Pellegrino can also help with this conversation. After discussing with Joe and Nisha this morning, we concluded that we really can't change the master schedule at this point in time. Our schedules go live on Tuesday.

However, this building's master schedule needs to be scrutinized and possible changed entirely so that we are properly allocating our staff, funding, and resources for our students. [emphasis supplied].

Thank you, Major

In a peculiar response to such disconcerting news from Mr. Jennings, Dr. Ponds responded via email at 5:32:53 on the same day:

Major,

Outstanding work!! Let's all get together with your team and support you. Please send Nina times your team is available. I will reschedule whatever I have to be there. I cannot thank you enough!! Have a good night.

Jonathan (Ex. V).

Dr. Ponds then assigned Mr. Cooper to investigate the building schedule discrepancies further. Cooper made it abundantly clear that the scope of his "investigation" pertained only to the underscored portion of Jennings' email, above. Cooper admitted that he did not investigate or follow-up further on any other aspect of the alleged deficiencies with the Renaissance schedule. In fact, the tenure charges which were filed were based on shortfalls in relation to the 1250 minute maximum of pupil contact time, as illustrated by Exhibit S. However, given the attachments to the color-coded summary chart, it is clear that Mr. Cooper was evaluating an in-person (39 and 30-minute block) schedule used during the 2019-2020 school year up until the time of the Covid shut down in March 2020. Conversely, Cooper did not base his analysis on the condensed 27-minute remote schedule created by Dr. Putrino (2020-2021). Since Mr. Jennings had possession of the "paper schedules", it is presumed that either Jennings or Dr. Ponds provided the in-person schedule to Cooper, or Cooper obtained it independently. Cooper admitted that he was not concerned about investigating inequities regarding the number of students per class.

Mr. Cooper began the audit in September 2020, which took approximately a month and a half to complete (Tr. 5, p. 771, line 18 through p. 772, line 1).[17] Cooper then presented his findings to the Board, which included Exhibit S, as follows:

Teacher Number	Minutes Taught	Missing Minutes	FTE %	Current Salary	Salary based on minutes worked per week	District Loss
Teacher 1	1017	233	81.36%	$84,185	$68,492.92	$15,692
Teacher 2	617	623	49.36%	$108,825	$ 53,716.02	$55,109
Teacher 3	822	428	65.76%	$78,093	$ 51,353.96	$26,739
Teacher 4	471	779	37.68%	$67,605	$ 25,473.56	$42,131

[17] The tenure charges allege that in or about February and March 2021 the District conducted an audit of the teachers' schedules at the Renaissance School.

Teacher 5	978	272	78.24%	$103,368	$ 80,875.12	$22,493
Teacher 6	900	350	72.00%	$99,968	$ 71,976.96	$27,991
Teacher 7	900	350	72.00%	$99,968	$ 71,976.96	$27,991
Teacher 8	900	350	72.00%	$99,968	$ 71,976.96	$27,991
Teacher 9	864	386	69.12%	$68,585	$ 47,405.95	$21,179
Teacher 10	1020	230	81.60%	$111,740	$ 91,179.84	$20,560
Teacher 11	1059	191	84.72%	$111,250	$ 94,251.00	$16,999
Teacher 12	1020	230	81.60%	$111,740	$ 91,179.84	$20,560
Teacher 13	570	680	45.60%	$67,605	$ 30,827.88	$36,777
Teacher 14	960	290	76.80%	$67,930	$ 52,170.24	$15,760
Teacher 15	900	350	72.00%	$58,920	$ 42,422.40	$16,498
Teacher 16	648	602	51.84%	$90,741	$ 47,040.13	$43,701
Teacher 17	1020	230	81.60%	$64,670	$ 52,770.72	$11,899
Teacher 18	1020	230	81.60%	$78,857	$ 64,347.31	$14,510
Teacher 19	1020	230	81.60%	$106,023	$ 86,514.77	$19,508
Teacher 20	474	776	37.92%	$99,113	$ 37,583.65	$61,529
Teacher 21	1020	230	81.60%	$108,340	$ 88,405.44	$19,935
Teacher 22	1020	230	81.60%	$69,585	$ 56,781.36	$12,804
Teacher 23	1020	230	81.60%	$76,137	$ 62,127.79	$14,009
Teacher 24	996	254	79.68%	$92,617	$ 73,797.23	$18,820
Teacher 25	1074	176	85.92%	$60,870	$ 52,299.50	$8,570
Teacher 26	900	350	72.00%	$80,131	$ 57,694.32	$22,437
Teacher 27	900	350	72.00%	$96,017	$ 69,132.24	$26,885
Teacher 28	900	350	72.00%	$65,310	$ 47,023.20	$18,287
Teacher 29	240	1010	19.20%	$99,113	$ 19,029.70	$80,083
				$2,527,274	$1,759,827	$767,447

Mr. Cooper acknowledged that the end product of his audit (above) did not reflect the actual schedules that were in place for 2020-2021 (Tr. 5, p. 782, lines 8-15). Cooper's explanation for conducting an "audit" for the 2020-2021 school term using the 2019-2020 schedule was that it was based on the information that he obtained from the computer (Tr. 5, p. 778, lines 13-18). However, Cooper backtracked from that explanation when he subsequently testified that his audit was based on what Mr. Jennings gave him, which appears to be the "paper" 2019-2020 in-person schedule Jennings received from Ms. Aulderman.

Mr. Cooper conceded that teachers were not required to teach 1250 minutes, as set forth in the tenure charge. Rather, the MEA contract only states that pupil contact time for teachers shall not exceed 1250 minutes (Ex. Q; Tr. 5, p. 805, lines 21-25). Cooper also testified that there were physical education (PE) teachers at Renaissance who did not have a full teaching load (Tr. 5, p. 791, lines 8-11). However, there were 240 students at Renaissance and only two PE teachers (Tr. 5, p. 791, lines 12-25). With PE required for every student, and assuming there was an even distribution of students among the PE teachers, there would have been 12 sessions of PE which would each have 20 students. Therefore, each PE teacher would have six periods. Cooper could not explain his conclusion that PE teachers at Renaissance did not have a full teaching load. His answers ranged from "I am not familiar with many schools that run PE that only has 20 kids in a section" to "I did not count the number of kids in the section" to "I don't know" how many students in the PE classes (Tr. 5, p. 792, line 1 through p. 793, line 25). In the end, Cooper conceded that the information on which he concluded that PE teachers did not have sufficient teaching periods was predicated solely on what Jennings had provided to him (Tr. 5, p. 796, line 24 through p. 797, line 6).

In addition, Mr. Cooper admitted that his chart contained mathematical errors. In his reference to teacher #4, as contained in Exhibit S, Cooper acknowledged that it showed 12 different periods, each of which were 39 minutes in length. When told that this amounted to 468 minutes, Cooper was at a loss to explain how he came to 351 minutes as contained in Exhibit S. He responded, "I am not sure" (Tr. 5, p. 784, lines 5-18). He also acknowledged that he listed one of the Friday classes as 39 minutes when it should have been 78 minutes (Tr. 5, p. 784, line 20 through p. 785, line 18). Cooper also testified that teacher #20 in Exhibit S was another example of a teacher not having sufficient pupil contact time (Tr. 5, p. 797, lines 8-15). Without knowing who the teacher was, here too, Cooper's "audit" contained simple arithmetical errors. Cooper agreed that the document contained eight classes that were 39 minutes each, which meant that the total number of minutes amounted to 312. Yet, the document, Exhibit S, stated that there were only 156 minutes (Tr.5, p. 798, lines 1-12). When asked whether his number of 156 minutes was accurate, Cooper readily acknowledged that it wasn't, testifying that "it's off" (Tr. 5, p. 798, line 12).

Additionally, Mr. Cooper acknowledged that all the duty periods and advisory periods counted towards pupil contact time. Yet, Cooper did not count advisory periods in his calculation (Tr. 5, p. 787, lines 1-25). He also did not count duty assignments (hall duty, lunch duty, or dismissal time) all of which the MEA contract says must be included in determining the amount of pupil contact time (Ex. Q; Tr. 5, p. 789, lines 1-25). Cooper admitted that not only did he not include the duty periods in Exhibit S, but that he also did not know how long lunch period, hall duty, or dismissal duty lasted (Tr. 5, p. 800, lines 1-25). Further, he was not aware that class periods on Friday were longer than the class periods on Monday through Thursday (Tr. 5, p. 790, lines 1-12; p. 798, lines 13-25; p. 799, line 1 through p. 803, line 5).

Mr. Cooper admitted that the alleged financial loss he said was attributable to the teacher #20 for not having had sufficient pupil contact time – a sum he said in Exhibit S amounted to $61,529 - was also not accurate (Tr. 5, p. 802, lines 16-20). Finally, Cooper testified that he never sought to correct the information that he had presented to the Board (Tr. 5, p. 803, lines 2-4).

Dr. Putrino noted that the advisory portion of homeroom and lunch duty were missing in Mr. Cooper's analysis (Tr. 9, p. 1416, lines 2-9). Sections of electives that are taken by students in periods 9 and 10 were also missing (Tr. 9, p. 1416, lines 10-15). Hall duty and dismissal duties prior to the end of the day were not included. When those items are factored in, Teacher #1 (identified as Ms. Dubois, a French teacher) should have been credited with 1,241 pupil contact minutes per week. Instead, Cooper recorded 1,017 minutes. In other words, Cooper performed an incomplete analysis of Dubois' schedule (Tr. 9, p. 1416, lines 23-25 and p. 1417, lines 1-3). Notably, the schedule that Putrino put in place for Dubois was the same as the 2019-2020 school year (for which Putrino received glowing feedback from Superintendent Kendra Johnson) (Tr. 9, p. 1417, lines 4-10).

Dr. Putrino explained that advisory periods, which were twenty minutes in length Monday through Thursday, also counted towards pupil contact time. Putrino's schedule establishes advisory teams for each grade level (6^{th} through 8^{th}) and it expressly noted that the homeroom teacher will lead the advisories (unless otherwise agreed upon by the team) (Ex. R24, Bates Stamp Putrino 0296). During advisory periods, in addition to taking attendance, the period was devoted to Montclair's "restorative justice initiative". It was a part of the curriculum (Tr. 8, p. 1371, lines 1-10). On Fridays, the schedule was markedly different. The advisory periods were 45 minutes to "give room for more thorough discussions in the restorative justice setting... and to allow for assemblies and video presentations or larger lessons" (Tr. 8, p. 1372, lines 2-12).

Dr. Putrino closed his scheduling testimony on cross-examination, as follows:

> Q. You took us through this sample schedule for this particular teacher. Is it your testimony that if you add up all of the minutes, counting Monday through Friday being a 39-minute period, counting a 20-minute period for the advisory, and then including the passing time, the three minutes for dismissal, and then the Friday, all of those advisory periods which were a little bit longer, I think only went through five, that if you did this for each of these schedules, that you would come pretty close to 1,250 minutes; that's your testimony for all of these schedules?
>
> A. I testified that they were close to or at 1200, but didn't --- or more, and didn't exceed 1250 ... (Tr. 9, p. 1464, lines 7-25 through p. 1465, lines 1-22).

Lastly, Dr. Matt Jennings testified on behalf of Dr. Putrino regarding the scheduling dispute. A difference of opinion arose as to Jennings qualifying as an expert witness. N.J.R.E. 702 states, "An expert may testify by opinion or otherwise if scientific/technical/specialized knowledge will assist the trier of fact to understand testimony or determine fact in issue, and expert is qualified by knowledge, skill, experience, training and/or education." In this matter, following *voir dire*, I concluded that Jennings qualified as an expert in formulating and reviewing over 40 school schedules for over 18 years in several school district leadership roles:

> So I'm going to admit the witness, qualify him as an expert, recognizing that there are varying degrees of expertise. And as we go along in the proceeding, cross-examination can certainly bring out further flaws, if any, with respect to the findings and conclusions that Dr. Jennings has made.
>
> So I'm satisfied initially based on his experience of reviewing schedules, creating some master schedules, that the topic of scheduling would be something he would be able to assist me with. So I'm going to allow the testimony, and of course, as we go through it, there could be cross-examination of what his testimony actually is (Tr. 11, p. 1805, line 15 through p. 1806, line 4).

Turning to the specific dispute between the parties, in anticipation of testifying and the hearing and for the purpose of preparing his expert report, Dr. Jennings testified that he reviewed three main documents: the teachers' contract, Exhibit S, and Dr. Putrino's scheduling documents (Ex. R24; Tr. 11, p. 1806, lines 17-21). Jennings testified that "[Dr. Putrino's scheduling

documents [were] more detailed perhaps, even more thorough than most of the ones that I've seen with regards to the assignment for things like dismissal. I mean, it's very specific" (Ex. R24; Tr. 11, p. 1808, lines 20-24). In contrast, Exhibit S was deficient for several reasons, most notably, that the school year of the schedule was not specified (Tr. 11, p. 1820, lines 12-14); the teacher names were intentionally omitted (Tr. 11, p. 1820, lines 15-22); and many of the district's numerical calculations were wholly incorrect (Tr. 11, p. 1820, line 23 through p. 1821, line 19). He stated, "To be honest ... I was shocked at some of the mathematical errors" (Tr. 11, p. 1820, line 23 through p. 1821, line 1). He further testified that all the numbered teachers listed in Exhibit S had "some degree of error... It was shocking to me to see – that teacher #13, teacher #4,... and #20... were significantly off" (Tr. 11, p. 1821, lines 2-18)(and that was without adding non-instructional pupil contact time).

Dr. Jennings observed, with respect teacher #4 in Exhibit S, referring to the 12 blue color-coded classes from Monday through Thursday and the double period on Fridays (Tr. 11, p. 1823, lines 1-20), Mr. Cooper had a total of 351 minutes, compared to Dr. Jennings' total of 546 minutes (Tr. 11, p. 1824, lines 13-22). He said that the simple arithmetical difference in the minutes was unexplainable – "I mean the numbers are there. It seems to me it would have to be an error, just a careless error in addition" (Tr. 11, p. 1824, line 25 through p. 1825, line 3). As for the missing 779 minutes – alleged for teacher #4 – Jennings emphatically stated that it was not accurate (Tr. 11, p. 1827, lines 1-6). His testimony with respect to teacher #20 was similar. For the blue color-coded classes, Mr. Cooper said there were 156 minutes of pupil contact time, where the actual number was 312 (Tr. 11, p. 1829, lines 1-10). Further, as with teacher #4, the calculations in Exhibit S did not include advisory periods or duty periods, all of which were missing (Tr. 11, p. 1830, lines 1-13).

Dr. Jennings opined that just reviewing what Mr. Cooper did in compiling his data would be obvious "that you're missing some things. Because not included here are things like the advisory, the hall duty, the lunch duty, any of those things. They're all missing. So, you would have to get additional information" (Tr. 11, p. 1825, lines 9-18). Jennings also said with the numbers in Exhibit S being so incorrect, he would have expected a more thorough follow-up which would have included speaking to the principal who created the schedule.

> Well, here's what I would expect. I would expect if I saw a number like this, that looked, you know, so out of line, I would expect there would have been a more thorough follow-up. And yes, I would have expected that you would look carefully at all of the information (Tr. 11, p. 1826, lines 7-12).

Dr. Jennings continued, "You're talking about making a very serious claim about an individual. And to... not get the most accurate picture, in my professional opinion, is not acceptable" (Tr. 11, p. 1825, line 23 through p. 1826, line 17). Knowing the significance of this decision... what's at stake... I would do the very best I could to make certain that the information provided to the Board was accurate... And if there was inaccuracy... I would certainly bring that to the Board's attention that an error was made" (Tr. 11, p. 1846, lines 1-17).

Petitioner attempted to characterize Dr. Jennings' ultimate findings as something less persuasive than they ultimately were: "Respondent's expert testified to some mathematical errors, but even his audit showed that the staff members were scheduled for significantly less than the 1250 pupil contact time."

	Respondent's expert's Total	Missing minutes according to Respondent's expert
1	1028	-222
2	629	-621
3	840	-410
4	668	-582
5	980	-270
6	920	-330
7	920	-330

8	920	-330
9	880	-370
10	1040	-210
11	1080	-170
12	1040	-210
13	808	-442
14	966	-284
15	900	-350
16	648	-602
17	1040	-210
18	1040	-210
19	1040	-210
20	632	-618
21	1040	-210
22	1040	-210
23	1040	-210
24	1028	-222
25	1108	-142
26	920	-330
27	920	-330
28	920	-330
29	240	-1010

(Ex. BB; Tr. 11, p. 1875, line 3 through p. 1876, line 13).

However, it became evident that Petitioner's numbers reflected above fail to include duty periods or advisory assignments (Tr. 11, p. 1877, lines 15-23). Dr. Jennings testified that when duty periods are included, like suspension, hall duty, etc., the minutes of pupil contact time are much closer to the maximum 1250 minutes (Tr. 11, p. 1873, lines 6-14).

Petitioner asserted that, under the MEA Agreement, homeroom should not be included in the pupil contact time. Although Dr. Jennings acknowledged that the contract specifies that homeroom doesn't count towards the 1250 minutes and that the schedule did not expressly state "advisory" as a co-subject with homeroom, he clarified that "five minutes of this is for homeroom, and then 15 minutes is for the advisory [supervisory time], with the exception of them being a 40

minute on Friday" (Tr. 11, p. 1832, lines 13-23). While it may be an estimate, that time needs to count toward the pupil contact time and added at a minimum 95 minutes per week (Tr. 11, p. 1832, lines 23-24). His testimony was notably informed by Dr. Putrino's testimony, which was not convincingly refuted.

Dr. Jennings noted that the MEA contract does not provide for a minimum number of minutes and that no teacher will get to exactly 1250 minutes of pupil contact time (Tr. 11, p. 1814, line 20 through p. 1815, line 1). He further explained that if you have more than 39 minutes left available, you would try to assign that teacher to another class, because you would have enough time for another full class period (Tr. 11, p. 1815, lines 4-7). He testified that 1221 minutes would be the range that he would look for when reviewing the scheduling documents (Tr. 11, p. 1815, lines 13-17). In conjunction with Exhibit BB, as prepared by Petitioner, Jennings agreed with the following adjustments which accounted for all forms of student contact time discussed previously.

Teacher							Ad.	Duty	Duty	Hall	Dism.	Total	1250
Dubois	12	468	3	120	8	240	125	5	196	72	16	1237	13
Anagnostis	20	780	3	120	4	120	100	1	40	72	16	1248	2
Lorusso	20	780	3	120	4	120	100	1	40	72	16	1248	2
Spagnulo	16	624	8	120	8	240	125	1	40	72	16	1237	13
Garzon	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Arnette	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Cullen	16	640	4	160	4	120	125	4	156	72	16	1289	-39
Thomas	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Gazillo	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Jordan	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Dunn	16	640	4	160	6	180	125	2	78	72	16	1271	-21
Smith	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Stulbaum	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Jackson	16	640	4	160	4	120	125	4	156	72	16	1289	-39
Woodward	16	640	3	120	8	240	125	1	40	72	16	1253	-3
Bousel	8	312	5	205	8	240	80	4	156	72	16	1081	169
Colon	20	878	3	120	2	78	85	0	0	72	16	1249	1
Brophy	20	878	3	120	2	78	85	0	0	72	16	1249	1

Prasarn	18	702	3	120	6	180	125	1	20	72	16	1235	15
Collier-Thomas	16	640	3	120	4	120	125	4	158	72	16	1251	-1
Hittel	16	640	4	160	4	120	125	4	156	72	16	1289	-39
Noori	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Ucci	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Harris	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Sender	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Doctry	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Stafford	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Dyer	16	640	4	160	8	240	125	0	0	72	16	1253	-3
Bailey	16	640	4	160	8	240	125	0	0	72	16	1253	-3
												1249	
			21 out of 29 people are over the 1250									1289	
			8 out 29 are under 1250										

Finally, Dr. Jennings clarified that advisory assignments were to be adjusted so that no one would ever go over the 1250 minutes:

> Q: So you based your expert report on these schedules, but you agree with me that 21, approximately 21 out of 29 teachers are actually over 1250, eight teachers, with a couple of them being significantly under 1250?
>
> A: I think what you're missing here is the backtracking that I had to do to find out why it was over. And I was told, and I don't know if Dr. Putrino ever spoke to this, but that the advisory assignments were adjusted so that nobody would go over (Tr. 11, p. 1880, lines 5-15).

In light of the foregoing, I first find, consistent with N.J.SA. 18A:6-17.1 (3)(b) and N.J.A.C. 6A:3-5.1 (b)(1), that an analysis of Petitioner's scheduling allegations against Dr. Putrino must be limited to whether or not Putrino put forth a 2020-2021 schedule which allegedly revealed that no teacher is teaching the contractual allotted 1250 minutes per week; numerous teachers are teaching less than 1000 minutes per week; the Renaissance Middle School was allegedly overstaffed to the approximate cost of $767,447.00 to the District; and the alleged significant financial loss to the District did not result in more student contact time and/or smaller classes.

However, in dismissing the tenure charge, as a threshold matter, I initially find that the tenure charge refers to a 2020-2021 schedule put together by Dr. Putrino. That schedule (Ex. R30) was a condensed remote schedule and not the master schedule (in-person) put together by Dr. Putrino in 2018-2019 and implemented during the 2019-2020 school year (Ex. R24; Tr. 9, p. 1460, lines 18-25 through p. 1461, lines 1-13). Mr. Cooper analyzed, charted and presented to the Board as Exhibit S Putrino's 2019-2020 schedule which, in turn, led to the filing of a tenure charge over the 2020-2021 schedule.

One basis for Dr. Putrino's motion to dismiss was that the tenure charge did not express which school year schedule was evaluated. Petitioner – referring to the subheading of the charge, its witness list and answers to interrogatories – replied during the motion to dismiss that it was the 2020-2021 schedule which was evaluated:

> In addressing Respondent's specific concerns, I first find that the Sworn Tenure Charges, Paragraphs 20-23 do allege that the 2020-2021 school year was the subject of the audit. The introductory heading itself states: "Renaissance Middle School 2020-2021 Teachers' Schedules Audit." To the extent that any clarification is needed, Petitioner's "Witness List" filed with the Sworn Tenure Charges and Statement of Evidence plainly speaks of the 2020-2021 school year as the subject of the audit (See, anticipated or potential testimony of Damen Cooper, Director of Human Resources; Dr. Timothy Purnell, former Interim Director of Human Resources). Lastly, in Petitioner's Answers to Respondent's Demand for Interrogatories, #21, Respondent demands that Petitioner "Identify the school term and/or year in which the "overstaffing" as set forth in the Charges began". Petitioner replies: " . . . Petitioner states that the audit was regarding the 2020-2021 Renaissance Middle School Teachers' Schedules." Thus, I disagree that Petitioner did not sufficiently identify the 2020-2021 school year as the year involved in the scheduling allegations against Respondent [March 1, 2022 Decision on Motion to Dismiss, page 16].

Based on this response, in part, I denied Dr. Putrino's motion to dismiss the tenure charge pertaining to scheduling. Now, however, after being presented with a fully developed record, I am inclined to dismiss the tenure charge based on the disconnect between the charged schedule (2020-2021) and Cooper's analysis of the in-person master schedule (2019-2020). Mr. Cooper's

analysis and presentation to the Board as Exhibit S clearly involved the 2019-2020 in-person schedule (characterized by 39 minute and 30 minute periods). In other words, Petitioner charged Dr. Putrino with various deficiencies in the 2020-2021 schedule (Ex. R30) which was never analyzed by Mr. Cooper and which Exhibit S does not encompass. In turn, Dr. Putrino did not discover until the cross examination of Mr. Cooper that the 2020-2021 condensed remote schedule was not audited. Rather, it was the 2019-2020 in-person master schedule which was audited. In my opinion, the disconnect between what was charged and the evidence presented constitutes a clear violation of N.J.SA. 18A:6-17.1 (3)(b) and N.J.A.C. 6A:3-5.1 (b)(1).

N.J.A.C. 6A:3-5.1(b) (1) specifically states:

> Charges shall be stated **with specificity as to the action or behavior underlying the charges** and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, **accompanied by a supporting statement of evidence**, both of which shall be executed under oath by the person(s) instituting such charges. Complete copies of all documents referenced in the statement of evidence shall be attached as part of the statement.

Therefore, having the benefit of a full record, I dismiss the scheduling tenure charge.

In the alternative, as testified to by Dr. Putrino, Dr. Jennings, and even as admitted by Mr. Cooper, in part, Cooper's analysis (Ex. S) was significantly underinclusive. It failed to include several forms of student contact minutes which are recognized in the MEA contract and/or as developed over the years as a matter of custom or practice. The chart developed from Putrino's and Jennings' testimony (Exhibit BB, save minor adjustments for advisory time) is consistent with the MEA contract and past practice accounting for varying forms of pupil contact time other than direct classroom instruction, i.e., advisory as part of homeroom, hall duty, activity after the last class but before the literal dismissal of students from school, in class support, lunch duty, etc.

While I acknowledge that Petitioner attempted to challenge the reasonableness of the past practice, for example, asking whether every teacher is needed to come into the hallway between every class, whether every homeroom has advisory activities, or whether every teacher spends three minutes in pre-dismissal activities, that is an argument to change the practice, if Petitioner wishes to do so by way of placing the MEA and MPA on notice during contract negotiations. It is not a basis to seek to remove one of the three middle school building administrators who adhere to the same scheduling practices (Tr. 9, p. 1456, lines 22-25 to 1457, line1).

Lastly, Petitioner has failed to show that it incurred any monetary loss during the 2020-2021 school year as a result of the 2020-2021 schedule. Indeed, even Mr. Jennings admitted that there were not many teaching duties to reassign someone to during remote learning. And, as the hybrid schedule came on line in April of 2020, sick outs and the unavailability of substitute teachers created a supply shortage, and not a supply surplus. In the final analysis, even peeking behind the outright dismissal of the charge as a threshold matter (as discussed above), I find that Petitioner failed to sufficiently prove that it lost $767,447.00 due to Dr. Putrino's 2020-2021 schedule (which was not even analyzed).

In light of the foregoing, I find and conclude that Petitioner has failed to sufficiently demonstrate the allegations set forth in the scheduling tenure charge it filed against Dr. Putrino:

> 20. In or about February and March 2021, Petitioner conducted an audit of the teachers' schedules for the Renaissance Middle School. A detailed review of the teachers' schedules at the Renaissance Middle School allegedly revealed that no teacher is teaching the contractual allotted 1250 minutes per week. Moreover, it is alleged that there are numerous teachers teaching less than 1000 minutes per week. As a result, the Renaissance Middle School was allegedly overstaffed to the approximate cost of $767,447.00 to the District. This allegedly significant financial loss to the District did not result in more student contact time and/or smaller classes (Ex. S).
>
> 21. Pursuant to the 2018-2021 Collective Bargaining Agreement between the Montclair Board of Education and the Montclair Education

Association, Article 8.1(i): "Pupil contact time is defined as the number of scheduled class minutes to which a teacher is assigned classroom instruction and/or supervisory duties. It specifically excludes homeroom and the ten (10) minutes before and twenty (20) minutes after school. The pupil contact time for classroom teachers assigned to the high school and the middle school shall not exceed 1250 minutes per week and 1500 minutes per week at the elementary school, average over the school year." (Ex. Q).

22. As Principal of the Renaissance Middle School, it is alleged that Respondent was responsible for preparing the teachers' schedules (Ex. R).

23. Thus, the alleged significant financial loss to the District, to the detriment of the students, by teachers allegedly being overstaffed, occurred during Respondent's appointment as Principal to the Renaissance Middle School.

CONCLUSION

For the reasons set forth more fully herein, I find and conclude that Petitioner, Montclair Board of Education has sufficiently demonstrated that Respondent, Dr. Putrino unwittingly showed an inappropriate video which offended a portion of the staff and some members of the public. However, I find that the penalty of dismissal is not consistent with just cause based on (1) the dismissal of two of the core allegations; (2) the mixed reactions to the video among Black educators; (3) Dr. Putrino's prior long-term unblemished employment history, which includes numerous anecdotes of him fostering inclusion and diversity, both within and outside of his place of employment; and (4) the unjustifiable variation in Petitioner's treatment of Dr. Putrino versus Assistant Principal Clark. Accordingly, I will modify the sought after dismissal penalty to the disciplinary penalty implemented for Assistant Principal Clark. Petitioner shall immediately offer reinstatement to Dr. Putrino as Principal of Renaissance Middle School. To the extent that Putrino was suspended without pay for more than the Clark suspension, Petitioner is directed to provide corresponding back pay and all applicable benefits of employment. To the extent that Putrino has suffered no loss in pay, then he must be returned to his position at the conclusion of the Clark suspension without pay. I will retain jurisdiction to the extent that the parties dispute the precise penalty which was issued to Assistant Principal Clark. Finally, I dismiss the tenure charge pertaining to the 2020-2021 schedule.

AWARD

For the reasons set forth more fully herein, I find and conclude that Petitioner, Montclair Board of Education has sufficiently demonstrated that Respondent, Dr. Putrino unwittingly showed an inappropriate video which offended a portion of the staff and some members of the public. However, I find that the penalty of dismissal is not consistent with just cause based on (1) the dismissal of two of the core allegations; (2) the mixed reactions to the video among Black educators; (3) Dr. Putrino's prior long-term unblemished employment history, which includes numerous anecdotes of him fostering inclusion and diversity, both within and outside of his place of employment; and (4) the unjustifiable variation in Petitioner's treatment of Dr. Putrino versus Assistant Principal Clark. Accordingly, I will modify the sought after dismissal penalty to the disciplinary penalty implemented for Assistant Principal Clark. Petitioner shall immediately offer reinstatement to Dr. Putrino as Principal of Renaissance Middle School. To the extent that Putrino was suspended without pay for more than the Clark suspension, Petitioner is directed to provide corresponding back pay and all applicable benefits of employment. To the extent that Putrino has suffered no loss in pay, then he must be returned to his position at the conclusion of the Clark suspension without pay. I will retain jurisdiction to the extent that the parties dispute the precise penalty which was issued to Assistant Principal Clark. Finally, I dismiss the tenure charge pertaining to the 2020-2021 schedule.

Respectfully submitted,

Joseph Licata

Dated: October 18, 2022

State of New Jersey)

) :SS

County of Bergen)

On the 18th day of October, 2022, before me personally came and appeared Joseph Licata, to me known and known to me to be the person described herein who executed the foregoing instrument and he acknowledged to me that he executed the same.

Jacqueline M. Licata

Notary Public

JACQUELINE M. LICATA
Commission # 50026026
Notary Public, State of New Jersey
My Commission Expires
November 09, 2025

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

IN THE MATTER OF THE TENURE PROCEEDING OF LONJETE NIAS

SCHOOL DISTRICT FOR THE CITY OF NEPTUNE, MONMOUTH COUNTY Petitioner	:	Agency Dkt No. 100-5/22
and	:	AWARD APPROVING WITHDRAWAL
LONJETE NIAS Respondent	:	

BEFORE: CAROL F. LASKIN, ESQUIRE, ARBITRATOR

APPEARANCES:

For the Petitioner
Dennis McKeever
Cornell, Merlino
McKeever & Osborne, LLC

For the Respondent
Lonjette Nias
Pro se

On May 3, 2022, the Neptune City Board of Education ("Board" or "Petitioner") referred certified tenure charges against Lonjete T. Nias ("Nias" or "Respondent") Supervisor of Special Services, to the Commissioner of Education ("Commissioner"), alleging Respondent engaged in conduct unbecoming, insubordination, excessive absences wherein she abandoned her position, warranting dismissal from employment and removal of her tenure.

On May 11, 2022, Nias answered articulating she had been on approved medical leave since October 2020, as a result of back surgeries, for which she is receiving disability payments. Nias has not been medically cleared to return to work. Upon review, on May 19, 2022, the Department of Education referred this matter to the undersigned, pursuant to *N.J.S.A.*

18A:6-16. *c.26* to hear and evaluate the tenure charges.

During the summer, the undersigned conducted a number of telephone conferences with the parties regarding the status of this matter. They were also encouraged to communicate without my assistance. As a result of their discussions, Nias agreed to submit her resignation from employment in exchange for the withdrawal, with prejudice, of the tenure charges. On August 11, 2022, Respondent submitted her resignation from employment and her position as Supervisor of Special Services effective Friday, August 12, at 2022. (Exhibit 1) The Neptune City Board of Education adopted a Resolution accepting the Letter of Resignation on August, 18, 2022. (Exhibit 2).

Upon request, sometime thereafter, the undersigned received a Certification from Superintendent Dr. Raymond J. Boccuti, containing, *inter alia*, the following language:

> "6. I believe the withdrawal of these charges is in the public interest, because the Board of Education received the desired outcome of this litigation without the expenditure of further District funds attempting to do so is neither warranted nor prudent. Furthermore, the District does not request that respondent surrender her professional certificates as part of this settlement.
> 7. Respondent, consent to the withdrawal of the tenure charges with prejudice.

The New Jersey Administrative Code contains procedures for filing Controversies and Disputes with the Commissioner of Education, *N.J.A.C. 6A:3-1.1,et seq.* The new *Subchapter 5* applies to *Charges Under the Tenure Employee's Hearing Act. N.J.A.C.*

N.J.A.C. 6A:3-5.6 addresses *withdrawal, settlement, or mooting of tenure charges.* Section (a), identifies the criteria a panel arbitrator must review prior to approving any settlement, as follows:

6A:3-5.6 Withdrawal, settlement, or mooting of tenure charges

> (a) Once tenure charges are certified to the Commissioner, they may be withdrawn or settled only with approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the arbitrator, 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 the charged party entered into the agreement with a full understanding of his or her rights;

5. A showing the agreement is in the public interest;

Upon review of the Petitioner's request to withdraw the tenure charges, with prejudice, in light of the Administrative Code, I ***find*** the Board's articulation evidencing the circumstances justifying the withdrawal in the public interest, is persuasive. Accordingly, based upon this review, Petitioner's request to withdraw the charges, with prejudice is, hereby ***APPROVED.***

DATED: 10/20/2022

Carol F. Laskin
CAROL F. LASKIN, ESQUIRE

STATE OF NEW JERSEY:
COUNTY OF CAMDEN:

I CERTIFY that on October 20, 2022

CAROL F. LASKIN, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person) :
(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his or her act and deed.

DATED: October 20, 2022 Lynda A Hillpot
NOTARY PUBLIC

Lynda A Hillpot
Notary Public
New Jersey
My Commission Expires 7-2-24
No. 50108025

From the Desk of...

Lonjeté T. Nias, MSW, LCSW, ACSW

14 Deer Hollow Dr. Howell, NJ 07731 *(732) 977-6037 LTGarl@aim.com*

August 11, 2022

Dr. Rayond J. Boccuti
Chief School Administrator & Principal
Woodrow Wilson School
Neptune City School District
210 West Sylvania Avenue
Neptune City, NJ 07753

RE: Resignation

Dr. Boccuti:

Please be advised that I hereby resign from my employment and position as Supervisor of Special Services with the Neptune City Board of Education effective Friday, August 12, 2022.

Sincerely,

Lonjeté T. Nias

Lonjeté T. Nias

EXHIBIT 1

NEPTUNE CITY BOARD OF EDUCATION
OFFICIAL CERTIFIED EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF NEPTUNE,
MONMOUTH COUNTY, NJ, AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of Neptune in the County of Monmouth, NJ, convened a Regular Board of Education meeting on August 18, 2022 at 6:00 p.m. The meeting was held at the Woodrow Wilson Elementary School Gymnasium.

The following members of the Board of Education were present:

Mr. Brown, Ms. Lashley, Mrs. McCarthy, Mrs. Mordaunt, Mrs. Rummel, Mrs. Zanni, Mrs. Smith, Vice President, and Mr. Susino, President

The following member of the Board of Education was absent:

Mrs. McGuigan

The following resolution was offered by Mr. Susino, seconded by Mrs. Smith and approved by the Neptune City Board of Education by the following roll call vote:

Ayes: 8 Nays: 0 Abstained: 0

MOTION, upon recommendation of the Chief School Administrator, to approve the letter of resignation from Lonjete T. Nias dated August 11, 2022 to resign from her employment and position of Supervisor of Special Services effective August 12, 2022

RESOLVE, that the Neptune City Board of Education approve the letter of resignation from Lonjete T. Nias dated August 11, 2022 to resign from her employment and position of Supervisor of Special Services effective August 12, 2022

Mindy Green

Ms. Mindy Green
School Business Administrator
Board Secretary
State of New Jersey
County of Monmouth
City of Neptune
Board of Education

EXHIBIT 2

274-22SEC
SEC Dkt. No. D01-22
Agency Dkt. No. 239-9/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Michael Smith,
Board of Trustees of the Gray Charter School,
Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately filed the Disclosure Statements after the issuance of the August 23, 2022 Order to Show Cause but prior to the SEC's September 14, 2022 meeting; therefore, a penalty of reprimand is recommended. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law.

Accordingly, respondent is hereby reprimanded as a school official found that have violated the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 24, 2022
Date of Mailing: October 24, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D01-22
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Michael Smith,
The Gray Charter School, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on August 23, 2022, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on August 23, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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 the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

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[1] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover, failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

Based on the list of school officials prepared by The Gray Charter School Lead, Respondent became a school official on or about November 8, 2021. Therefore, Respondent was required to file his Disclosure Statements within thirty (30) days of his appointment. Despite this fact, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

Respondent also received reminders from the Commission to file his Disclosure Statements. More specifically, by electronic correspondence dated July 1, 2022, and August 2, 2022, Respondent was reminded that his Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on August 23, 2022. After having been served with the OTSC, Respondent filed his Disclosure Statements on August 29, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent stated, "as a new Board Member, [he] was not aware of the deadline for the annual Disclosure Statement[s]" and he "was not checking emails with any regularity" because he was "devoted to planning for [his] wedding." Importantly, Respondent did not deny that he did not file his Disclosure Statements in a timely fashion.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because he did not timely file Disclosure Statements. Although Respondent ultimately filed his Disclosure Statements, the filing was several months late, and submitted only after multiple reminders were sent reiterating his statutory obligation to file Disclosure Statements.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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 brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: September 14, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D01-22

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) within thirty (30) days of his appointment; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on August 23, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent filed his Disclosure Statements on August 29, 2022, and also filed a response to the Commission's OTSC that did not dispute that he did not file his Disclosure Statements in a timely fashion; and

Whereas, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its special meeting on September 14, 2022, the Commission recommended that the Commissioner of Education impose a penalty of reprimand; and

Whereas, at its special meeting on September 14, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on September 14, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq., Director

275-22SEC
SEC Dkt. No. D03-22
Agency Dkt. No. 240-9/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Derrick Henry,
Board of Education of the Township of Orange,
Essex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately filed the Disclosure Statements after the issuance of the August 23, 2022 Order to Show Cause but prior to the SEC's September 14, 2022 meeting; therefore, a penalty of reprimand is recommended. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 24, 2022
Date of Mailing: October 24, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D03-22
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Derrick Henry,
Orange School District Board of Education, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on August 23, 2022, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on August 23, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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 the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

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[1] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover, failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2022. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, by electronic correspondence dated July 1, 2022 and August 2, 2022, Respondent was reminded that his Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on August 23, 2022. After having been served with the OTSC, Respondent filed his Disclosure Statements on August 25, 2022, but did not dispute that his filing was untimely, or otherwise submit anything in writing explaining why a penalty should not be imposed.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because he did not timely file Disclosure Statements. Although Respondent ultimately filed his Disclosure Statements, the filing was several months late, and submitted only after multiple reminders were sent reiterating his statutory obligation to file Disclosure Statements.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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 brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: September 14, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D03-22

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2022; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on August 23, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent filed his Disclosure Statements on August 25, 2022, which was after the Commission issued an OTSC; and

Whereas, Respondent did not dispute that his filing was untimely, or otherwise submit anything in writing explaining why a penalty should not be imposed; and

Whereas, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its special meeting on September 14, 2022, the Commission recommended that the Commissioner of Education impose a penalty of reprimand; and

Whereas, at its special meeting on September 14, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on September 14, 2022.

Kathryn A. Whalen, Esq., Director

276-22SEC
SEC Dkt. No. D07-22
Agency Dkt. No. 241-9/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Ismail Dalia, Board of Education of the Town of West New York, Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent filed the Disclosure Statements before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law.

Accordingly, as of the date of this decision, respondent is hereby removed from the Board for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 24, 2022
Date of Mailing: October 24, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D07-22
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Ismail Dalia,
West New York School District Board of Education, Hudson County

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I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on August 23, 2022, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on August 23, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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 the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

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[1] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover, failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2022. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, by electronic correspondence dated June 29, 2022 and August 2, 2022, Respondent was reminded that his Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on August 23, 2022. After having been served with the OTSC, Respondent still failed to file Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because he did not timely file Disclosure Statements.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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 brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: September 14, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D07-22

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2022; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on August 23, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file his Disclosure Statements following issuance of the OTSC, and failed to file a response to the OTSC; and

Whereas, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its special meeting on September 14, 2022, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on September 14, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on September 14, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq., Director

277-22SEC
SEC Dkt. No. D08-22
Agency Dkt. No. 242-9/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Lisa Qarmout,
Board of Education of the Town of Newton,
Sussex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that respondent ultimately filed the Disclosure Statements after the issuance of the August 23, 2022 Order to Show Cause but prior to the SEC's September 14, 2022 meeting; therefore, a penalty of reprimand is recommended. Respondent filed exceptions to the recommended penalty, arguing that she had difficulty opening and submitting the form, on both her phone and laptop.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. There is no evidence that respondent attempted to file the Disclosure Statements prior to the April 30, 2022 deadline, or that respondent sought technical assistance when she experienced trouble with the form.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 24, 2022
Date of Mailing: October 24, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D08-22
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Lisa Qarmout,
Newton School District Board of Education, Sussex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on August 23, 2022, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on August 23, 2022, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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 the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

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[1] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover, failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2022. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, by electronic correspondence dated June 29, 2022 and August 2, 2022, Respondent was reminded that her Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on August 23, 2022. After having been served with the OTSC, Respondent filed her Disclosure Statements on September 13, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent stated, that she "struggled with opening and submitting the form" and "encountered difficulties with it for a couple of months." Importantly, Respondent did not deny that she did not file her Disclosure Statements in a timely fashion.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because she did not timely file Disclosure Statements.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of

Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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 brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: September 14, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D08-22

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2022; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on August 23, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent filed her Disclosure Statements on September 13, 2022, and also filed a response to the Commission's OTSC that did not dispute that she did not file her Disclosure Statements in a timely fashion; and

Whereas, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its special meeting on September 14, 2022, the Commission recommended that the Commissioner of Education impose a penalty of reprimand; and

Whereas, at its special meeting on September 14, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on September 14, 2022.

Kathryn A. Whalen, Esq., Director

278-22SEC
SEC Dkt. No. D09-22
Agency Dkt. No. 243-9/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Katherine Limon, Board of Education of the Wallkill Valley Regional School District, Sussex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC), finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent filed the Disclosure Statements before the issuance of the Commissioner's final decision, the SEC recommended that respondent be suspended for 30 days. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law.

Accordingly, as of the date of this decision, respondent is hereby removed from the Board for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 24, 2022
Date of Mailing: October 24, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D09-22
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Katherine Limon,
Wallkill Valley Regional Board of Education, Sussex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on August 23, 2022, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on August 23, 2022, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised Respondent that failure to respond would be deemed an admission of the facts set forth in the OTSC.[1] Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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 the material facts, as here, are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

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[1] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover, failure to timely file the required Disclosure Statements "shall constitute a violation of the ... Act and may result in the reprimand, censure, suspension or removal of a school official pursuant to the recommendation of the Commission as acted upon by the Commissioner [of Education]." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2022. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, by electronic correspondence dated June 29, 2022 and August 2, 2022, Respondent was reminded that her Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on August 23, 2022. After having been served with the OTSC, Respondent still failed to file Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because she did not timely file Disclosure Statements.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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 brief on appeal.

Robert W. Bender, Chairperson

Mailing Date: September 14, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D09-22

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2022; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on August 23, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file her Disclosure Statements following issuance of the OTSC, and failed to file a response to the OTSC; and

Whereas, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its special meeting on September 14, 2022, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be forty-five (45) days after the mailing date of the within decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its special meeting on September 14, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on September 14, 2022.

Kathryn A. Whalen, Esq., Director

279-22SEC
SEC Dkt. No. T01-22
Agency Dkt. No. 244-9/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Annette Beasley,
Board of Education of the Township of
Irvington, Essex County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the August 23, 2022 Order to Show Cause but prior to the SEC's September 14, 2022 meeting. The SEC notes that respondent was previously reprimanded in 2021 for failure to timely complete the required training. Due to the repeated failure to comply with the statutory obligation, the SEC recommended that respondent be suspended for 30 days.

Respondent filed exceptions to the recommended penalty, arguing that her failure to complete her training was due to an oversight. She also refers to unspecified personal issues and contends that she provided valuable leadership to the Board in recent negotiations.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. There is no dispute that respondent failed to complete the training in a timely manner as required by statute, and respondent's exceptions provide no basis to reduce the recommended penalty.

Accordingly, the respondent is hereby suspended for 30 days as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 24, 2022
Date of Mailing: October 24, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T01-22
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Annette Beasley,
Irvington Board of Education, Essex County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on August 23, 3022, and also served on August 23, 2022, via electronic mail.[1] The OTSC directed Annette Beasley (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on August 23, 2022, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Irvington Board of Education (Board), located in Essex County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. According to NJSBA, Respondent was required to complete the Governance 3 training program by March 31, 2022.[2]

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[1] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

[2] The March 31, 2022, deadline is because on an April school board of education election.

On or about August 22, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by March 31, 2022, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. *See* **Exhibit A**. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on August 23, 2022.

To date, there is no dispute that Respondent did not complete her required training by March 31, 2022, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed training on September 1, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent stated, her "failure to complete the training was simply an oversight on [her] part." Importantly, Respondent did not deny that she did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **suspension for thirty (30) days**, with such suspension to become effective immediately upon adoption by the Commissioner of Education. The Commission's recommended sanction is predicated on the fact that, not only did Respondent complete training more than five (5) months late, but she was also sanctioned in 2021 (reprimand) for, as here, failing to comply with the statutory requirement to complete ethics training. Respondent's repeated failure to abide by, and comply with, her statutory obligations as a school official must be met with an appropriate sanction.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: September 14, 2022

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T01-22

Whereas, Annette Beasley (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by March 31, 2022; and

Whereas, at its meeting on August 23, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by March 31, 2022, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed training on September 1, 2022, and also filed a response to the Commission's OTSC that did not dispute that she did not complete training in a timely fashion; and

Whereas, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete mandated training; and

Whereas, at its special meeting on September 14, 2022, the Commission recommended that the Commissioner of Education impose a penalty of suspension for thirty (30) days; and

Whereas, at its special meeting on September 14, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its special meeting on September 14, 2022.

Kathryn A. Whalen, Esq., Director

280-22SEC
SEC Dkt. No. T03-22
Agency Dkt. No. 246-9/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Francisco Martinez,
Board of Education of the Borough of
Fairview, Bergen County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the August 23, 2022 Order to Show Cause but prior to the SEC's September 14, 2022 meeting; therefore, a penalty of reprimand is recommended.

Respondent filed exceptions to the recommended penalty, consisting of an email from the Fairview Business Administrator (BA), who indicated that the delay in respondent's training was caused by the BA's error in registering respondent for the wrong course and technical difficulties that required numerous contacts with technical support.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. While the Commissioner is sympathetic to the technical difficulties encountered by the BA, there is no

evidence that respondent attempted to complete his training in advance of the March 31, 2022 deadline.

Accordingly, the respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 24, 2022
Date of Mailing: October 24, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T03-22
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Francisco Martinez,
Fairview Board of Education, Bergen County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on August 23, 2022, and also served on August 23, 2022, via electronic mail.[1] The OTSC directed Francisco Martinez (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on August 23, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Fairview Board of Education (Board), located in Bergen County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. According to NJSBA, Respondent was required to complete the Governance 4 training program by March 31, 2022.[2]

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[1] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

[2] The March 31, 2022, deadline is because on an April school board of education election.

On or about August 22, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by March 31, 2022, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. *See* **Exhibit A**. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on August 23, 2022.

To date, there is no dispute that Respondent did not complete his required training by March 31, 2022, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed training on August 23, 2022, but has not submitted anything, in writing, explaining why a penalty up to and including removal should not be imposed for his failure to do so by March 31, 2022.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked

"Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: September 14, 2022

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T03-22

Whereas, Francisco Martinez (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by March 31, 2022; and

Whereas, at its meeting on August 23, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by March 31, 2022, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by March 31, 2022; and

Whereas, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete mandated training; and

Whereas, at its special meeting on September 14, 2022, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on September 14, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its special meeting on September 14, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq., Director

281-22SEC
SEC Dkt. No. T04-22
Agency Dkt. No. 247-9/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Claudia Baselice,
Board of Education of the Township of
North Bergen, Hudson County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the August 23, 2022 Order to Show Cause but prior to the SEC's September 14, 2022 meeting; therefore, a penalty of reprimand is recommended. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, the respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 24, 2022
Date of Mailing: October 24, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T04-22
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Claudia Baselice,
North Bergen Board of Education, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on August 23, 3022, and also served on August 23, 2022, via electronic mail.[1] The OTSC directed Claudia Baselice (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on August 23, 2022, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the North Bergen Board of Education (Board), located in Hudson County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. According to NJSBA, Respondent was required to complete the Governance 4 training program by March 31, 2022.[2]

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[1] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

[2] The March 31, 2022, deadline is because on an April school board of education election.

On or about August 22, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by March 31, 2022, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. *See* **Exhibit A**. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on August 23, 2022.

To date, there is no dispute that Respondent did not complete her required training by March 31, 2022, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed training on August 29, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent stated, that she took "all of the training, but not all of it was showing up in the computer transcript record"; as a result, she "retook the course showing up as missing." Respondent respectfully requests that the OTSC "be withdrawn and this matter be declared resolved or dismissed."

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o

Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: September 14, 2022

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T04-22

Whereas, Claudia Baselice (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by March 31, 2022; and

Whereas, at its meeting on August 23, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by March 31, 2022, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, and also filed a response to the Commission's OTSC that did not dispute that she did not complete training in a timely fashion; and

Whereas, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete mandated training; and

Whereas, at its special meeting on September 14, 2022, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on September 14, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its special meeting on September 14, 2022.

Kathryn A. Whalen, Esq., Director

282-22SEC
SEC Dkt. No. T05-22
Agency Dkt. No. 248-9/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Muhammad Mahmoud,
Board of Education of the Village of
Ridgewood, Bergen County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the August 23, 2022 Order to Show Cause but prior to the SEC's September 14, 2022 meeting; therefore, a penalty of reprimand is recommended. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, the respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 24, 2022
Date of Mailing: October 24, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T05-22
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Muhammad Mahmoud,
Ridgewood Board of Education, Bergen County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on August 23, 2022, and also served on August 23, 2022, via electronic mail.[1] The OTSC directed Muhammad Mahmoud (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on August 23, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Ridgewood Board of Education (Board), located in Bergen County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. According to NJSBA, Respondent was required to complete the Governance 1 training program by March 31, 2022.[2]

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[1] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

[2] The March 31, 2022, deadline is because on an April school board of education election.

On or about August 22, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by March 31, 2022, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. *See* **Exhibit A**. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on August 23, 2022.

To date, there is no dispute that Respondent did not complete his required training by March 31, 2022, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed training on August 25, 2022, and also filed a response to the Commission's OTSC. More specifically, Respondent stated, "he (incorrectly) believed that he had previously completed this training; upon realizing his error, he immediately completed the training." Importantly, Respondent did not deny that he did not complete training in a timely fashion.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on September 14 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o

Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[3] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) 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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: September 14, 2022

[3] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T05-22

Whereas, Muhammad Mahmoud (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by March 31, 2022; and

Whereas, at its meeting on August 23, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by March 31, 2022, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, and also filed a response to the Commission's OTSC that did not dispute that he did not complete training in a timely fashion; and

Whereas, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete mandated training; and

Whereas, at its special meeting on September 14, 2022, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on September 14, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its special meeting on September 14, 2022.

Kathryn A. Whalen, Esq., Director

284-22
OAL Dkt. No. EDU 04995-19
(OAL Dkt. No. EDU 1517-18 On Remand)
Agency Dkt. No. 5-1/18

New Jersey Commissioner of Education

Final Decision

In the Matter of the Teaching Certificate of
Sheila Tabanli, Central Jersey Prep Charter School,
Somerset County.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 25, 2022
Date of Mailing: October 25, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04995-19

AGENCY DKT. NO. 5-1/18

(ON REMAND EDU 1517-18)

IN THE MATTER OF THE TEACHING CERTIFICATE OF SHEILA TABANLI, CENTRAL JERSEY PREP CHARTER SCHOOL, SOMERSET COUNTY.

Teresa L. Moore, Esq., for petitioner Central Jersey Prep Charter School (Riker, Danzig, Scherer, Hyland, Perretti, LLP, attorneys)

Sheila Tabanli, respondent, pro se

Record Closed: May 13, 2022 Decided: September 19, 2022

BEFORE **ELIA A. PELIOS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 10, 2019, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On May 13, 2022, an executed settlement agreement and Stipulation of Dismissal with Prejudice was received, 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 confirmed by the representations of both counsel.

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 19, 2022
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: 9/21/2022

Date Mailed to Parties: 9/21/2022

/caa

APPENDIX

LIST OF EXHIBITS

Jointly submitted:

J-1 Settlement Agreement and General Release

J-2 Stipulation of Dismissal with Prejudice

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (hereinafter the "Agreement") is made and entered into by and between **Sheila Tabanli** ("Tabanli"), in her capacity as an individual and on behalf of her heirs, executors, administrators, agents, successors and assigns (hereinafter "Tabanli") and **Central Jersey College Prep Charter School** ("CJCP"). Tabanli and CJCP are sometimes collectively referred to as the "Parties."

RECITALS

WHEREAS, the terms of this Agreement are the product of mutual negotiation and compromise between the Parties;

WHEREAS, CJCP commenced litigation against Tabanli before the Commissioner of Education, Docket No. EDU 04995-2019, Agency No. 5-1/18 (the "Action");

WHEREAS, in order to avoid the time, cost and uncertainty of litigation, the Parties wish to compromise and settle all matters relating to and arising from the Action and Tabanli's employment at CJCP;

WHEREAS, Tabanli understands and agrees that this Agreement settles, waives, bars, and resolves any and all claims that she or anyone on her behalf may have or could possibly have against CJCP in connection with the Action and her employment with CJCP, unless expressly excluded as more particularly described in Paragraph 3;

WHEREAS, this Agreement supersedes all prior agreements, understandings, or promises between Tabanli and CJCP, whether written or oral;

NOW, THEREFORE, in consideration of the mutual promises, agreements and other good and sufficient consideration set forth herein, the Parties hereby AGREE as follows:

1. Denial of Wrongdoing

It is understood and agreed that by accepting this Agreement and by exchanging the consideration identified herein, Tabanli and CJCP do not in any way admit or concede any wrongdoing on their part or on the part of CJCP's present or former employees, owners, shareholders, partners, officers, directors, trustees, affiliates, attorneys, agents, and/or representatives. The Parties specifically and explicitly deny that they engaged in any wrongdoing.

2. Consideration

In full and final satisfaction of its claims as more particularly described in this Agreement, CJCP agrees to dismiss the Action with prejudice. CJCP will submit a stipulation of dismissal with prejudice to the administrative law judge within seven (7) days of CJCP's attorneys' receipt of this Agreement and the stipulation of dismissal with prejudice both executed by Tabanli and sent by email to Teresa Moore, Esq. at tmoore@riker.com.

3. General Release of Claims by Tabanli

It is understood and agreed by and between the Parties to this Agreement that in return for the consideration set forth in Paragraph 2, and the other promises contained herein, Tabanli does, knowingly and voluntarily, completely and forever, release and discharge CJCP and its affiliates, successors, predecessors, and assigns and present and former employees, owners, partners, shareholders, officers, directors, trustees, attorneys, insurers, agents, and representatives (collectively, the "Released Parties") from any and all causes of action, claims, judgments, obligations, damages (compensatory and punitive), claims to attorneys' fees, and rights to pre- or post-judgment interest, or liabilities of whatever kind and character, relating to Tabanli's employment with CJCP. This General

Release includes any claims that Tabanli or anyone on Tabanli's behalf may have arising under New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1 et seq., the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq., the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 et seq., violation of public policy, infliction of emotional distress, the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq., Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000(e) et seq., the Age Discrimination in Employment Act of 1967, as amended, (29 U.S.C. § 621 et seq.), the Civil Rights Act of 1991 as amended, the Americans with Disabilities Act as amended, 42 U.S.C. § 1201 et seq., the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., 42 U.S.C. § 1981, 42 U.S.C. § 1983, 38 U.S.C. § 4301 et seq., the Genetic Information Nondiscrimination Act ("GINA"), the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq., the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., the Equal Pay Act of 1963, 29 U.S.C. § 206(d) et seq. (as amended), New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 et seq., the New Jersey Wage and Hour Law, N.J.S.A., 34:11-56a et seq., the New Jersey SAFE Act, N.J.S.A. 34:11-C-1 et seq., the New Jersey Civil Rights Act, N.J.S.A. 10:6-1; and prohibitions against wage discrimination based upon sex (N.J.S.A. 34:11-56.1 et seq.) as amended, or any other federal, state, or local human rights, civil rights, wage and hour, pension, employment or labor law, rule and/or regulation, public policy, contract or tort law, or any claim of retaliation under such laws and any claim arising under the common law, including, but not limited to, causes of action for wrongful discharge, breach of contract, fraud, defamation, interference with contract or prospective economic advantage, and infliction of emotional distress, violation of any other national, state, or local statute, law,

or ordinance, claims for loss of income, compensatory damages, emotional distress, liquidated damages, punitive damages, attorneys' fees and costs, and any other action whether cognizable in law or in equity, based on any conduct up to and including the Effective Date of this Agreement. Tabanli further represents that she has not filed or made any allegations related to the Released Parties in any other matter in any court, agency or tribunal.

Nothing in this Agreement shall be construed as prohibiting Tabanli from filing any charge or complaint with the EEOC or any other administrative agency or participating in any investigation or proceeding conducted by the EEOC or any other administrative agency, nor shall any provision of this Agreement adversely affect Tabanli's right to engage in such conduct. Notwithstanding the foregoing, Tabanli waives the right to obtain any relief from the EEOC or any other administrative agency or recover any monies or compensation as a result of filing any such charge or complaint.

4. General Release of Claims by CJCP

It is understood and agreed by and between the Parties to this Agreement that in return for the consideration set forth in Paragraph 3, and the other promises contained herein, CJCP and its affiliates, successors, predecessors, and assigns and present and former employees, owners, partners, shareholders, officers, directors, trustees, attorneys, insurers, agents, and representatives, do, knowingly and voluntarily, completely and forever, release and discharge Tabanli from any and all causes of action, claims, judgments, obligations, damages (compensatory and punitive), claims to attorneys' fees, and rights to pre- or post-judgment interest, or liabilities of whatever kind and character, relating to Tabanli's employment with CJCP, based on any conduct up to and including the Effective Date of this Agreement. CJCP further represents that it has not filed or made

any allegations related to the Tabanli in any other matter in any court, agency or tribunal.

5. 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.

6. 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 are to be resolved against the drafting party, shall not be employed in the interpretation of this Agreement. The captions and headings at the beginning of each paragraph are for convenience and reference only and shall not limit, define, or affect the construction and interpretation of this Agreement.

7. Applicable Law

This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey, regardless of conflict of laws principles, and all lawsuits related to this Agreement must be brought in the courts of the State of New Jersey. The Parties consent to the personal and subject-matter jurisdiction of the courts of the State of New Jersey, including, but not limited to, without regard to principles of conflict of laws, venue, and forum non conveniens.

8. 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.

9. Review and Revocation Period

Tabanli acknowledges that she was given twenty-one (21) days to review this Agreement from the time it was presented to her, and that she has reviewed it with her attorney to the extent she chose to do so. Tabanli also acknowledges that she was advised that she has seven days after she signs and delivers the Agreement to revoke it by notifying Teresa Moore, Esq., at Riker, Danzig, Scherer, Hyland & Perretti, LLP, One Speedwell Avenue, Morristown, New Jersey 07962, in writing. This Agreement is not effective or enforceable until the seven-day revocation period has expired.

BY SIGNING THIS AGREEMENT, TABANLI ACKNOWLEDGES:

(i) She has read this Agreement completely.

(ii) She has had the opportunity to consider the terms of this Agreement.

(iii) She has been advised to consult with her attorney prior to executing this Agreement.

(iv) She understands and means everything that she said in this Agreement and she agrees to all its terms.

(v) She is not relying on CJCP to explain this Agreement to her.

(vi) 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 availed herself of this opportunity to whatever extent she desired.

(vii) She has signed this Agreement voluntarily and entirely of her own free will, without any pressure from CJCP.

_____ Dated: 04/07/2022
Sheila Tabanli

_____ Dated: 5/10/2022
Central Jersey College Prep Charter School

IN THE MATTER OF TEACHING CERTIFICATE OF TABANLI, SHEILA CENTRAL JERSEY COLLEGE PREP CHARTER SCHOOL, SOMERSET COUNTY	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDU-04995-2019S Agency Reference No. 5-1/18 **STIPULATION OF DISMISSAL WITH PREJUDICE**

It is hereby stipulated and agreed by and between the parties that the above-captioned matter is dismissed with prejudice and without costs against any party.

RIKER DANZIG SCHERER HYLAND & PERRETTI
Attorneys for the Petitioner
Central Jersey College Prep Charter School

By: _____
TERESA L. MOORE

Dated: May 13, 2022

SHEILA TABANLI
Respondent

By: _____
SHEILA TABANLI

Dated: April 7, 2022

285-22
OAL Dkt. No. EDU 03705-20
Agency Dkt. No. 39-2/20

New Jersey Commissioner of Education

Final Decision

Maria Marousis,

Petitioner,

v.

Board of Education of the Township of Brick Ocean 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. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes, with respect to paragraph IV of the Agreement, that the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, in regard to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential. Further, the Commissioner notes that the Agreement references several actions that were to take place in a time frame that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D., S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 25, 2022
Date of Mailing: October 25, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 03705-20
AGENCY DKT. NO. 39-2/20

MARIA MAROUSIS,
Petitioner,
v.
BRICK TOWNSHIP BOARD OF EDUCATION,
OCEAN COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Detzky, Hunter & DeFillippo, LLC, attorneys)

Ryan M. Amberger, Esq., for respondent (Montenegro, Thomson, Montenegro & Genz, P.C., attorneys)

Record Closed: September 15, 2022 Decided: September 19, 2022

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This appeal was filed on February 12, 2020. On March 11, 2020, the Department of Education Office of Controversies and Disputes transmitted the matter along with the petition of appeal to the Office of Administrative Law.

The parties have agreed to a settlement and entered into a Settlement Agreement and Release, indicating the terms thereof, and submitted the Settlement Agreement and Release; the certification of the Secretary of the Brick Township Board of Education (Board) that at its regular meeting on August 16, 2022, the Board adopted a resolution approving the settlement; and a Stipulation of Settlement and Dismissal with Prejudice executed by counsel for both parties, all of which are attached and fully incorporated herein. (J-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 on the Settlement Agreement and Release.

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

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

September 19, 2022
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 9-21-22

Date Mailed to Parties: 9-22-22

TMC/nmn

APPENDIX

EXHIBITS

Jointly submitted:

J-1 Settlement Agreement and Release, Board Resolution, and Stipulation of Settlement and Dismissal with Prejudice

RECEIVED
2022 SEP 15 A 11:53
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MONTENEGRO, THOMPSON, MONTENEGRO & GENZ, P.C.
531 Burnt Tavern Road
Brick, NJ 08724
(732) 295-4500
Attorneys for the Brick Township Board of Education
Ryan Amberger Attorney ID: 113632015

MARIA MAROUSIS, Petitioner, vs. **BRICK TOWNSHIP BOARD OF EDUCATION,** Respondent.	COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY **OAL DKT. NO. EDU-03705-20** **AGENCY DKT. NO. 39-2/20** **STIPULATION OF SETTLEMENT AND DISMISSAL WITH PREJUDICE**

THIS MATTER having been commenced by the Petitioner, Maria Marousis, against the Respondent, the Brick Township Board of Education, and discussions having been entered into between the parties with regard to a disposition of all claims, and the matter in difference in the above entitled action having been amicably resolved by and between the parties pursuant to the terms set forth in the annexed settlement agreement, it is hereby stipulated and agreed that any and all claims by and between the parties are hereby dismissed with prejudice and without costs to such parties.

DETZKY, HUNTER & DEFILLIPPO, LLC

Stephen B. Hunter, Esq.
Attorney for Petitioner

Dated: 9/14/22

MONTENEGRO, THOMPSON MONTENEGRO & GENZ, P.C.

Ryan M. Amberger, Esq.
Attorney for Respondent

Dated: 9/14/22

BRICK TOWNSHIP PUBLIC SCHOOLS
101 HENDRICKSON AVENUE
BRICK, NJ 08724

CERTIFICATION

I hereby certify that I, the undersigned, am the Brick Township Board of Education Secretary and am duly authorized to certify resolutions adopted by the Board of Education at the Regular Meeting held on the 16th day of August, 2022.

To approve a Settlement Agreement for 5364.

James W. Edwards, Jr., CPA
Business Administrator/Board Secretary

RECEIVED
2022 SEP 15 A 11:53
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RECEIVED

2022 SEP 15 A 11:54

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement") is hereby made and entered into this 16th day of August, 2022 by and between Petitioner, Maria Marousis (hereinafter "Petitioner"), and Respondent, the Brick Township Board of Education (hereinafter the "Board") (collectively, the "Parties", individually, a "Party").

RECITALS

WHEREAS, Petitioner is an employee of the Board currently employed as a Keyboarding Clerk 2; and

WHEREAS, the Board is the local board of education for the Brick Township Public School District operating under the laws of the State of New Jersey; and

WHEREAS, on February 12, 2020, Petitioner commenced an action before the Commissioner of Education, under Agency Dkt. No. 39-2/20, by filing a Petition of Appeal asserting claims related to tenure and salary; and

WHEREAS, after the Board filed an Answer contesting the allegations and seeking dismissal of the Petition of Appeal, the matter was transmitted to the Office of Administrative Law for adjudication on March 10, 2020; and

WHEREAS, the Parties have participated in discovery and settlement discussions; and

NOW, THEREFORE, in consideration of the foregoing and the covenants contained herein, and intending to be legally bound hereby, the Parties agree as follows:

I. Incorporation of Recitals.

The recitals set forth above are incorporated herein by reference.

II. Consideration and Terms.

A. Base Salary and Compensation Adjustment. In consideration of the foregoing and in full and final settlement of the claims set forth in the Petition of Appeal, Petitioner shall receive a $6,000 increase in her base salary effective July 1, 2022. Additionally, Petitioner shall annually receive $6,000 in non-pensionable compensation for services performed for the administration of the McKinney Vento Homeless Grant (based on the overtime work to be performed). The annual appointment can only be guaranteed for the 2022-2023 school year; however, the current Superintendent agrees that as long as Petitioner wants the position and receives sufficient evaluations from her supervisor, he will recommend Petitioner for the position and have it placed on the agenda for Board action annually.

B. Assignment. Petitioner will remain in her current position as a Keyboarding Clerk 2 in accordance with Civil Service regulations and assigned to Brick Memorial High School for the 2022-2023 school year.

C. Tenure. The Board recognizes Petitioner as having attained tenure as a clerical employee pursuant to N.J.S.A. 18A:17-2.

D. Vacation. The Board shall grant Petitioner a one-time credit of ten (10) vacation days. Any unused vacation days out of this 10-day credit shall not be paid out during her employment or upon separation/retirement.

E. Release. In consideration of the foregoing, the Parties agree that this Agreement is intended to be a final settlement and resolution of all issues in connection with the claims at issue in this litigation, and is intended by each Party to release the other Parties and their representatives, members, officers, employees, professionals, and agents from liability arising out of the claims at issue in this litigation.

F. Covenant Not to Sue. The Parties each agree that they will not make, assert, or maintain against any Party that they released in this Agreement, any claim, demand, action, or suit arising out of, or in connection with, the matters respectively released in this Agreement, including, but not limited to, any claims that were brought, or could, or should, have been brought, in the Petition of Appeal.

G. Dismissal of Petition of Appeal. Within seven (7) days of execution of this Agreement, the Parties shall take all action necessary to mark the Petition of Appeal settled, discontinued, and ended, including executing and filing a Stipulation of Dismissal with Prejudice of the Petition of Appeal.

III. Compromise of Disputed Claims / No Admission of Liability.

It is understood and agreed by the Parties that this Agreement is in compromise of disputed claims in the Petition of Appeal. The settlement of the claims by and against the Parties shall not be construed as an admission of liability on the part of any Party to this Agreement. By entering into this Agreement; the Parties do not admit to any liability or wrongdoing, or concede the truth or accuracy of any pleading entered in this matter, except as to the matters set forth in the recital clauses above. Further, the Parties deny any and all liability, responsibility, and/or fault.

IV. Confidentiality.

The Parties agree that the settlement consideration and terms shall be held confidential between them and shall not be disclosed to any individual, person, organization, or entity without the prior written consent of the other Parties to this Agreement, other than as required by a Court of competent jurisdiction, or by applicable law, regulation, or legal or judicial process, or for purposes of seeking financial or legal or tax advice, or as may be required by licensing authorities or insurers, or as necessary to effect each Party's duties under this Agreement, including the dismissal of claims in the Petition of Appeal.

V. Non-Disparagement.

The Parties agree not to defame or willfully disparage any other Party to this Agreement, or cause the Parties to be defamed or disparaged in any regard or as to any subject matter, including, but not limited to the subject matter of the Petition of Appeal, except as may be required to make statements that would otherwise be disparaging or defamatory by order of any court of competent jurisdiction, or otherwise required by applicable law, regulation, or legal or judicial process, including statements made in the course of prosecuting the underlying action and/or Complaint.

VI. Waiver of Terms.

The Parties agree that the waiver of any provision of this Agreement must be in writing signed by an authorized agent of each Party making such a waiver. Waiver of any default, breach, or violation of this Agreement shall not be deemed a waiver of any other default, breach, violation, or other provisions of this Agreement.

VII. Severability.

Once fully executed, each covenant and agreement contained in this Agreement shall be for all purposes construed to be a separate and independent covenant and agreement. If any term or provision of this Agreement, or the application thereof to any person or circumstance, should be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforced to the extent permitted by law.

VIII. Governing Law; No Drafting Party.

This Agreement, and the obligations and performances of the Parties hereunder, shall be governed, interpreted, construed, and enforced solely in accordance with the laws of the State of New Jersey, without regard to choice of law principles. The drafting and preparation of this Agreement is the result of the efforts of all Parties hereto and their respective counsel, and 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 one Party.

IX. Binding Effect.

All of the terms of this Agreement shall be binding upon and inure to the benefit of, and be enforceable by, the successors, assigns, or affiliates of each of the Parties to this Agreement.

X. Counterparts.

This Agreement may be executed in two or more counterparts, each of which will be deemed an original, but all of which together shall constitute one and the same instrument.

XI. Entire Agreement.

This Agreement constitutes the entire agreement between the Parties with respect to settlement of the Petition of Appeal. Except as specifically provided herein, no amendment, modification, or alteration of the terms or provisions of this Agreement shall be binding unless signed in writing by all Parties to this Agreement.

XII. No Evidence in Future Proceedings.

The Parties agree that if this Agreement does not become effective for any reason, it shall be deemed to be negotiation for settlement purposes only, and will not be admissible in evidence or usable for any purpose whatsoever, except to enforce the terms of this Agreement.

XIII. Attorneys' Fees and Costs.

The Parties shall bear their own attorneys' fees and costs.

XIV. Effective Date.

This Agreement shall become effective, and be deemed executed, on the date that it has been signed by Petitioner, approved by a vote of the Board, and signed by the designee of the Board.

XV. Warranty of Authority to Execute Agreement.

The Parties represent and warrant that no other person or entity has or has had any interest in the claims, demands, obligations, or causes of action referred to in this Agreement, and that they have not sold, assigned, transferred, conveyed, or otherwise disposed of any of the claims, demands, obligations, or causes of action referred to in this Agreement.

XVI. Headings.

The headings used in this Agreement are for convenience only and shall not be used to aid in the interpretation of any provision of this Agreement.

XVII. Acknowledgement.

The Parties acknowledge and agree that: (a) each Party has had the opportunity to consult with, and has in fact consulted with such professionals, experts, and legal counsel of their choice as such Party may have desired with respect to all matter settled and resolved herein; (b) each Party has participated fully in the negotiation and preparation of this Agreement; (c) each Party has carefully reviewed the entire Agreement; (d) each Party has been advised of its rights and

obligations with respect to the execution of this Agreement; and (e) each Party is entering into this Agreement knowingly and willfully. Accordingly, this Agreement shall not be more strictly construed in favor of, or against any Party hereto.

IN WITNESS WHEREOF, the following have hereto set their hands and seals as of the dates indicated:

MARIA MAROUSIS

By: Maria Marousis

Print: Maria Marousis

Dated: 8/11/22

Witnessed by:

NOTARY PUBLIC/ATTORNEY

Lisa A Dyas
Notary Public
New Jersey
My Commission Expires 4-1-2025
No. 2325936

BRICK TWP. BOARD OF EDUCATION

By:

Print: James W. Edwards, Jr., CPA BA/BS

Dated: 8/12/2022

Witnessed by:

NOTARY PUBLIC/ATTORNEY

MARY CAREY
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 4/15/2024

286-22
OAL Dkt. No. EDU 00673-22
Agency Dkt. No. 209-11/21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Sparta, Sussex County,

Petitioner,

v.

A.B.-G. and J.F. on behalf of minor children, K.B. and M.B.,

Respondents.

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

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 25, 2022
Date of Mailing: October 25, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00673-22

AGENCY DKT. NO. 209-11/21

BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,

Petitioner,

v.

A.B-G. AND J.F. ON BEHALF OF MINOR CHILDREN, K.B. AND M.B.,

Respondents

Marc H. Zitomer, Esq., for petitioner (Schenck, Price, Smith & King, attorneys)

John Chiaia, Esq., respondents (Chiaia & Associates, attorneys)

Record Closed: September 14, 2022 Decided: September 14, 2022

BEFORE, **WILLIAM J. COURTNEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The above matter was scheduled for a hearing on September 16, 2022 but was adjourned because the parties agreed to settle the matter. A executed settlement agreement indicating the terms of settlement was forwarded to the undersigned on September 14, 2022 and is attached hereto.

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

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

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

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement 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.

William J. Courtney

September 14, 2022
DATE

WILLIAM J. COURTNEY, ALJ

Date Received at Agency: 9-16-22

Date Mailed to Parties: 9-16-22
sej

SCHENCK, PRICE, SMITH & KING, LLP
220 Park Avenue
P.O. Box 991
Florham Park, New Jersey 07932
(973) 539-1000
Attorneys for Petitioner

SPARTA TOWNSHIP BOARD OF EDUCATION, **Petitioner,** **v.** **ANGEL BRAVO-GOMES AND JESSEL FUENTES, ON BEHALF OF MINOR CHILDREN, K.B. AND M.B.,** **Respondents.**	**STATE OF NEW JERSEY DEPARTMENT OF EDUCATION** **COMMISSIONER OF EDUCATION** **OAL DKT. NO.: EDU 06717-2021 S** **AGENCY REF. NO.:** 209-11/21 **SETTLEMENT AGREEMENT**

This Agreement is made as of July 1, 2022, by and between Petitioner, Sparta Township Board of Education ("the Board" or "Petitioner"), and the Respondent, Angel Bravo-Gomes and Jessel Fuentes, o/b/o K.B. and M.B.

RECITALS

WHEREAS, August 26, 2021, the Sparta Township Board of Education Residency Committee ("Committee") convened a residency hearing, which Respondent Fuentes attended.

WHEREAS, after having heard and considered all of Respondent's proofs, the Committee determined that K.B. and M.B. were not domiciled within the District during the 2020-2021 school year and recommended to the full Board that they be disenrolled.

WHEREAS, shortly following the hearing, Respondent Fuentes voluntarily withdrew K.B and M.B. from the District.

WHEREAS, the Committee recommended to the Board that it assess back-tuition for both students for their ineligible attendance in the District during the 2020-2021 school year.

WHEREAS, at the Board's September 29, 2021 meeting, the Board adopted a resolution to assess Respondents back-tuition for K.B. and M.B.'s improper attendance in the District during the 2020-2021 school year in the amounts of $18,331.00 for K.B. and $20,677.00 for M.B.

WHEREAS, the Board thereafter commenced this administrative action to recoup alleged tuition costs; and

WHEREAS, this administrative action is captioned above is presently pending before the Commissioner of Education in the Office of Administrative Law, the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, in order to avoid the expense, inconvenience, distractions and inherent uncertainties associated with continuation of this dispute, and the fees and expenses that inevitably would result therefrom, the Parties, by this Agreement, herein agree to adopt a full and final settlement of any and all claims, lawsuits, complaints, and/or disputes between Petitioner and Respondents in connection with any and all damages and losses arising from the Litigation; and

WHEREAS, by this Agreement, Petitioner will voluntarily dismiss the Litigation without costs to any party as against the other, except to enforce the terms of the agreement, if necessary;

NOW, THEREFORE, in consideration of good and valuable consideration, the sufficiency and adequacy of which is acknowledged, the parties to this Agreement agree as follows:

1. Respondents shall pay the Board the sum of nineteen thousand, five hundred and four dollars ($19,504.00) representing one half of the back tuition due and owing for the period of the student's ineligible attendance in the District as determined by the Board and as set forth in the Petition, which shall constitute a full and final settlement of the claim for back tuition asserted against Respondents by the Board of Education in the Litigation.
2. The aforesaid amount shall be paid in twenty-four (24) equal installments of $812.66 and due on the first day of every month starting on August 1, 2022. Payment shall be in the form of a check made payable to the "Sparta Board of Education" and delivered or mailed to the office of Joanne Black, School Business Administrator/Board Secretary, at the District Administration office located at 18 Mohawk Avenue, Sparta, New Jersey, 07871.
3. The Board, in consideration of this Stipulation of Settlement and Release, and in full, final, and complete settlement of the matter, hereby agrees to a withdrawal and/or dismissal, with prejudice, of the Petition of Appeal in this matter, except to enforce the terms if necessary.
4. Respondents understand and agree that, if they fail to make a payment in accordance with this Agreement, such failure shall constitute a default and the entire balance of $19,504.00, plus interest at the rate of 6.25 % will become due and owing.
5. In the event of a default, Respondents further agrees to indemnify the Board for any and all costs, including court costs and attorney's fees, associated with any action instituted by Petitioner to enforce the terms of this Agreement should Respondents breach the Agreement and/or fail to adhere to the agreed-upon payment plan.

6. The terms of this Agreement shall in no way constitute acceptance or assent by the Board that any other child of Respondents, as may be applicable, is automatically entitled to a free public education in the District at any point in the future.
7. This Agreement is subject to formal approval by the Board. If approved, the Board President, Superintendent and/or Business Administrator, as indicated, is fully authorized to execute this Agreement on behalf of the Board.
8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.
9. This Agreement is to be construed in accordance with the laws of the State of New Jersey.
10. Respondents hereby represents that they are freely entering into this Agreement and have consulted with their attorney John Chiaia, Esq. regarding this Agreement.
11. This Settlement shall be subject to the approval of the Office of Administrative Law and the Commissioner of Education prior to becoming effective. Should it not be approved, Petitioner will refund the Respondents any payments which have been made and each party reserves all of its legal and other rights regarding this matter.
12. This Agreement shall be binding upon all parties hereto, and shall inure to the benefit of each of them, as well as their respective estates, heirs, legal representatives, successors, predecessors, parent companies, subsidiaries, affiliates, owners, directors, officers, shareholders, members, employees, agents and assigns.
13. This Agreement constitutes the entire understanding and agreement by the parties with respect to the subject matter of this Agreement, and there are no agreements, undertakings, restrictions, representations or warranties as between the parties other than

those set forth herein. This Agreement supersedes all previous arrangements or understandings, whether written or oral, and contains the entire agreement of the parties with respect to its subject matter. This Agreement may be modified or amended only by written agreement jointly executed by the Petitioner and Respondent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, consisting of five pages, effective on the day and year first above written.

FOR PETITIONER,
SPARTA TOWNSHIP BOARD OF EDUCATION

Date: 8/25/2022

CRAIG PALLESCI, BD. PRES.

RESPONDENT,

Date: _____

ANGEL BRAVO-GOMES

ATTEST:

RESPONDENT,

Date: _____

JESSEL FUENTES

ATTEST:

287-22
OAL Dkt. No. EDU 05381-22
Agency Dkt. No. 161-6/22

New Jersey Commissioner of Education

Final Decision

David Rouse,

Petitioner,

v.

Board of Education of the Borough of Somerdale, Camden County,

Respondent.

The record of this matter, the proposed 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 such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes, with respect to paragraph 6 of the Agreement, that the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* in regard to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 25, 2022
Date of Mailing: October 25, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05381-22

AGENCY DKT. NO. 161-6/22

DAVID ROUSE,

Petitioner,

v.

BOARD OF EDUCATION, OF THE BOROUGH OF SOMERDALE,

Respondent.

Paul E. Griggs, Esq., for petitioner (Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Geoffrey Stark, Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: September 15, 2022 Decided: September 20, 2022

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 30, 2022, 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, along with the Board Resolution, indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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, 2022
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 9/21/2022

Date Mailed to Parties: 9/22/2022

MAB/kl

RECEIVED

2022 SEP -2 A 9:12

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Geoffrey N. Stark, Esq. – 01811-2010
CAPEHART & SCATCHARD, P.A.
8000 Midlantic Drive, Suite 300S
P.O. Box 5016
Mount Laurel, NJ 08054-5016
(856) 234-6800
Attorneys for Respondent, Somerdale Board of Education

DAVID ROUSE, Petitioner, v. SOMERDALE BOARD OF EDUCATON, Respondent.	NEW JERSEY COMMISSIONER OF EDUCATION Agency Reference No.: 1619-/22 Docket No.: EDU 05381-2022S Civil Action **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("the Agreement" or "this Agreement") is entered into this 11 day of August, 2022, by and between David Rouse, residing at 171 Echelon Road, Apartment 3, Voorhees, New Jersey 08043 ("Petitioner"), and Respondent, the Somerdale Board of Education, located at 301 Grace Street, Somerdale, New Jersey 08083 ("Board" or "District") (Petitioner and the Board collectively referred to as "the Parties").

WHEREAS, Petitioner served in the position of Business Administrator/Board Secretary for the Somerdale Public School District under a contract for the period of July 1, 2021, through June 30, 2022; and

WHEREAS, Petitioner holds a Provisional School Business Administrator Certificate which expires on July 31, 2022, and a School Business Administrator Certificate of Eligibility; and

WHEREAS, on May 5, 2022, the Board voted to send a proposed 2022-2023 contract for Petitioner to the county office of education. The proposed contract for the 2022-2023 school year reflected a proposed annual salary of $99,347.00; and

WHEREAS, the proposed contract for the 2022-2023 required that Petitioner possess such certifications from the State Board of Examiners as are necessary to permit him to hold the position of school business administrator; and

WHEREAS, the proposed contract for the 2022-2023 school year included a provision for termination of the contract by either party upon sixty-days' notice; and

WHEREAS, on June 9, 2022, the employment contract between Petitioner and the Board for the 2022-2023 school year was not approved by the Board; and

WHEREAS, on June 14, 2022, Petitioner received written notice that the employment contract between Petitioner and the Board for the 2022-2023 school year was not approved by the Board; and

WHEREAS, on June 22, 2022, Petitioner filed with the Commissioner of Education a Verified Petition of Appeal, and an Application for Emergent relief, thereby initiating the above-captioned litigation; and

WHEREAS, on June 30, 2022, the Application for Emergent Relief was transmitted to the Office of Administrative Law; and

WHEREAS, Respondent filed an opposition to the Application for Emergent Relief, contesting the argument that Petitioner was entitled to the relief sought; and

WHEREAS, the Office of Administrative Law scheduled an oral argument on the Application for Emergent Relief before the Hon. May Ann Bogan, A.L.J., on July 6, 2022; and

WHEREAS, prior to the scheduled oral argument, ALJ Bogan engaged the Parties in settlement discussions, with the goal of amicably resolving any and all potential disputes, claims, or lawsuits between them by way of settlement of all claims, without the need to resort to further litigation; and

WHEREAS, as a result of said settlement discussions, the Parties were able to reach a mutually acceptable resolution of their dispute by way of settlement, the terms and conditions of which are fully set forth in this Agreement; and

NOW THEREFORE, in view of the aforementioned premises, and in consideration for the mutual promises and terms set forth below, the Parties hereby agree as follows:

1. The Parties agree to settle any and all claims between them on the following terms:

    a. The Board agrees to pay to the Petitioner a total of SIXTEEN THOUSAND, THREE-HUNDRED AND THIRTY-ONE AND 00/100 DOLLARS ($16,331.00). This amount is calculated based upon an amount equal to sixty (60) pro-rated days of salary at an annual rate of $99,347.00.

    b. The payment described above shall be in one check payable to Petitioner, and delivered to the office of Petitioner's counsel at:

c. The payment described above shall be subject to Petitioner's counsel furnishing the Board with a completed W-9 form.

d. The payment(s) described above shall be the total and maximum financial responsibility of the Respondent, or any of its members, directors, officers, administrators, employees, servants, representatives, agents, or assigns. Petitioner expressly acknowledges that he shall bear responsibility for any taxes attributable to the payment(s) described above.

e. The Board shall utilize its best efforts to ensure that such settlement proceeds are paid to Petitioner in the manner described above within thirty (30) business days of final approval of this Agreement by the Board at a duly constituted meeting thereof.

2. In exchange for the Board making the payment set forth in Paragraph 1 above, Petitioner, his executors, heirs and assigns, hereby release and discharge the Board, as well as any and all of their former and current members, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, as well as their heirs, executors and administrators (hereinafter "Releasees"), from any and all liability, 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, now has or may hereafter have for any reason whatsoever on account, arising out of or in consequence of his employment relationship and/or separation of employment, including, but not limited to:

a. All federal and state statutory claims and any amendments to such statutes, including but not limited to claims arising under the New Jersey Law Against Discrimination, the New Jersey Civil Rights Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, Title VII of the Civil Rights Act of 1964, Sections 1981 through 1988 of Title 42 of the United States Code, the Age Discrimination in Employment Act of 1967, including the Older Workers' Benefit Protection Act, the Americans with Disabilities Act of 1990, the Rehabilitation Act, the Employee Retirement Income Security Act of 1974, the Fair Labor Standards Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, the National Labor Relations Act, the Federal Warn Act, the Family and Medical Leave Act of 1993, the Occupational Safety and Health Act, the Equal Pay Act, the New Jersey Minimum Wage Law, the New Jersey Wage and Hour Law, Equal Pay Law for New Jersey, the New Jersey Worker Health and Safety Act and the Labor Management Relations Act;

b. All claims arising under the United States or New Jersey Constitutions;

c. All claims arising under any Executive Order or derived from or based upon any state or federal regulations;

d. All common law claims, including but not limited to any and all rights to discovery, breach of contract, tort claims, claims for wrongful discharge, constructive discharge, violation of public policy, breach of an express or implied contract, breach of an implied covenant of good faith and fair dealing, negligent or intentional infliction of emotional distress, hostile work environment, defamation, conspiracy, tortious interference with contract or prospective economic advantage, promissory estoppel, equitable estoppel, fraud, misrepresentation, detrimental reliance, retaliation and negligence;

e. All claims for any compensation including, back wages, front pay, punitive damages, pay increases, bonuses or awards, fringe benefits, disability benefits, severance benefits, reinstatement, retroactive seniority, pension benefits, contributions to retirement plans, or any other form of economic loss;

f. All claims for personal injury, including physical injury, mental anguish, emotional distress, pain and suffering, embarrassment, humiliation, damage to name or reputation, interest, liquidated damages and punitive damages;

g. Any claims arising out the terms and conditions of Petitioner's employment with the Board and the non-approval of an employment contract between Petitioner and the Board for the 20223-2023 school year;

h. Any rights to reemployment with the Board;

i. Any claim of tenure, re-employment, placement on a re-employment list and/or seniority arising under Title 18A of the New Jersey Statutes, including but not limited to N.J.S.A. 18A:28-5, N.J.S.A. 18A:28-6, and N.J.S.A. 18A:28-12.

j. Any grievance pursuant to any Board policy or regulation and any collective bargaining agreement; and

k. All claims for costs, interest and attorneys' fees.

Except as otherwise provided herein, Petitioner has not, and agrees that he shall not, file any lawsuit or claim against the Releasees based on any events, whether known or unknown, including, but not limited to, any events related to, arising out of, or in connection with, his employment with the Board or the non-approval of an employment contract between Petitioner and the Board for the 20223-2023 school year, in any court or tribunal of the United States, New Jersey, or any other state, city, county, or locality. Petitioner further understands that, except as provided herein, he shall not personally recover monies, and expressly waives the right to recover such monies, for any complaint or charge filed against the Releasees with any federal, state or local board, agency or court.

3. In consideration of Petitioner's release of the Board, and the other good, valuable and sufficient consideration recited herein, the Board releases and gives up any and all claims and rights, including disciplinary charges, which it may presently have and be aware of against Petitioner. This release applies to claims resulting from anything which has happened throughout the course of Petitioner's employment up to now arising from or related to his employment with the Board. Except as otherwise provided herein, and subject to the fulfillment of the terms of this Agreement, the Board will take no further action with respect to the non-approval of an employment contract for Petitioner for the 2022-2023 school year.

4. Petitioner expressly represents that he is not a Medicare beneficiary and is not currently receiving, has not received in the past, will not have received at the time of payment pursuant to this Agreement, is not entitled to, is not eligible for, and has not applied for or sought, Social Security Disability or Medicare benefits. In the event any statement in the preceding sentence is incorrect (for example, but not limited to, if Petitioner is a Medicare beneficiary, etc.), the following sentences of this paragraph apply. Petitioner affirms, covenants, and warrants that he has made no claim for illness or injury against, nor is he aware of any facts supporting any claim against, the Board and/or the Released Parties under which they could be liable for medical expenses incurred by Petitioner before or after the execution of this Agreement. Furthermore, Petitioner is aware of no medical expenses which Medicare has paid and for which the Board and/or the Released Parties are or could be liable, now or in the future. Petitioner expressly agrees and affirms that, to the best of his knowledge, no liens of any governmental entities exist, including those for Medicare conditional payments. Petitioner agrees to indemnify, defend, and hold forever harmless the Board and/or the Released Parties from any Medicare claims, liens, damages, conditional payments, or rights to payment, if any, including attorneys' fees, and he further agrees to waive any and all future private causes of action for damages pursuant to 42 U.S.C. § 1395y(b)(3)(A) et seq.

5. It is expressly understood that Petitioner is no longer an employee of the Board, and the Board shall have no obligation whatsoever to rehire or reinstate Petitioner into its employ. In the event that the Board or the Board's administrators or employees are contacted for a reference regarding Petitioner, both Parties expressly understand and acknowledge their agreement that a "neutral" reference shall be provided with only the following information: Petitioner's position(s) held with the Board, the dates of his employment, and his salary information if requested.

6. Neither party shall communicate or disclose the terms of this Agreement to any person or entity, other than that party's attorney or other legal representative, family, fiduciaries, or with court personnel or staff, for purposes of effectuating this Agreement and the settlement of claims hereunder, or for any other purposes required by law, and only then in order to effectuate the terms hereof or for such other purposes as are strictly required by law. The Parties and/or their legal representatives may disclose the terms of this Agreement for purposes of entering appropriate orders with the court, or any other tasks that may be required to effectuate the terms of settlement and resolution of the within claims or potential litigation pursuant hereto. If a disclosure is to be made as required by

law or to effectuate this settlement, it shall be made only to the minimum extent necessary to effectuate such purposes. In the event that either party must disclose the terms of this Agreement to any person or entity as permitted by this paragraph, that party shall provide advance written notice to the other party, who shall be considered the Superintendent of Schools for the Somerdale School District in the case of the Board for such purposes. Furthermore, each party agrees that said party shall not disparage the other party or make negative statements concerning the other in any manner likely to injure, harm the reputation of, or cause interference with the other party, its business, its financial interests, or its business operations.

7. Upon payment of the settlement proceeds as set forth in Paragraph 1 above, counsel for Petitioner shall withdraw with prejudice, both the above-captioned emergent-relief matter, and the pending Verified Petition of Appeal bearing the same name. The Parties agree to take any and all additional action that may be necessary to ensure the dismissal or withdrawal with prejudice of the above-captioned litigation.

8. This Agreement represents the compromise of disputed claims. Further, nothing contained in this Agreement constitutes an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other party, nor shall anything in this Agreement ever be treated as an admission of liability by either party for any purposes whatsoever. This Agreement may never be used as evidence in any legal or other proceeding of any kind, except one to enforce its own terms. In the event an action is brought by either party to enforce the terms of this Agreement, each party shall bear its own legal fees and costs. The burden of proof for any alleged breach hereof shall be borne by the party asserting such claim for breach.

9. It is expressly understood that neither party shall be considered a prevailing party under any statute, common law, or otherwise, for any purposes whatsoever, as a result of this Agreement or the compromise of claims as set forth herein. Each party shall be responsible for its own attorney's fees, expert fees, and litigation costs incurred in connection with this matter.

10. Notwithstanding any provision hereof to the contrary, this Agreement and the settlement of claims as set forth herein, is subject to and fully contingent upon approval by affirmative vote of the Board at a duly constituted meeting thereof, and it is null, void, of no force and effect, and without prejudice to any party, if the Agreement is not so approved. It is expressly understood that this Agreement shall carry no force and effect, and no settlement shall have been formed, and no agreement reached, in the event the Board does not vote to approve this Agreement by majority vote at a duly constituted meeting thereof. As of the drafting of this agreement, the next duly-scheduled regular meeting of the Board is August 11, 2022.

11. The Parties expressly agree and represent that they have had the opportunity to discuss the terms of this Agreement with legal counsel of their choosing and that they enter into this Agreement voluntarily and with a full understanding of its meaning. The Parties further state that they are fully satisfied with the representation provided by their legal counsel.

12. In the event that any provision, clause, or portion of this Agreement shall be held invalid or unenforceable by any court or tribunal of competent jurisdiction, the remaining provisions are deemed severable and shall remain in full force and effect to the fullest extent permitted by law, unless the Agreement, so construed, would substantially frustrate the purposes of the Parties in entering into this Agreement.

13. This Agreement may be executed in multiple counterparts, and one copy of this Agreement with all Parties' signatures appended thereto shall be considered an original of this Agreement. For ease of execution and approval, the Parties further acknowledge and agree that electronic copies of signatures shall be deemed to be the same as original signatures.

14. The "WHEREAS" clauses of this Agreement are provided merely for background purposes, and it is expressly understood that such clauses are not material terms and conditions of this Agreement and shall carry no legal force and effect.

15. This Agreement represents the entire understanding between the Parties. The Parties acknowledge that they have not relied upon any other representations, promises, agreements, warranties, or understandings, except those expressly contained herein. This Agreement may only be modified by a subsequent written addendum mutually executed between the Parties.

16. The language of this Agreement has been developed mutually, and the rule of construction against the drafter shall not apply to its interpretation.

17. This Agreement shall be governed by the laws of the State of New Jersey. This Agreement may only be enforced in the Superior Court of New Jersey, and no other forum or tribunal shall possess jurisdiction to enforce this Agreement. Venue shall be properly laid only in the Camden County Vicinage of the Superior Court.

18. This Agreement is a full and final settlement and constitutes a legal release of any and all claims that were raised or could have been raised in a legal proceeding or other proceeding, of any kind, filed by either party, arising out of or relating to the non-approval of an employment contract between Petitioner and the Board for the 2022-2023 school year, and covering all periods of time, whether prior to, during, or subsequent to the dates of Petitioner's employment with the Board.

19. Petitioner understands that the Older Worker Benefit Protection Act requires that he be provided a period of at least twenty-one (21) calendar days within which to consider this Agreement. Further, Petitioner has the right within seven (7) calendar days of the date of his signature of this Agreement (the "revocation period") to revoke this Agreement, including his waiver of rights to claim damages and/or money under the Age Discrimination in Employment Act and the Older Worker Benefit Protection Act. In the event that Petitioner revokes this Agreement, it shall be null and void as to Petitioner and the foregoing claims only and the parties shall have no obligations hereunder. To be effective, Petitioner's revocation must be in writing and actually delivered to Geoffrey N. Stark, Esq. at Capehart & Scatchard,

P.A., 8000 Midlantic Drive, Suite 300 South, Mt. Laurel, NJ 08054, within the seven (7) day period. This Agreement shall not become effective or enforceable until the revocation period has expired. Thus, provided Petitioner has not exercised the right of revocation provided herein, the "effective date" of this Agreement shall be either the eighth (8th) day following the date of Petitioner's signature of this Agreement or the date that the agreement is approved by the Board at a duly constituted meeting, whichever occurs later.

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

SOMERDALE BEACH BOARD OF EDUCATION

MARK PEASE
Superintendent of Schools

Dated: 8/11/2022

KIM BARKOFF
President, Somerdale Board of Education

Dated: 8/11/22

WITNESS:

PAUL E. GRIGGS, ESQ.

Dated: July 12, 2022

DAVID ROUSE

Dated: 7/12/22

RESOLUTION OF THE SOMERDALE BOARD OF EDUCATION AUTHORIZING THE EXECUTION OF A SETTLEMENT AGREEMENT AND GENERAL RELEASE BETWEEN THE SOMERDALE EDUCATION ASSOCIATION AND DAVID ROUSE

WHEREAS, Petitioner David Rouse ("Rouse") filed an action with the New Jersey Commissioner of Education (Agency Reference No. 1619-22 and Docket No. EDU 05381-2022S) against the Somerdale Board of Education ("Board") alleging various claims relating to the non-renewal of Rouse's contract for the 2022-2023 School Year; and

WHEREAS, Rouse and the Board engaged in settlement discussions to reach a mutually acceptable resolution of the dispute by way of a settlement agreement which is attached hereto and made a part hereof; and

NOW, THEREFORE, BE IT RESOLVED, by the Somerdale Board of Education as follows:

1. The provisions of the **WHEREAS** clauses set forth above are incorporated herein by reference and made a part hereof.

2. The SBOE hereby authorizes and directs the Board President and/or her designee to execute the above referenced Settlement Agreement and General Release between the David Rouse and the Somerdale Board of Education in the form attached hereto and made a part hereof.

RECEIVED
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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

14. To approve the following resolution:

RESOLUTION OF THE SOMERDALE BOARD OF EDUCATION AUTHORIZING THE EXECUTION OF A SETTLEMENT AGREEMENT AND GENERAL RELEASE BETWEEN THE SOMERDALE EDUCATION ASSOCIATION AND DAVID ROUSE

WHEREAS, Petitioner David Rouse ("Rouse") filed an action with the New Jersey Commissioner of Education (Agency Reference No. 1619-/22 and Docket No. EDU 05381-2022S) against the Somerdale Board of Education ("Board") alleging various claims relating to the non-renewal of Rouse's contract for the 2022-2023 School Year; and

WHEREAS, Rouse and the Board engaged in settlement discussions to reach a mutually acceptable resolution of the dispute by way of a settlement agreement which is attached hereto and made a part hereof; and

NOW, THEREFORE, BE IT RESOLVED, by the Somerdale Board of Education as follows:

1. The provisions of the **WHEREAS** clauses set forth above are incorporated herein by reference and made a part hereof.

2. The SBOE hereby authorizes and directs the Board President and/or her designee to execute the above referenced Settlement Agreement and General Release between the David Rouse and the Somerdale Board of Education in the form attached hereto and made a part hereof.

RECEIVED
2022 SEP 15 A 11: 34
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ROLL CALL VOTE: YES 6 NO 0 ABSTAIN 0 ABSENT

B. Facilities – Reviews the needs and uses of district buildings and grounds

Report by Facilities Committee Chair

On a motion made by Mr.Smith and seconded by Ms. Klenk the following was approved:

Recommend that the Board of Education on the recommendation of the business administrator approve the following items 1-3 for Use of Facilities as per Somerdale Board of Education Policy 7510:

1. To post approve the Boy Scouts of America to use Ward Field for "Operation H2O" on August 8, 2022 from 6:00 pm - 8:30 pm. (attachment #1 - #2)

2. To approve the Camden County Prosecutor's Office Community Outreach and Engagement Unit to conduct a Cyber Safety Presentation on September 30, 2022.

3. To approve the request by retired Somerdale Park Teachers to plant a tree in memory of Linda Saun and Barbara Reppy and to honor their dedication and many years of service to the Somerdale School District.

ROLL CALL VOTE: YES 6 NO 0 ABSTAIN 0 ABSENT 3

INSTRUCTIONAL, Taylor Klenk, Chairperson, James Anderson, Alternate Chairperson, Kevin Smith, Administrative Liaisons: Mark Pease, Robert Ford

A. Curriculum Reviews and evaluates standardized test results as a district and monitors direction of curriculum.

Report by Curriculum Committee Chair

On a motion made by Mr Smith and seconded by Ms. Schoettle the following was approved:

Recommend that the Board of Education on the recommendation of the superintendent, approve the following items 1-2:

I hereby certify this to be a true correct copy of minutes of a meeting of the Somerdale Board of Education on 9/8/2022

Board Secretary

288-22
OAL Dkt. No. EDU 08867-21
Agency Dkt. No. 184-9/21

New Jersey Commissioner of Education

Final Decision

Joy Dominic,

Petitioner,

v.

Board of Education of the Township of Alexandria, Hunterdon County,

Respondent.

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

Upon review, the Commissioner observes that the President and the Secretary of the Alexandria Township Board of Education signed the agreement on behalf of the Board. Please note that pursuant to *N.J.A.C.* 6A:3-1.13, when a district board of education is a party to a contested matter, a proposed settlement agreement must either include a copy of the Board resolution approving the settlement or the signature of the Board's attorney, who is the Board's duly authorized representative in litigation. Without either the Board attorney's signature or the appropriate Board resolution designating the Board President and Secretary to sign the agreement on its behalf, the Commissioner cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement consistent with the 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: October 25, 2022
Date of Mailing: October 25, 2022

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 08867-21

AGENCY DKT. NO. 184-9/21

JOY DOMINIC,

Petitioner,

v.

TOWNSHIP OF ALEXANDRIA BOARD OF EDUCATION, HUNTERDON COUNTY,

Respondent.

John Farinella, Esq., for petitioner (Schwartz Law Group, LLC, attorneys)

Phillip Stern, Esq., for respondent (DiFrancesco, Bateman, Kunzman, Davis, Leher & Flaum, LLC, attorneys)

Record Closed: September 8, 2022 Decided: September 14, 2022

BEFORE **SUSAN L. OLGIATI**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 27, 2021, 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 submitted a fully executed Settlement Agreement/Release. In addition, petitioner has submitted a letter withdrawing the Verified Petition of Appeal and related Motion for Summary Decision. A copy of these documents is attached and fully incorporated herein as Exhibit 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 on the attached Settlement Agreement/Release.

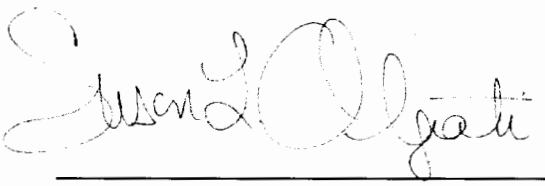
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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.



September 14, 2022
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: _____

Mailed to Parties: _____

SLO/as

296-22

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

October 27, 2022

VIA E-MAIL ONLY

Daniel R. Roberts, Esq.
Kenney, Gross, Kovats & Parton
214 Park Avenue
Manalapan, NJ 07726

John E. Croot, Jr., Esq.
Adams, Gutierrez & Lattiboudere, LLC
Woodbridge Towers
555 Route 1 South, Suite 240
Iselin, NJ 08830

Re: ***Board of Education of the Borough of Union Beach, Monmouth County v. Board of Education of the Borough of Keyport, Monmouth County, OAL Dkt. No. EDU 03586-22, Agency Dkt. No. 69-3/22.***

Dear Counsel:

I have reviewed the papers filed in connection with both the petitioner's and the respondent's requests for interlocutory review of Administrative Law Judge Tricia M. Caliguire's order issued August 11, 2022, granting in part and denying in part respondent's motion to dismiss the petition. Upon full consideration 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, the parties' requests for interlocutory review are hereby denied.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

c: Tricia M. Caliguire, Administrative Law Judge
Clerk, Office of Administrative Law

296-22L

297-22
OAL Dkt. No. EDU 06069-21
Agency Dkt. No. 96-6/21

New Jersey Commissioner of Education

Final Decision

R.S. and S.T., on behalf of minor child, A.S.,

Petitioners,

v.

Board of Education of the Borough of Sayreville, Middlesex County,

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 31, 2022
Date of Mailing: November 2, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06069-21
AGENCY DKT. NO. 96-6/21

R.S. AND S.T. ON BEHALF OF A.S.,

Petitioners,

v.

BOROUGH OF SAYREVILLE BOARD OF EDUCATION, MIDDLESEX COUNTY,

Respondent.

Nina Rossi, Esq., for petitioners (CAIR New Jersey, attorneys)

Regina M. Phillips, Esq., for respondent (Madden and Madden, attorneys)

Record Closed: October 3, 2022 Decided: October 3, 2022

BEFORE **DEAN J. BUONO**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 20, 2021, 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. This Settlement Agreement resolves all disputes.

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 and general release.

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 3, 2022
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 10/4/2022

Date Mailed to Parties: 10/5/2022

/cb

APPENDIX

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into as of this 2nd day of September, 2022, between Rachid Safri and Saida Tigharghari, on behalf of minor child, A.S. (referred to herein collectively as "Petitioners"), Petitioners in that certain disciplinary petition (the "Disciplinary Petition") pending in the State of New Jersey, Office of Administrative Law, and styled R.S. and S.T., on behalf of minor child, A.S. v. Board of Education of the Borough of Sayreville, Middlesex County, Agency Reference No. 96-6/21, OAL Docket. No.: EDU 06-69-2021 S on the one hand, and the Sayreville Board of Education (referred to hereinafter as "Respondent" or "Sayreville"), on the other hand. The parties to this Agreement shall be referred to collectively as the "Parties."

By means of this Agreement, Petitioners intend to fully and unconditionally release any and all claims they, their heirs, administrators, executors, personal representatives, beneficiaries, and assigns may have against Respondent, and each of Respondent's affiliates, predecessors, successors, parents, subsidiaries, divisions, assigns, officers, directors, representatives, employees, former employees, insurers (including the School Alliance Insurance Coverage Fund (SAIF) and Highland Claim Services, Inc.), attorneys, consultants and agents, (collectively referred to as "Releasees"), the remaining terms of which Agreement are now fully set forth in Paragraphs I through XV below.

I. Agreement respecting the May 6, 2021 Discipline Entry in A.S.'s student file

Sayreville agrees to modify the May 6, 2021 Discipline Entry contained in A.S.'s student file to include only the following information:

a. Reported Date: May 6, 2021
b. Location: Hallway
c. Incident Issues: Inappropriate Behavior
d. Administrative Actions: Board Hearing

II. Consideration

The parties have bargained for and expressly agree that the rights and obligations of each party contained in this Settlement Agreement and General Release constitute sufficient consideration for the other party's execution.

III. Counsel Fees and Costs

The parties shall bear their own counsel fees and costs associated with the Disciplinary Petition and any matters that were or could have been raised in the Disciplinary Petition.

IV. Covenant to Not Pursue Further Legal Action

Petitioners hereby covenant and agree that the Disciplinary Action shall be marked settled and the Honorable Dean J. Buono, the assigned Administrative Law Judge, shall issue a

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decision of settlement. Petitioners shall take no further action against any individual or entity based upon the matters set forth within Petitioners' pleadings and/or based upon any other cause of action that Petitioners may have stemming or originating from the disciplinary action taken by Respondent.

V. General Release

Whereas Petitioners brought the Disciplinary Petition challenging the discipline imposed on A.S. by Sayreville and seeking other relief as set forth with more particularity within their pleadings, and in consideration for the terms and conditions set forth herein, Petitioners, and their heirs, successors and assigns, hereby voluntarily waive, generally release and discharge Releasees from any and all rights or claims that Petitioners may have against Releasees, for any and all reasons and for any and all claims resulting from anything that has happened up to the date of this Agreement, whether known or unknown, for any and all reasons, including, but not limited to claims of discrimination or harassment with regards to any alleged protected category, status or class, including but not limited to age, sex, religion, race, disability, familial status or national origin, breach of contract, retaliation, hostile educational environment, wrongful discharge, intentional and/or negligent infliction of emotional distress, defamation, libel, slander, personal injury, any claims for equitable relief, and any other economic and/or non-economic damages whatsoever.

Petitioners agree that this Agreement sets forth a complete and full resolution of this matter and any claims possessed by either Rachid Safri and Saida Tigharghari, individually or on behalf of, A.S. as well as A.S., individually, and that this Agreement fully resolves any and all issues, causes of action and claims possessed by Petitioners and/or attorneys' fees or costs that they have or may have against Releasees. Petitioners specifically waive any and all claims set forth in the Disciplinary Petition and any rights that Petitioners may have under:

- Title VII of the Civil Rights Act of 1964, as amended;
- The Civil Rights Act of 1991;
- Sections 1981-1988 of Title 42 of the United States Code, as amended;
- The United States Constitution;
- The Americans with Disabilities Act of 1990, as amended;
- The Rehabilitation Act of 1973, 29 U.S.C. §100 et seq. ("Section 504");
- The Family Educational Rights and Privacy Act;
- The New Jersey Law Against Discrimination;
- The New Jersey and Federal Constitutions;
- The New Jersey Civil Rights Act;
- Title 18A of the New Jersey Statutes Annotated;
- The Individuals with Disabilities in Education Act, 20 U.S.C. §1400, et seq ("IDEA");
- Any other federal, state or local civil or human rights law pertaining to civil rights, discrimination or education, or any other applicable local, state or federal law, regulation or ordinance;
- Any Sayreville School District Policy, Procedure, or Regulation;
- Any public policy, contract, tort or common law;

- Any allegation for costs, fees or other expenses including but not limited to attorney's fees incurred in the lawsuit or in any of these matters,
- Any regulations promulgated under any of the aforementioned laws, or any other State or Federal law, statute, rule or regulation, regardless of the forum for the claim.

The aforementioned claims shall be referred to as the "Released Claims." Notwithstanding any other provision of this Release, the following are not barred by the Release: (a) claims relating to the validity of this Agreement; (b) claims by either party to enforce this Agreement; (c) claims that legally may not be waived; (d) claims arising after the execution of this Agreement that are not encompassed by the Released Claims.

VI. Release Includes Unknown Claims

A. Petitioners understand and agree that the Released Claims are intended to and do include any and all claims of every nature and kind whatsoever (whether known, unknown, suspected, or unsuspected and whether pursuant to any law or cause of action presently in effect or which may be enacted or created in the future) which they have or may have against the Releasees, individually or collectively.

B. Petitioners further acknowledge that they may hereafter discover facts different from or in addition to those which they now know or believe to be true with respect to the Released Claims and agrees that, in such event, this Agreement shall nevertheless be and remain effective in all respects, notwithstanding such different or additional facts, or the discovery thereof.

C. Petitioners represent and acknowledge (i) that they and their attorneys have conducted whatever investigation was deemed necessary by them and their attorneys to ascertain all facts and matters related to this Agreement; (ii) that they have consulted with and received advice from legal counsel concerning this Agreement; (iii) that they are fully satisfied with their legal counsel, and (iv) that they are not relying in any way on any statement or representation by Respondent or its attorneys, except as expressly stated herein, in reaching their decision to enter into this Agreement.

VII. No Assignment or Transfer of Released Claims

Petitioners represent and warrant that as of the Effective Date, Petitioners have not assigned, transferred, or hypothecated, or purported to assign, transfer, or hypothecate, to any person, firm, corporation, association, or entity whatsoever any of the Released Claims. Petitioners hereby agree to indemnify and hold harmless Releasees against, without limitation, any and all rights, claims warranties, demands, debts, obligations, liabilities, costs, expenses (including attorneys' fees), causes of action, and judgments based on, arising out of, or connected with any such transfer, assignment, or hypothecation, or purported transfer, assignment, or hypothecation.

VIII. No Admission of Liability and No Prevailing Party Status

other than that as set forth herein, and that this Agreement contains the sole and entire Agreement between them with respect to the subject matter thereof. The Parties to this Agreement further acknowledge and agree that language proposed for, deleted from, or otherwise changed in the various drafts of this Agreement but not included therein shall not be considered in any way in the interpretation and application of this Agreement and shall not in any way affect the rights and obligations of the Parties to this Agreement.

XIII. Counterparts and Signatures

This Agreement may be executed in any number of counterparts, and may be executed on copies, each of which shall be deemed an original, including electronic and facsimile signatures, and each such counterpart shall have the same force and binding effect as if executed by all Parties. The Parties agree that notarized signatures are not required and further agree not to contest the authenticity of any signature to this Agreement.

XIV. Understanding

Petitioners acknowledge and represent that they have read this Agreement in full and, with advice of counsel, understand and voluntarily consent and agree to each and every provision contained herein. Petitioners acknowledge and represent that Releasees have not made any representations to them concerning the terms of effects of this Agreement, other than those contained in this Agreement.

XV. Applicable Law and Mutual Submission to Jurisdiction

This Agreement shall be construed and enforced according to the laws of the State of New Jersey. Petitioners agree to submit any and all disputes arising out of or based on this Agreement to the Office of Administrative Law of the State of New Jersey, except as to enforcing the terms of the Agreement, where Petitioners may seek enforcement in any court of competent jurisdiction.

SIGNATURES FOLLOW.

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date shown below.

PETITIONERS:

Rachid Safri, Individually — Date: 9/22/22

Saida Tigharghari, Individually — Date: 09/22/22

Rachid Safri o/b/o A.S. — Date: 09/22/22

Saida Tigharghari o/b/o A.S. — Date: 09/22/22

RESPONDENT:

SAYREVILLE BOARD OF EDUCATION

Anthony Esposito

By: _____ Date: 9-27-22

Title: Board President

298-22
OAL Dkt. No. EDU 02641-22
Agency Dkt. No. 45-3/22

New Jersey Commissioner of Education

Decision

P.P. and J.P., on behalf of minor child, P.P.,

Petitioners,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The petitioners did not appear for the scheduled Zoom hearing in this matter despite having received appropriate notice, and did not call the OAL to explain why they were unable appear.

Upon review, the Commissioner agrees with the Administrative Law Judge's determination that petitioners have abandoned their appeal and that dismissal is therefore appropriate. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 31, 2022
Date of Mailing: November 2, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 02641-22
AGENCY DKT. NO. 45-3/22

P.P. AND J.P. ON BEHALF MINOR CHILD P.P.,
Petitioners,
v.
TOWNSHIP OF RANDOLPH BOARD OF EDUCATION, MORRIS COUNTY
Respondent.

P.P. and **J.P.**, petitioners, pro se

Marc H. Zitomer, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: October 5, 2022 Decided: October 12, 2022

BEFORE **SUSANA E. GUERRERO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners challenge the determination made by the Township of Randolph Board of Education (the Board) that P.P's actions constituted a violation of the Harassment Intimidation and Bullying (HIB) law.

This matter was transmitted to the Office of Administrative Law (OAL), where it was filed on April 5, 2022. An initial prehearing telephone conference was held on May 5, 2022, during which another conference was scheduled for June 10, 2022. At the June 10, 2022 conference, hearing dates were discussed and the hearing was scheduled for October 4, 2022, via Zoom. The undersigned issued a Prehearing Order on June 15, 2022, which indicated the date for hearing, along with a notice. Although the Board attorney, and Board representative, appeared for the Zoom hearing, petitioners did not appear and did not call the OAL to explain why they were unable to do so.

Accordingly, I **CONCLUDE** that petitioners have abandoned their petition and that dismissal is therefore appropriate.

ORDER

It is hereby **ORDERED** that this 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.

October 12, 2022
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 31, 2022
Date of Mailing: November 2, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04987-22
AGENCY DKT. NO. 134-5/22

AYBEK, SAKIR AND MANSUR, NIHA,

Petitioners,

v.

TOWNSHIP OF BOONTON BOE, MORRIS MORRIS COUNTY,

Respondent.

Joseph D. Castellucci, Jr., Esq., for petitioners (Law Office of Joseph D. Castellucci, Jr., attorney)

Danielle Panizzi, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: October 5, 2022 Decided: October 5, 2022

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 20, 2022 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.

CERTIFIED MINUTE EXTRACT FROM THE MEETING OF
THE BOARD OF EDUCATION
OF BOONTON TOWNSHIP, MORRIS COUNTY, NEW JERSEY

The Board of Education of the Township of Boonton, in the County of Morris, New Jersey, convened at a Regular Session Meeting on September 21, 2022 at 7:30 p.m in the Rockaway Valley School Library.

CALL TO ORDER: 7:30 p.m.

ROLL CALL

Present: Lauren Bardach, Barry Brantner, Christine Cabana (7:40pm), Jeffrey Chen, Charles Eaton, Leigh Hermey, Christopher Johnson, Jonathan LeVar, Grace McBride

Also Present: Superintendent/Principal — Christian Angelillo, Ed.D.
School Business Administrator/Board Secretary — John T. Murray II, RSBA

OTHER BOARD ACTION

OBA -01 **RESOLUTION NO. 2022-04**

RESOLUTION OF THE BOONTON TOWNSHIP BOARD OF EDUCATION AUTHORIZING AND APPROVING SETTLEMENT OF LITIGATION

WHEREAS, on or about May 26, 2022, Petitioners filed a Petition of Appeal with the Commissioner of Education disputing the Boonton Township Board of Education's ("Board") **residency determination regarding students (#30969) and (#31439) who were found to be ineligible to receive a free public education in the Boonton Township Public Schools; and**

WHEREAS, the Board is party to an action pending before the Office of Administrative Law, bearing OAL Docket No. EDU 04987-2022; and

WHEREAS, following extensive negotiations between the Parties, a proposed settlement was reached in the above matter; and

WHEREAS, following extensive negotiations, the Parties wish to amicably resolve the dispute pursuant to the terms presented to the Board in the Settlement Agreement without the necessity of further legal proceedings; and

NOW THEREFORE BE IT RESOLVED THAT the Board of Education approves the Settlement Agreement and Release on the terms and conditions contained therein; and

BE IT FURTHER RESOLVED THAT the Board President and Business Administrator/ Board Secretary may sign the Settlement Agreement and Release on behalf of the Board.

Moved by Mr. LeVar, seconded by Mrs. McBride to approve OBA-01 and duly approved by a 9-0-0 roll call vote as follows:

AYE: Lauren Bardach, Barry Brantner, Christine Cabana, Jeffrey Chen, Charles Eaton, Leigh Hermey, Christopher Johnson, Jonathan LeVar, Grace McBride

I, John T. Murray II, School Business Administrator/Board Secretary of the Board of Education of the Township of Boonton, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on September 21, 2022 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Boonton Township Board of Education as 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 and affixed the corporate seal of said Board of Education this September 22, 2022.

(AFFIX SEAL)

John T. Murray II, RSBA
Business Administrator/Board Secretary

300-22
OAL Dkt. No. EDU 05054-22
Agency Dkt. No. 143-6/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Cathy Carr, Board of Education of the Township of Montgomery, Somerset County.

The record of this matter, the proposed Consent Order (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 31, 2022
Date of Mailing: November 2, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05054-22

AGENCY DKT. NO. 143-6/22

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF CATHY CARR, BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY.

Edward A. Cridge, Esq., for petitioner, Cathy Carr (Mellk Cridge, LLC, attorneys)

Stephen R. Fogarty, Esq., for respondent, Board of Education of the Township of Montgomery (Fogarty & Hara, attorneys)

Record Closed: October 3, 2022 Decided: October 3, 2022

BEFORE **DEAN J. BUONO**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 22, 2022, 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. This Consent Order resolves all disputes.

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 consent order.

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 3, 2022
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 10/4/2022

Date Mailed to Parties: 10/5/2022

/cb

APPENDIX

EXHIBITS

Jointly submitted

J-1 Consent Order

Edward A. Cridge, Esq. (NJ Bar ID No. 026462006)
MELLK CRIDGE LLC
211 Blackwell Road
Pennington, NJ 08534
P: (609)-924-0700 / E:ed@mellk-cridge.com
Attorneys for Respondent Cathy Carr

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IN THE MATTER OF THE SUSPENSIONOF THE TEACHING CERTIFICATE OF CATHY CARR,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No._____
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY.	:	Transmitted by the Department of Education Agency Dkt. No. 143-6/22
	:	*Administrative Action*
	:	**CONSENT ORDER**

THIS MATTER having come before the Commissioner of Education of the State of New Jersey by way of Verified Petition and Order to Show Cause ("OSC") filed by Petitioner Montgomery Township School District Board of Education (the "Board"); and

The Board, by and through the Verified Petition and OSC, and for the reasons set forth therein, seeking the suspension of Respondent Cathy Carr's ("Ms. Carr's") 1001 Certificate as an Elementary School Teacher in Grades K-6, issued by the State of New Jersey, Department of Education, State Board of Examiners (hereinafter the "Teaching Certificate"), pursuant to N.J.S.A. 18A:26-10 and N.J.A.C. 6A:9B-4.8; and

The aforesaid Verified Complaint and OSC having been filed by the Commissioner and assigned docket number 143-6/22; and

Ms. Carr having Answered and Opposed the Verified Petition and OSC; and

The Commissioner of Education, on June 21, 2022, having transmitted the above-captioned matter as a Contested Case to the State of New Jersey, Department of Education, Office of Administrative Law ("OAL"); and

The Board and Ms. Carr having reached a mutually acceptable resolution of the matter in difference by and between them; and

The Board and Ms. Carr, by and through there undersigned counsel, consenting to the entry of this **CONSENT ORDER**;

NOW, THEREFORE, it is hereby **ORDERED THAT** Ms. Carr's Teaching Certificate shall be suspended for a period of nine (9) calendar months, said suspension commencing upon August 1, 2022, and ending on May 1, 2023.

WE HEREBY CONSENT TO THE ENTRY OF THIS ORDER

FOGARTY AND HARA
Attorneys for Petitioner
Montgomery Township
School District
Board of Education

By: _____
Stephen R. Fogarty, Esq.

Dated: August 2, 2022

MELLK CRIDGE LLC
Attorneys for Respondent
Cathy Carr

By: s/ Edward Cridge, Esq.
Edward Cridge, Esq.

Dated: July 28, 2022

301-22
OAL Dkt. No. EDU 05110-22
Agency Dkt. No. 144-6/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Kiersten Minnes, Board of Trustees of the Camden's Promise Charter Schools, Camden County.

The record of this matter, the parties' 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. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In so doing, however, the Commissioner notes the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.,* with respect to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential. Further, the Commissioner notes that the Agreement references actions that were to take place in a time frame that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the

terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 31, 2022
Date of Mailing: November 2, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05110-22
AGENCY REF. NO. 144-6/22

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF KIERSTEN MINNES.

Emily Strawbridge, Esq., for petitioner, Camden's Promise Charter Schools Board of Trustees, Camden County (Parker McCay, P.A., attorneys)

Michael P. Stanton, Esq., for respondent, Kiersten Minnes (McCrosson & Stanton, PC, attorneys)

Record Closed: October 4, 2022 Decided: October 12, 2022

BEFORE **JOAN M. BURKE**, ALJ:

NATURE OF PROCEEDINGS

This matter was transmitted to the Office of Administrative Law on June 22, 2022, 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 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 Camden's Promise Charter School Board has approved the settlement at its Board meeting held on September 1, 2022, as evidenced by the attached sworn statement of its Board Secretary, Rachelle H. Baughn. (J-1.)

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 12, 2022
DATE

JOAN M. BURKE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JMB/as

302-22

New Jersey Commissioner of Education

Final Decision

Yolette Severe,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

Synopsis

Petitioner – a school bus driver – appealed the Department's determination to suspend her school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 *et seq.* after an incident in which a Millburn student was left on petitioner's school bus at the end of one of her assigned bus routes on November 16, 2020. Petitioner did not dispute that the child was left on the bus but contended that the student was never left alone. Although petitioner contended that she had called each student's name as they left the bus, she conceded that she had not conducted a visual walk-through to check for remaining students, and that after petitioner arrived at the bus parking lot, a student who had fallen asleep awoke and stood up; petitioner then drove the student back to their assigned school. The respondent Department filed a motion to dismiss in lieu of an answer, requesting that the motion be converted to a summary decision motion upon transmittal of the matter to the Office of Administrative Law (OAL).

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner has admitted that on November 16, 2020, she did not conduct a full visual inspection of her school bus when she dropped off students at the their school in Millburn; pursuant to *N.J.S.A.* 18A:39-28, petitioner had an affirmative duty to visually inspect the school bus at the end of the transportation route to determine that no pupil had been left on the bus; the "end of the transportation route" was when the children were dropped off at the assigned destination – the school; in accordance with *N.J.S.A.* 18A:39-29, if a school bus driver is found to have left a pupil on the bus at the end of a route, the driver's school bus endorsement shall be suspended for six months for the first offense. Accordingly, the ALJ granted summary decision to the respondent and affirmed the petitioner's six month suspension for leaving a child on the school bus at the end of a route.

Upon full review, the Commissioner concurred with the ALJ that the respondent is entitled to summary decision. Accordingly, the petition was dismissed; 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, and to notify petitioner's employer that she 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.

302-22
OAL Dkt. No. EDU 01502-21
Agency Dkt. No. 245-12/20

New Jersey Commissioner of Education

Final Decision

Yolette Severe,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

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.

On November 16, 2020, petitioner, a bus driver for the Millburn school district, transported students to school. Although she called each student's name as they left the bus, she did not visually inspect the bus for remaining students. After petitioner left the school and arrived at the bus parking lot, she realized a student who had fallen asleep was still on the bus. Petitioner then returned the child to school.

The Administrative Law Judge (ALJ) concluded that the "end of the transportation route" was when the children were dropped off at the assigned destination – the school. Petitioner did not conduct a visual inspection of the bus, as required by *N.J.S.A.* 18A:39-28, before leaving the school. The ALJ therefore ordered that petitioner's "S" endorsement be

suspended for six months, as *N.J.S.A.* 18A:39-29(a) imposes that mandatory suspension for a first-time offense of leaving a child on a school bus.

Upon review, the Commissioner concurs with the ALJ that petitioner failed to inspect the bus at the end of her route as required, which resulted in a student being left on the bus. As such, the Commissioner agrees with the ALJ's conclusion that *N.J.S.A.* 18A:39-29 mandates a six-month suspension of petitioner's school bus endorsement as this was her first offense.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed. The Office of Student Protection is directed to notify the Motor Vehicle Commission of its obligation, pursuant to *N.J.S.A.* 18A:39-29, to suspend petitioner's school bus "S" endorsement on her driver's license for six months and to notify petitioner's employer that, for the period of suspension, she is ineligible for continued employment as a school bus driver.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 31, 2022
Date of Mailing: November 2, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01502-21
AGENCY DKT. NO. 245-12/20

YOLETTE SEVERE,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF STUDENT PROTECTION,
Respondent.

Landry Belizaire, Esq., for petitioner

Hasibul Haque, Deputy Attorney General, for respondent (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

Record Closed: August 9, 2022 Decided: September 19, 2022

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Yolette Severe (Severe), challenges the suspension of her bus-driver "S" endorsement. The six-month suspension is due to petitioner's alleged violation of

N.J.S.A. 18A:39-28, et seq., in leaving a child on a school bus assigned to her on November 16, 2020. The Office of Student Protection (OSP) determined that this was petitioner's first offense of this kind, and accordingly imposed a penalty of a six-month suspension of her "S" endorsement to operate a school bus.

Petitioner filed her Petition of Appeal with the Department on November 30, 2020. On January 22, 2021, the Department filed a motion to dismiss in lieu of an answer, pursuant to N.J.A.C. 6A:3-1.10.[1] The matter was transferred to the Office of Administrative Law (OAL), where it was filed on February 5, 2021, as a contested case under N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Multiple telephone status conferences were held. No opposition had been filed to the Department's motion to dismiss. Petitioner was granted multiple extensions of time within which to file responsive pleadings. On April 18, 2022, the Department renewed its request for this matter to be dismissed. Petitioner replied and asked for an additional ten days to review the motion and file opposition, and the request for additional time was granted once again. Nothing was received from petitioner, and on July 5, 2022, the Department renewed its request for the dismissal of this matter. A peremptory telephone conference was scheduled for July 18, 2022, and no one appeared for petitioner. As of that date the motion remained unopposed, more than a year and a half after its filing. On July 20, 2022, petitioner emailed asking that the telephone conference from two days earlier be rescheduled. Petitioner was instead advised that if no responsive pleadings were received by July 29, 2022, the matter would be dismissed.

Nothing was received by July 29, 2022. On August 1, 2022, an email was received on behalf of petitioner seeking oral argument on the motion. That request was denied. A response to the motion was thereafter received on August 9, 2022, in opposition to the Department's motion to dismiss in lieu of answer. On August 9, 2022, the Department filed its reply. The record closed on August 9, 2022.

[1] The Department had initially filed a Motion to Dismiss in Lieu of an Answer with the Commissioner of Education under N.J.A.C. 6A:3-1.10. The Department requested in its motion that once the matter was transferred to the Office of Administrative Law, the Department's motion be converted to a summary-decision motion under N.J.A.C. 1:1-12.5, as no material facts are in dispute.

FINDINGS OF FACT

1. On November 16, 2020, Severe was working as a bus driver for the Millburn school district. She completed her scheduled route for the group of students she was transporting, and "called each child" as they left the bus.

2. Without visually inspecting the bus for any remaining students, Severe left the school and drove to the bus parking lot, and as she was leaving the bus, "a student stood up that fell asleep." Severe then returned to the school with that student, N.B.

3. Severe indicated that if it had not been for a new policy in the District, she "would have walked the bus" as she had "done every morning."

4. Severe admits that she left the school after dropping off the group she was transporting and did not visually inspect the bus. Instead, she called students by name at the school.

5. Severe alleges that the child on board was "never left alone" and that she had "not yet completed her transportation route."

DISCUSSION

The School Bus Safety Act, N.J.S.A. 18A:39-26 to -33, requires that the 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:39-28. A violation of N.J.S.A. 18A:39-28 results in a mandatory penalty. N.J.S.A. 18A:39-29. The statute dictates that "[i]n 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 . . . ." N.J.S.A. 18A:39-29(a).

The issue in this case is whether Severe complied with the statutory requirement that the 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:39-28.

Severe has admitted that she did not visually inspect the bus when she dropped off the children at a Millburn school before proceeding to the bus lot. Because it is undisputed that petitioner did not visually inspect the school bus at the end of her route, and prior to starting her next route, no further inquiry is required. Arcos v. N.J. Dep't of Educ., Crim. Hist. Rev. Unit, 2018 N.J. AGEN LEXIS 497 (August 28, 2018), adopted, 2018 N.J. AGEN LEXIS 1208 (September 20, 2018). As in Arcos, Severe argues that she had not yet completed her transportation route, implying that her route ends at the end of her work day when all children have been dropped off, and that the child was "never left alone and was with her at all times." The administrative law judge (ALJ) in Arcos determined that Arcos admitted that she did not visually inspect the bus when she dropped students off at the school, and that whether she "did or did not remain in the vicinity of the child is therefore not relevant to her claim that the child 'was never left alone.'" The ALJ also concluded that Arcos's route ended at the school, and not at the end of her work day.

The "end of the route" pursuant to N.J.S.A. 18A:39-26 is at the point where all of the children in that group leave the bus to enter their school, and the bus is empty of riders, and before the driver moves on to her next route, at which point the driver shall inspect the bus for remaining students. Klein v. N.J. Dep't of Educ. Crim. Hist. Rev. Unit, 2012 N.J. AGEN LEXIS 781, Comm'r Decision (February 21, 2012).

Thus, whether Severe did or did not remain in the vicinity of the child is therefore not relevant to her claim that the child "was never left alone." The critical analysis is did the Department fail to establish by a preponderance of the credible evidence that she failed to visually inspect the school bus to which she was assigned at the end of the transportation route to determine that no pupil had been left on the bus?

Severe admits that she failed to visually inspect her bus when she dropped off the children at their school in Millburn. Her route ended when she dropped the students off at the school. She did not visually inspect the bus before driving to the bus lot. It is undisputed that a student remained on the bus at the end of the route and was still on the bus when Severe arrived at the bus lot and was exiting the bus. The statute is unambiguous in its requirement that the driver visually inspect the bus, and Severe did not do so, in violation of N.J.S.A. 18A:39-28. Because of the safety implication of such a violation, a mandatory penalty exists in the event that the OSP determines that a child was indeed left behind. Garner v. N.J. Dep't of Educ., Crim. Hist. Rev. Unit, 2009 N.J. AGEN LEXIS 173 (April 3, 2009), adopted, Comm'r (May 1, 2009), https://www.nj.gov/education/legal/. Thus, "[i]n the event that . . . a school bus driver is found to have left a pupil on the school bus . . . , his school bus endorsement shall be: (a) suspended for six months, for a first offense . . . ." N.J.S.A. 18A:39-29(a). Here, since Severe was in clear violation of the statute, the penalty imposed is mandatory, and there is no discretion to impose anything less than a six-month suspension of her "S" endorsement. Where the violation has been established, no circumstances of the event or of the driver may be considered in determining the penalty. Garner, 2009 N.J. AGEN LEXIS 173 at *5–6.

I **CONCLUDE** that as the "end of the transportation route" under N.J.S.A. 18A:39-28 is when the children are dropped off at the assigned destination, that triggers the school-bus driver's affirmative duty to inspect the school bus under N.J.S.A. 18A:39-28, not when the bus driver competes all of her assigned routes for the day.

The Department seeks relief pursuant to N.J.A.C. 1:1-12.5(b), 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." This provision mirrors the summary-judgment language of R. 4:46-2(c) of the New Jersey Court Rules. The motion judge must "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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

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." Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. at 242, 249 (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. Ibid. (quoting Liberty Lobby, 477 U.S at 252).

I **CONCLUDE** that the evidence presented by the parties does not establish any material facts in dispute. 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 arguments offered by the Department 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:39-29(a). The Department's motion for summary decision must be **GRANTED**.

ORDER

It is hereby **ORDERED** that the Department's motion for summary decision is hereby **GRANTED** and it is further **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.

September 19, 2022
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: September 19, 2022

Date Mailed to Parties: September 19, 2022

309-22
OAL Dkt. No. EDU 04320-21, EDU 10019-21 (on remand)
Agency Dkt. No. 55-4/21

New Jersey Commissioner of Education

Final Decision

Friends of Team Charter School, Inc.,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this matter, the October 7, 2022 Order of Administrative Law Judge (ALJ) Kimberly A. Moss, petitioner's request for interlocutory review, and the Newark Board of Education's (Board) response thereto have been reviewed and considered.

This matter involves the transfer of twelve school buildings from the Board to the Newark Housing Authority (NHA), pursuant to a 2016 site disposition and development agreement (Agreement) in which the NHA agreed to convey the buildings to third parties for the benefit of the Board and the City of Newark. The Agreement provided that any sites conveyed to the NHA would be subject to a right of reversion, which the Board could exercise if the NHA had not developed a site project or demonstrable plans for a site within three years of the Agreement. The NHA sold one of the sites – the Maple Avenue School – to a third party in 2017, and that party sold the property to petitioner, which is developing the property as a public charter school.

The Board filed a complaint against the NHA and petitioner in Superior Court, seeking to enforce its rights to reversion of the Maple Avenue School property on the grounds that a site project had not been completed and the property was not being used for one of the Agreement's permitted uses. Thereafter, petitioner filed the petition of appeal in this matter, alleging that the Board was not authorized to file the Superior Court complaint and had failed to comply with school facilities regulations. After the ALJ granted the Board's motion for summary decision, the Commissioner remanded the matter, finding that "[w]hile the Agreement itself is not a school facilities project, the Board's pursuit of litigation to exercise the right of reversion contained in the Agreement could constitute land acquisition and/or a school facilities project, subject to applicable statutes and regulations." *Friends of Team Charter School, Inc. v. Bd. of Educ. of the City of Newark, Essex Co.*, Commissioner Decision No. 258-21 (October 19, 2021).[1]

Following the remand, the parties filed motions for summary decision. Petitioner argued that the Board's Superior Court complaint was not filed in accordance with the law because the Board had not authorized the filing and had not obtained the Commissioner's approval, which petitioner alleges is necessary because the complaint constitutes a school facilities project. The Board argued that the pursuit of litigation does not require the Board's or the Commissioner's approval. The ALJ concluded that the issue of whether the Superior Court complaint is a school facilities project is premature because the determination depends on the decision of the Superior Court. The ALJ noted that if the Superior Court complaint is decided

[1] The Commissioner's decision also rejected the ALJ's conclusion that the petition of appeal was untimely.

against the Board, the petition of appeal in this matter would be moot. Accordingly, the ALJ denied the parties' motions for summary decision.

Petitioner requested interlocutory review of the ALJ's order. Petitioner contends that the question of whether the Board was required to pass a resolution authorizing the filing of the Superior Court complaint and/or to obtain Commissioner approval of the filing as a school facilities project is a question that arises under the school laws and is therefore within the Commissioner's primary jurisdiction. According to petitioner, it is inappropriate for the ALJ to defer a ruling until the Superior Court issues a decision when there is a live controversy under the school laws and the Board could be enjoined from its activities if they are in violation of those laws. Petitioner also argues that the ALJ's Order does not explain why a decision by the Superior Court concerning real property and contract claims would be probative on the issues of the Board's authority to take action without a Board resolution or Commissioner approval. Petitioner asks the Commissioner to enter summary decision in its favor and to enjoin the Board from further prosecuting the Superior Court complaint.

In response, the Board concurs with petitioner that the ALJ's order warrants immediate review. The Board agrees with petitioner that the issue of whether the Superior Court complaint is a school facilities project is not premature. However, the Board contends that summary decision should be granted in its favor and that the petition of appeal should be dismissed.

Upon review, the Commissioner concludes that the question of whether the filing of the Superior Court complaint required the approval of the Board, or of the Commissioner as a school facilities project, is ripe for review. These determinations depend on the application of

the school laws, which are within the Commissioner's jurisdiction pursuant to *N.J.A.C.* 18A:6-9. The Superior Court does not have the authority to determine whether a Board resolution was required to file the Superior Court complaint.[2] Furthermore, the Commissioner disagrees with the ALJ that a ruling by the Superior Court against the Board could render the question of whether the Superior Court complaint is a school facilities project moot. The ALJ appears to have reasoned that if the Board is not permitted to exercise its right of reversion, then it will not be engaging in any activities on the property that could constitute a school facilities project. However, as stated in the Commissioner's previous decision in this matter, the Superior Court complaint itself may constitute a school facilities project. That question also falls within the Commissioner's jurisdiction pursuant to *N.J.A.C.* 18A:6-9, and not the jurisdiction of the Superior Court. If it is determined that the Superior Court complaint is a school facilities project, and that the Board should have obtained the Commissioner's approval of that project prior to filing the complaint, then the complaint should not proceed.

While the Commissioner concludes that the questions of Board and/or Commissioner approvals of the Superior Court complaint are ripe for review at this time, the Commissioner declines to address them on the limited record available as part of the request for interlocutory review.

[2] The Commissioner notes that the ALJ's Order indicates that petitioner did not provide any regulation that states that a superintendent cannot commence a civil action without a resolution by the Board. However, the ALJ did not make any findings or reach any conclusions on this issue.

Accordingly, this matter is remanded to the OAL for a determination on the parties' motions for summary decision[3] and any other proceedings necessary to bring this matter to a close.

IT IS SO ORDERED.[4]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 14, 2022
Date of Mailing: November 16, 2022

[3] The Commissioner does not reach a conclusion about whether the parties' motions meet the standard for summary decision, pursuant to *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995). On remand, the ALJ is free to determine that there are material facts in dispute or that there are other factors that preclude summary decision. Alternatively, if the ALJ concludes that the *Brill* standard has been met and that it is appropriate to decide the matter on a summary basis, a decision on the merits of the motions should be issued.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

310-22

New Jersey Commissioner of Education

Decision

Board of Education of the Township of North Bergen, Hudson County,

Petitioner,

v.

Maria Castellito,

Respondent.

Synopsis

The petitioning Board of Education sought and was granted an order for emergent relief to compel respondent, Maria Castellitto, – a teacher employed by the Board – to undergo a mental and physical examination within 60 days. Respondent suffers from an inability or unwillingness to adapt to the technology that was necessary for remote instruction during the COVID-19 epidemic, citing a fear that she was being watched through her computer by unknown parties and that those she spoke with through the telephone and by way of video conference were imposters. Respondent was placed on medical leave from the District on November 18, 2021 and cannot be returned to a classroom until she submits to the appropriate mental and physical examinations.

The ALJ found that: the granting of emergent relief to compel a mental and physical examination within 60 days of the Commissioner's Order, dated September 14, 2022, was the only issue for determination in this case. As there are no further issues to be addressed at this time, this matter should be closed.

Upon review, the Commissioner concurred with the ALJ that it is appropriate to close this matter. Accordingly, the Initial Decision of the OAL was affirmed, and the matter was closed.

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

310-22
OAL Dkt. No. EDU 03414-22
Agency Dkt. No. 95-4/22

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of North Bergen, Hudson County,

Petitioner,

v.

Maria Castellitto,

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.

The Commissioner previously granted the Board's application for emergent relief and ordered respondent to appear for all necessary mental and physical examinations within 60 days. *Bd. of Educ. of North Bergen, Hudson Cty. v. Maria Castellitto*, Commissioner Decision No. 230-22E (September 14, 2022). The Initial Decision indicates that there are no further issues that need to be addressed. Upon review, the Commissioner concurs with the ALJ that it is appropriate to close this matter. Accordingly, the Initial Decision is affirmed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 14, 2022
Date of Mailing: November 16, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

GRANTING EMERGENT RELIEF

OAL DKT. NO. EDU 03414-22

AGENCY DKT. NO. 95-4/22

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,

Petitioner,

v.

MARIA CASTELLITTO,

Respondent.

Jason M. Ryglicki, Esq., for petitioner (Ryglicki & Gillman, P.C., attorneys)

M.C., respondent, appearing pro se

Record Closed: September 2, 2022 Decided: September 29, 2022[i]

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the Township of North Bergen, Hudson County, ("Petitioner" or "District") filed a Petition with the New Jersey Department of Education

[i] The September 2, 2022 Order Granting Emergent Relief is now being submitted as an Initial Decision with the appropriate language at the conclusion of the decision for the purpose of closing the matter.

("DOE"), seeking Emergent Relief to compel Maria Castellitto ("Respondent" or "M.C."), an employee/teacher of the petitioner, to undergo a mental and physical examination. The contested matter was transferred to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:6A-12.1, where it was filed on May 2, 2022, to be heard on an emergent basis.

The Emergent Hearing was scheduled for May 6, 2022, via Zoom. Respondent failed to appear for the Zoom hearing. Counsel for petitioner, Jason M. Ryglicki, did appear for said hearing. It became apparent at that time that respondent would not be appearing for the hearing because she suffers from an inability or unwillingness to adopt to technology, including a fear that she was being watched through her computer by unknown parties and that those she spoke with through the telephone and by way of video conference were imposters. Respondent also had been placed on medical leave since November 18, 2021 and cannot return to a classroom until the appropriate mental and physical examinations are performed. Attempts were made to reach respondent at her last known telephone number and by way of email to no avail. In light of same, it was agreed to by Mr. Ryglicki, Esq. that the matter should not be heard on May 6, 2022 date as an emergent and that the respondent be given an opportunity to appear for an in-person hearing.

The matter was re-scheduled for an in-person hearing on June 6, 2022. On said date, petitioner appeared by way of counsel, Mr. Ryglicki, however, notice was sent to the wrong address for respondent, and she did not appear. Once again attempts were made to reach respondent by phone and email to no avail. In consideration for the concerns of all involved in this matter, Mr. Ryglicki had a wellness check conducted to ensure the well-being and safety of respondent. On June 6, 2022, the Edgewater Police Department conducted the wellness check and determined that respondent seemed well. See, Certification of Jason M. Ryglicki, Esq. attached as Attachment A. The matter was rescheduled for July 12, 2022 as a telephone hearing. Once again, respondent failed to appear for the telephone hearing.

The matter will be decided as an application for Emergent Relief, irrespective, of the above detailed timeline.

FACTUAL DISCUSSION AND FINDINGS OF FACT

At the June 6, 2022 hearing, counsel for respondent read into the record "The Facts Common to All Counts" which were set forth in the Petition for Emergent Relief. The Petition for Emergent Relief to Compel a Mental and Physical Examination is attached hereto as Attachment B. The facts are undisputed, and I therefore **FIND** them to be the **FACTS** of the case.

LEGAL ANALYSIS AND CONCLUSION

A Motion for Emergent Relief filed with the Commissioner of Education shall be subject to a review under Crowe v. DeGioia, 90 N.J. 126, 132-134 (1983), N.J.A.C. 6A:3-1.6. Specifically, there are four prongs the Commissioner must consider when emergent relief is sought: (1) it is necessary to prevent irreparable harm, (2) the legal right underlying the application is unsettled, (3) the applicant has made a preliminary showing of a reasonable probability of ultimate success on the merits, and (4) the relative hardship to the parties in granting or denying the application. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1983).

In the case at hand, M.C. has been employed by the North Bergen Board of Education for nearly twenty years and she has been on medical leave since November 18, 2021, following an examination by the District's psychiatrist, due to her on-going behaviors. According to the District, without consideration as to her prior efficiency and ability in her employment, the past two years have been especially challenging. As clearly set forth in the facts placed on the record and attached hereto as Attachment B, the behavior ranges from an inability or unwillingness to adopt technology which was required to be utilized during the COVID-19 pandemic, including a fear that she was being watched through her computer by unknown parties, believing the people she spoke with telephonically and by way of video conference were imposters, etc... Her

behaviors have necessitated medical intervention on at least two (2) prior occasions and have interfered with her ability to effectively educate her students. Respondent has gone as far as to deny the requirement to modify tests as required by an Individualized Educational Program ("IEP") as required by Federal law. Meanwhile, since November 18, 2021, she has been employed by the District and has failed to comply with the District's resolution mandating that she undergoes physical and mental testing to assess whether she would be capable of returning to the classroom. The District argues that failure to have these tests completed in a timely fashion will continue to impinge on the District's constitutional duty to provide a thorough and efficient education. Further, over the past several months, the District has accrued significant costs associated with M.C.'s medical leave and will continue to accrue additional cost on a daily basis into the foreseeable future. Respondent's on-going refusal to get evaluated has and will continue to cause irreparable harm.

N.J.S.A 18A:16-2 states that a Board of Education "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 burden to challenge any such judgment of the board lies with the challenger of said judgment. Bd. of Edu. of Lyndhurst v. Blevis, OAL Docket No. 01711-07 at 5. To satisfy any issues related to due process, the statute requires "that the teacher or employee be provided with a statement outlining the reasons the board . . . is ordering said teacher or employee to submit to the fitness for duty examination, . . . [and an] opportunity for a hearing, if such a hearing is requested. Further, a teacher or employee has a right to appeal from an adverse decision to the State Board of Education under N.J.S.A. 18A:6-27." Id. (citing Curcio v. Collingswood Bd. of Educ., 2006 U.S. Dist. LEXIS 46648, 2 006 WL 1806455 at * 10 (slip op.) (D.N.J. 2006); Kochman v. Keansburg Board of Education, 124 N.J. Super. 203, 213-14, 305 A.2d 807 (Ch. Div. 1973). The right of a Board to order such evaluation has been found constitutional in both Federal and State Courts. See, Hoffman v. Jannarone, 401 F. Supp. 1095 (D.N.J. 1975) (rev'd in part); Gish v. Board of Ed. of Borough of Paramus, Bergen County, 145 N.J. Super., 96, 104-105, 366 A.2d 1337 (App. Div. 1976).

In this case, M.C. refused to be tested after being afforded her procedural right to be heard in a preliminary hearing. M.C. failed to appear at said meeting despite adequate notice. Furthermore, the District argue that M.C.'s refusal has never been supported by any rationale or other reasonable basis for such denial, and she has never appealed nor indicated her intent to appeal the determination of the Board. As shown above, the legal rights of petitioner to seek this evaluation is settled law and the District is likely to succeed based on that settled right, and the facts specific to this case. Therefore, the District clearly has satisfied the second and third prong of the Crow v. DeGioia test.

While the District acknowledges that ordering M.C. to undergo evaluations touches her constitutional rights. It is well settled that "the interest of the State of New Jersey to protect its youth outweighs the individual constitutional rights of the teacher or employee in question." See, Hoffman v. Jannarone, 401 F. Supp. 1095 (D.N.J. 1975) (rev'd in part); Gish v. Board of Ed. of Borough of Paramus, Bergen County, 145 N.J. Super., 96, 104-105, 366 A.2d 1337 (App. Div. 1976). While M.C. is subject to an undeniable hardship, the hardships faced by the Board relate to their constitutional obligation to provide a thorough and efficient education to their students, as well as the ongoing costs accrued by the District at the expense of the taxpayers of the Township and State. Therefore, in weighing the relative hardships, it is clear that the hardships faced by the Board of Education outweigh the hardships of the respondent, thereby satisfying the fourth prong under DeGioia.

For the reasons set forth above, I **CONCLUDE** that respondent's request for emergent relief is warranted, and that the petitioner be ordered to undergo physical and mental evaluation, as set forth more fully on the record and in the petition. (Attachment B).

ORDER

It is hereby **ORDERED** that petitioner's request to compel respondent to appear for a mental and physical examination is hereby **GRANTED**. it is further **ORDERED**

that the respondent is to appear for all necessary mental and physical examinations within sixty days.

There are no further issues that needs to be addressed therefore, this matter is closed.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 29, 2022

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: September 29, 2022

Date Mailed to Parties: September 29, 2022

sej

APPENDIX

List of Moving Papers

For Petitioner:

Letter Brief

Petitioner for Emergent Relief (Attachment B)

Wellness Check Certification of Counsel (Attachment A)

For Respondent:

None

311-22

New Jersey Commissioner of Education

Final Decision

Wayne Ernst,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner challenged the denial of his application for a Teacher of Physical Science Certificate by the New Jersey Department of Education, Board of Examiners (the Board). The Board denied the application because petitioner did not meet the specified requirements under *N.J.A.C.* 6A:9B-10.4, as he satisfied the physics requirement but lacked seven (7) semester-hour credits in chemistry. Petitioner contended that the Board erred by not accepting as equivalent his similar coursework from disciplines that overlap with chemistry and his professional experience teaching chemistry. The Board filed a motion to dismiss.

The ALJ found, *inter alia*, that: when a decision by the Board has been appealed, the Commissioner must determine whether that decision is supported by sufficient credible evidence in the record and will not disturb the decision unless the appellant has demonstrated that the Board acted in a manner that was arbitrary, capricious, or contrary to law; pursuant to *N.J.S.A.* 18A:6-38, the Board is responsible for determining if an instructional teaching certificate may be issued to an applicant; if an applicant has been advised of a deficiency in their certification requirements, they may provide the Board with evidence of alternative education and/or experience that he or she believes is equivalent to the area(s) of deficiency; in this case, the Board determined not to accept petitioner's alternative education to satisfy the remaining requirements that he needed to receive a Teacher of Physical Science certificate; and the Board's decision in this matter was reasonable and consistent with applicable regulations. The ALJ concluded that petitioner did not meet requirements for a Teacher of Physical Science Certificate pursuant to *N.J.A.C.* 6A:9B-9.1 and 10.4; accordingly, the ALJ granted the Board's motion to dismiss.

Upon comprehensive review, the Commissioner found, *inter alia,* that: the ALJ mistakenly applied the wrong standard of review in the Initial Decision, stating that the SBE's decision will not be overturned unless the petitioner proves that the SBE acted in a manner that was arbitrary, capricious or contrary to law; the appropriate standard of review here is whether the SBE's decision was consistent with the applicable statutory and regulatory provisions of *N.J.A.C.* 6A:3; nonetheless, the record of this matter demonstrates that the petitioner did not complete the required course work and that the SBE's decision to deny his application was consistent with the applicable regulatory provisions. Accordingly, the Initial Decision of the OAL was modified with respect to the appropriate standard of review and the petition was dismissed.

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

311-22
OAL Dkt. No. EDU 05270-22
Agency Dkt. No. 137-6/22

New Jersey Commissioner of Education

Final Decision

Wayne Ernst,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

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.

In this matter, petitioner challenges the New Jersey State Board of Examiners' (Board) denial of his application for a Teacher of Physical Science Certificate. Petitioner currently holds a Teacher of Physics Certificate of Eligibility with Advanced Standing and a Teacher of Physics Certificate. The Board denied his application because he was missing seven (7) semester-hour credits in chemistry. Petitioner argued that his alternative education and experience satisfied a one-to-one-correspondence to the missing chemistry credits, in accordance with *N.J.A.C.* 6A:9B-4.12(b). The Board found that while the physics courses petitioner took may have included chemistry concepts, they did not include the in-depth chemistry instruction required under *N.J.A.C.* 6A:9B-10.4; further, the topics petitioner taught in a chemistry course were not comparable to the coursework required for a Teacher of Physical Science, which includes chemistry at the advanced level. Following a motion to dismiss, the Administrative Law Judge (ALJ) found that petitioner did

not meet requirements for a Teacher of Physical Science Certificate pursuant to *N.J.A.C.* 6A:9B-9.1 and 10.4.

As a threshold matter, a discussion of the applicable standard of review for petitions of appeal that are filed under *N.J.A.C.* 6A:3 is necessary. When there is a challenge to a determination made by an office within the Department of Education, the Commissioner is not mandated to give deference to her staff, but instead determines if the finding was legally appropriate. *See, Board of Trustees of the Passaic County Elks Cerebral Palsy Center v. New Jersey Dept. of Educ., Office of Fiscal Accountability and Compliance*, Commissioner's Decision No. 334-14, dated August 14, 2014 (finding that a decision of the Office of Fiscal Accountability and Compliance is not given deference by the Commissioner). Moreover, where the Department of Education has limited the scope of review of a subordinate office or division, it has done so by regulation, *i.e.* appeals filed under *N.J.A.C.* 6A:4 challenging a decision of the State Board of Examiners revoking/suspending a certificate, or a decision of the School Ethics Commission.

In the Initial Decision, the ALJ mistakenly referenced *N.J.A.C.* 6A:4-4.1(a), applied deference to the Board, and stated that the Board's decision in this case would not be overturned unless the petitioner proves that the Board acted in a manner that was arbitrary, capricious or contrary to law. It is important to recognize that a decision by the Board denying an application for a certificate is not entitled to the arbitrary, capricious or unreasonable standard of review that is afforded to appeals filed under *N.J.A.C.* 6A:4, challenging a decision of the Board revoking or suspending a certificate. *See, Jessica Walder v. New Jersey Department of Education, State Board of Examiners*, Commissioner's Decision No. 503-14, decided December 29, 2014 (finding that the Commissioner does not give deference to a decision of the State Board of Examiners denying a request for issuance of a certificate). The petition of appeal in this matter was filed in accordance with *N.J.A.C.*

6A:3, which consists of completely different regulatory provisions than *N.J.A.C.* 6A:4; these two Administrative Code Sections should never be conflated. As such, the standard of review that governs appeals filed under *N.J.A.C.* 6A:4 does not apply to this case. Therefore, the appropriate standard of review of the Boards' decision is whether the decision is consistent with the applicable statutory and regulatory provisions.

Upon review of the record and applying the appropriate standard of review, the Commissioner agrees with the ALJ's ultimate determination that petitioner has not met the requirements for a Teacher of Physical Sciences Certificate pursuant to *N.J.A.C.* 6A:9B-9.1 and 10.4. Petitioner is seven (7) semester-hour credits short of the requirement in chemistry and his physics coursework does not satisfy a one-to-one equivalent to the missing chemistry courses, as both physics and chemistry courses are required for the Physical Sciences endorsement.

Accordingly, the Initial Decision of the OAL is modified with respect to the appropriate standard of review and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 14, 2022
Date of Mailing: November 16, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 05270-22

AGENCY DKT. NO. 137-6/22

IN THE MATTER OF THE DENIAL OF THE TEACHING CERTIFICATE OF WAYNE ERNST, NEW JERSEY DEPARTMENT OF EDUCATION, BOARD OF EXAMINERS.

Wayne Ernst, petitioner, pro se

Sydney Finkelstein, Deputy Attorney General, for respondent, New Jersey Department of Education, Board of Examiners (Matthew J. Platkin, Acting Attorney General, attorney)

Record Closed: September 1, 2022 Decided: September 30, 2022

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioner, Wayne Ernst, challenged the denial of his application for a Teacher of Physical Science Certificate by the New Jersey Department of Education, Board of Examiners (the Board). The Board denied the application because Ernst did not meet

the specified requirements under N.J.A.C. 6A:9B-10.4; he satisfied the physics requirement but lacked seven semester-hour credits in chemistry. Petitioner contends that the Board erred by not accepting his similar coursework from disciplines that overlap with chemistry and his professional experience teaching chemistry as equivalent to his area of deficiency.

PROCEDURAL HISTORY

On March 4, 2022, the Board rendered its written decision denying petitioner's request. On June 1, 2022, petitioner filed an appeal of the Board's decision with the Bureau of Controversies and Disputes. On June 21, 2022, respondent filed a Motion to Dismiss in lieu of an Answer, and the contested case was transmitted to the Office of Administrative Law (OAL) where it was filed on June 28, 2022. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13.

After a telephone conference, I set a briefing schedule regarding the respondent's pending Motion to Dismiss. On August 23, 2022, petitioner filed his opposition to respondent's motion. Respondent replied by letter brief on September 1, 2022, at which time the record closed.

FACTUAL DISCUSSION

A Motion to Dismiss is recognized in the Administrative Code at N.J.A.C. 6A:3-1.5(g). While the Commissioner may dismiss the petition based on such motion prior to referral of the matter to the OAL, it is also the Commissioner's prerogative to transfer determination of the motion to the OAL. In assessing such a motion, the claims made by the party who filed the petition must be deemed to be true and all reasonable inferences such allegations may support must be accepted. The standard utilized by the courts in judging such motion is traditionally quite liberal towards the non-moving party. Green v. Morgan Props., 215 N.J. 431, 451 (2013).

Herein, respondent maintained that petitioner has failed to state a claim upon which relief can be granted. The standard to be applied in deciding this motion is

essentially the same that govern a motion under R. 4:46-2 for summary judgment in civil litigation. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121, (App. Div. 1995), certif. denied, 145 N.J. 372 (1996). Under this standard, the court or agency must determine "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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). When making a summary decision, 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." Brill, 142 N.J. at 540.

Accordingly, for the purposes of the motion, all facts alleged by the petition will be deemed admitted, and I **FIND** as follows:

Ernst received his Bachelor of Science degree in physics with a concentration in astronomy and a minor in mathematics from Montclair State University. He currently holds a Teacher of Physics Certificate of Eligibility with Advanced Standing (CEAS), issued in June 2013, and a Teacher of Physics Certificate, issued in November 2015.

In the spring of 2021, Ernst filed an application for an additional endorsement in Physical Science. To meet the endorsement requirements under N.J.A.C. 6A:9B-9.1(a)1iii, Ernst was required to have completed "[a] 30-credit coherent sequence of courses in physics and a minimum of 15 credits in chemistry." N.J.A.C. 6A:9B-10.4. Ernst met the requirement for physics but not for chemistry. As shown on his transcripts, Ernst earned eight credits in chemistry-specific courses, leaving him seven credits short.

In his appeal, Ernst asked the Board to consider alternative education and professional experience as equivalent to the seven chemistry credits. Ernst believes that certain courses at Montclair State University should have been credited toward the chemistry requirement because these courses covered topics, concepts, and skills that overlap with chemistry courses. His position is that the unique relationship between physics and chemistry and the overlap between these disciplines should not be divided

by a mere course label of "PHYS" versus "CHEM." As noted on his transcript, Ernst took a total of forty-seven credit-hours in courses labeled as "PHYS" and eight credit-hours in courses labeled as "CHEM." He stressed that a review and comparison of the courses is required to appropriately assess his qualification for this endorsement.

Ernst maintained that three credits he earned in thermodynamics under the "PHYS" label should have been deemed a one-to-one equivalent for a chemistry course. In support of his argument, Ernst compared the course outline from his thermodynamics course in the physics department under the "PHYS" label at Montclair State University with course syllabi from chemistry departments under the "CHEM" label at other universities. These included: Princeton University's Chemical Dynamics and Thermodynamics; New Jersey Institute of Technology's Physical Chemistry I; Rowan University's Chemical Engineering Thermodynamics; and the College of New Jersey's Chemical Thermodynamics. As a further demonstration of the equivalency of his physics department thermodynamics course, Ernst included an email from Dr. Michael T. Kelly, who offered a comparison between Chemistry 306 offered at Princeton with Physics 320 offered at Montclair. Dr. Kelly determined that the comparison was "quite good" with some exceptions.

As demonstrated above, Ernst maintained that he established a one-to-one equivalency with his thermodynamics physics course, that should have provided him with three additional chemistry credits. Although Ernst maintained that he could easily make up the four-credit deficit from his other courses, he requested that the Board approve his professional experience teaching chemistry at Jack M. Barrack Hebrew Academy for the remaining four credits.

Ernst appeared before the Board at its meeting on January 21, 2022. He was asked no questions. The Board considered the alternative education and experiences that Ernst believed was equivalent to his coursework deficiency. After review, the Board determined that Ernst "did not provide compelling evidence of a one to one correspondence between his proffered alternative education and experience and the 7 semester-hour credits in chemistry." In denying his application, the Board noted that "while Ernst may have taken courses that included concepts covered in chemistry

courses and taught a chemistry course, the Board finds that it is necessary to complete the full complement of coursework for eligibility as a Teacher of Physical Science because the endorsement enables its holder to teach a variety of courses related to the physical science, including chemistry, at the advanced level."

LEGAL ANALYSIS AND CONCLUSION

Ernst carries the burden of demonstrating by a preponderance of the credible evidence that he is entitled to the certification he seeks. Farrar v. State Bd. of Exam'rs, EDU 13763-08, Initial Decision (April 27, 2010), aff'd, Comm'r (July 26, 2010), <http://njlaw.rutgers.edu/collections/oal/>. When a decision by the Board has been appealed, the Commissioner "shall ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated the State Board of Examiners . . . acted in a manner that was arbitrary, capricious, or contrary to law." N.J.A.C. 6A:4-4.1(a). "Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewerage Co. v. Dep't of Environmental Protection, 122 N.J. Super. 184, 199 (App. Div. 1973), citations omitted.

The Board of Examiners is responsible for determining if an instructional teaching certificate may be issued to an applicant. N.J.S.A. 18A:6-38. If an applicant for a teaching certificate has been advised of a deficiency in their certification requirements, they "may provide the Board of Examiners with evidence of alternative education and/or experience that he or she believes is equivalent to the area(s) of deficiency." N.J.A.C. 6A:9B-4.12(b). The Board is not permitted to waive any requirements, but can consider alternative education if the petitioner demonstrates, by a preponderance of the credible evidence, that the alternative education is the one-to-one equivalent with the statutory requirements. Jessica Walder v. New Jersey State Board of Examiners, EDU 08530-14, Initial Decision (November 10, 2014), aff'd, Commissioner (May 15, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

Ernst urges that I undertake the comparison between his physics courses and chemistry courses that the Board declined to do. But that is not my role. Rather, I must assess whether the actions of the Board were patently unreasonable and arbitrary when they decided that, in their view, courses that may include concepts also covered in chemistry courses do not meet the requirement embodied in the administrative code that required a minimum of fifteen credits in chemistry. N.J.A.C. 6A:9B-10.4. While the comparison syllabi with Princeton and other prestigious institutions of higher learning and Dr. Kelly's assessment of the comparison provided by Ernst offer well-considered arguments in favor of giving him the credit he seeks, the law demands that I defer to the viewpoint of the Board, as it is the body delegated with the authority to determine what credentials qualify applicants to teach the children of New Jersey. The Legislature has delegated the responsibility for the issuance of teaching certificates to the Board. N.J.S.A. 18A:6-38.

Moreover, I concur with the Board that the regulatory scheme plainly states that coursework both in physics and chemistry are prerequisites to the certificate Ernst seeks. N.J.A.C. 6A:9B-10.4. It would thus be inconsistent with the regulatory scheme to permit Ernst to satisfy his missing chemistry credits with physics credits. The regulatory scheme required Ernst to have completed a **minimum** of fifteen credits in chemistry while also completing a thirty-credit coherent sequence of courses in physics. Moreover, N.J.A.C. 6A:9B-4.12(c) in pertinent parts provides:

> The Board of Examiners shall not:
>
> 1. Waive any test, GPA, degree completion, or approved educator preparation program completion requirements;
>
> 2. Permit a candidate to substitute education and/or experience for any test, GPA, degree, or approved educator preparation program completion requirements.

Therefore, I **CONCLUDE** that the Board's decision relative to Ernst's application for certification is reasonable; is consistent with the regulatory intent, which is to rigorously vet applicants for certification; and is entitled to deference.

ORDER

It is hereby **ORDERED** that the Board of Examiners' Motion to Dismiss is **GRANTED** and the petition of appeal is **DISMISSED**.

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

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days and unless 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, 2022
DATE

Kathleen M. Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/jns

312-22

New Jersey Commissioner of Education

Final Decision

L.H. and S.H., on behalf of minor children, L.H. and S.H.,

Petitioners,

v.

Board of Education of the City of Burlington, Burlington County,

Respondent.

Synopsis

Pro se petitioners L.H. and S.H. filed an emergent relief petition challenging the determination of the respondent Board that their children – who allegedy became homeless after the family lost their house in Burlington – are no longer eligible to receive a free public education in Burlington because they have been living with S.H.'s mother in Willingboro for several years. Petitioners accused school administrators of harassment and defamation in their handling of this residency matter. The Board contended that petitioners are no longer homeless and Willingboro has become the district of residence; accordingly, the children should be enrolled in the Willingboro school district.

The ALJ found, *inter alia*, that: the case was transmitted to the Office of Administrative Law (OAL) on an emergent basis, with the sole issue for determination being residency; petitioners' family had previously lived in Burlington, but lost their residence and attributed this to "unstable housing"; in October 2021, the Board received notification from the Willingboro Township Board of Education that the family had been residing in Willingboro and were no longer considered homeless; petitioners' children were allowed to finish out the 2021-2022 school year in Burlington, but thereafter the District required petitioners to enroll in the Willingboro school district. The ALJ concluded that petitioners are no longer domiciled in Burlington, and are now domiciled in Willingboro; further, petitioners failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982). Accordingly, the ALJ ordered the emergent relief petition denied, and affirmed the Board's residency determination.

Upon review, the Commissioner concurred with the ALJ that petitioners failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. However, the portion of the Initial Decision affirming the Board's residency determination was rejected, as such determinations are fact-specific and require evidence beyond what was submitted as part of the emergent proceedings. Accordingly, the matter was remanded to the OAL for further proceedings consistent with the Commissioner's 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.

312-22
OAL Dkt. No. EDU 08135-22
Agency Dkt. No. 231-9/22

New Jersey Commissioner of Education

Final Decision

L.H. and S.H., on behalf of minor children,
L.H. and S.H.,

Petitioners,

v.

Board of Education of the City of Burlington,
Burlington County,

Respondent.

The record of this matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the Initial Decision of the Administrative Law Judge (ALJ) have been reviewed and considered. The parties did not file exceptions

Upon review, the Commissioner concurs with the ALJ, for the reasons detailed in the Initial Decision, that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

However, the record does not contain sufficient information to determine on the merits whether petitioners' children are domiciled in Burlington or whether they are entitled to a free public education in Burlington schools. Residency determinations are fact-specific and require evidence beyond what has been submitted as part of the emergent proceedings to date.

Accordingly, the portion of the Initial Decision denying petitioners' application for emergent relief is adopted for the reasons stated therein. The portion of the Initial Decision affirming the Board's residency determination is rejected, and this matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D., D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 14, 2022
Date of Mailing: November 16, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08135-22
AGENCY DKT. NO. 231-9/22

L.H. AND S.H. ON BEHALF OF MINOR CHILDREN L.H. AND S.H.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,
Respondent.

L.H. and S.H., petitioners, pro se

Alicia D'Anella, Esq., for respondent, Board of Education of the City of Burlington (Parker McCay, P.A., attorneys)

Record Closed: September 26, 2022 Decided: September 27, 2022

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

Petitioners L.H. and S.H. filed and a perfected Petition of Appeal in the form of Emergent Relief with the Department of Education on or about September 19, 2022, from the determination of the Board of Education ("District" or "Board") of the City of Burlington ("Burlington") dated September 7, 2022, that their family is not domiciled in the City of Burlington and that her children (also named L.H. and S.H.) cannot continue to attend its schools.

PROCEDURAL HISTORY

The Department of Education Office of Controversies and Disputes transmitted the Request for Emergent Relief to the Office of Administrative Law (OAL) on or about September 19, 2022. The transmittal was in the form of an emergent application only and the sole issue to be decided in the case is residency. This matter was assigned to the undersigned for oral argument on the emergency request, which was held through Zoom technology, consistent with the OAL Covid-19 Emergency provisions, on September 26, 2022, and the record closed on that date.

FINDINGS OF FACT AND TESTIMONY

Petitioners appeal was accompanied by a writing that articulated their thoughts. The undersigned determined that petitioners were pro se and their writing warrants repeating for determination as evidence in the record. Without objection from the District this is their recitation.

L.H. and S.H. filed this complaint because they felt that the vice principal and/or school administrator used their position of power to bully, intimidate, harass and defame the family's character by belittling the children and family through knowingly lying over a petition of filing with the Department of Education division of controversies. This was directed by the school board, vice principal (Nicholas Rancani) and the school's attorney to file in a written letter, dated August 1,2022. Seven days after the decision was made

giving them twenty-one days to appeal the rule. L.H. and S.H. filed an appeal on August 16, 2022, mailing the appeal to Trenton, while making a copy of the form for their records. L.H. and S.H. received a letter to attend orientation for their daughter. Which was attended and they also set up the children's online school portal for the year.

On the first day of school, September 7, 2022, when the children arrived at school, they were denied entry by the school principal which stated to L.H. that they were dropped from enrollment. L.H. and S.H. returned them back home while they tried to resolve the matter with the Burlington City school district and their department of education.

The following day L.H. and S.H. received a hand delivered letter stating that they were being reported to the New Jersey Department of Children and Family. On September 9, 2022, a case worker from the New Jersey Department of Children and Family came to the home. A report was filed with their office claiming the children weren't enrolled in school and were truants. L.H. and S.H. showed her documents from the school portal showing that the children were enrolled in school and explained to her what was going on. Also, that day a truancy officer came from Willingboro Township, a district where the children never attended school.

A school board member from the City of Burlington came to where they "temporarily stay" to hand deliver a letter. L.H. and S.H. filed the complaint for several reasons including that the children were never unenrolled from school. L.H. and S.H. also claim that there was no truancy violation because the school denied entry and they did not have fifteen days of unexcused absences from school. They claim the District filed a false child endangerment complaint with the New Jersey Department of Children and Family. They allege that the "City of Burlington school district and vice principal Nicholas Rancani or someone acting on their behalf knowingly shared private, confidential and privileged information about L.H. and S.H.'s minor children without written consent".

They further allege that Vice Principal Nicholas Rancani used his position to "attempt to bully...and harass the family by knowingly misrepresenting how the appeal process worked and by filing a report with the New Jersey Department of Children and

Family. That deprived the children of a stable family environment. While bullying our family with tactics, Nicholas Rancani used his position as a school administrator to misrepresent his authority by denying access to school which are publicly funded. He knowingly misrepresented the school appeal process which was set by the New Jersey Department of Education."

They feel this action was taken due to their "ethnicity and their beliefs that I am disenfranchised person. Their action already caused social embarrassment to our family especially since L.H. is a volunteer coach on our son's youth football team."

L.H. and S.H. testified that they did not receive a lot of the documentation from the District. They conceded that they "lost the housing in Burlington due unstable housing" and moved to Willingboro to live with S.H.'s mother. However, when S.H.'s mother has "psychotic breaks" they have to stay away for a while.

Respondent claims that petitioners are seeking emergent relief on a residency matter involving their two children, L.H. and S.H., and they submitted a page of unsubstantiated attacks on the school employees who have been trying to assist them. In support of its opposition, and in light of the absence of facts in petitioners' pleadings, the Board submits and relies on the certification of Superintendent, Dr. John Russell. ("Russell Certification.")

Petitioners are known to the Board as a family having been homeless for several years. As they were residing in the City of Burlington when they became homeless, the children L.H. and S.H. were permitted to remain enrolled in the District's schools. In October of 2021, the Board received a copy of a letter that had been sent to petitioners by the Willingboro Township Board of Education ("Willingboro"). (Russell Certification ¶ 2.) The letter stated that petitioners had been residing at 52 Country Club Road in Willingboro ("Willingboro Property") for over a year and were no longer considered homeless. The letter directed the petitioners to withdraw their children from the District and register them in Willingboro. Id. Willingboro also provided the District with a copy of a McKinney-Vento Parent/Guardian Contact Report, dated May 5, 2021, from the

Gloucester County Special Services School District. (Id. at ¶ 3.) That report confirmed that petitioners had been residing at the Willingboro Property since 2018. (Id. at ¶ 3.) Based on the information received from Willingboro, the District informed petitioners that they were no longer considered to be "intransition" under the McKinney Vento Act in light of their stable residence at the Willingboro Property since 2018. (Id. at ¶ 4.) Petitioners were advised that their children could continue school in the District until December 23, 2021, but that the District would no longer be providing transportation. Id. Throughout the remainder of 2021, the District had multiple conversations with petitioners regarding their children's enrollment status through various staff members. (Id. at ¶ 5.) In early January of 2022, petitioner L.H. met with Dr. Russell to discuss the children's continued enrollment. (Id. at ¶ 6.) In light of the educational disruptions caused by the COVID-19 pandemic, Dr. Russell agreed to allow the children to continue attending school in the District through the end of the 2021-2022 school year. (Id. at ¶ 6.) Dr. Russell made clear to L.H. that the District would move forward with removal of petitioners' children at the conclusion of the 2021-2022 school year, should petitioners refuse to enroll them in Willingboro. Id. The children finished the school year enrolled in the District but did not receive transportation. Id. Petitioners never appealed or contested the loss of transportation. Id. Petitioners took no action to withdraw their children from the District or enroll them in Willingboro. Therefore, on July 20, 2022, the District sent petitioners an Initial Notice of Ineligibility, advising them that the children were no longer eligible to attend school in the District based on their residency in Willingboro, and advising of their right to request a hearing before the Board. (Id. At ¶ 7.)

Petitioners requested a hearing, and the Board held by committee on July 25, 2022. (Id. at ¶ 8.) During this hearing, petitioners admitted that they have been living at the Willingboro Property since 2019. Id. They confirmed much of the information in the Parent/Guardian Contact Report from the Gloucester County Special Services School District, specifically that the Willingboro Property was owned by S.H.'s parents, and that petitioners had moved in after S.H.'s father passed away in order to help take care of her mother. Id.

After the hearing, the District sent a Final Notice of Ineligibility to petitioners on August 1, 2022. (Id. at ¶ 9.) The letter was hand-delivered by a staff member, and petitioners acknowledged their receipt of same on August 4, 2022. Id. Because petitioners did not appeal the Board's final determination within twenty-one (21) days, the District sent a disenrollment letter to petitioners on September 8, 2022. (Id. at ¶ 10.) It was not until their children were unable to attend school on September 7th, well beyond the twenty-one (21) day timeframe, that petitioners filed their Petition. The Gloucester County Special Services School District provides McKinney-Vento related services to students from districts in Gloucester, Camden, Atlantic and Burlington Counties. While petitioners made this representation during the hearing, all of the documentation related to this case suggests petitioners actually lived at the Willingboro Property since 2018. Petitioners filed this Appeal with the Office of Controversies and Disputes on September 7, 2022. (Id. at ¶ 11.) They enrolled the children in Willingboro, where they are currently attending. (Id. At ¶ 12.)

FACTUAL DISCUSSION

Based upon the testimony of the witnesses and the documentary evidence presented, and with the opportunity to assess the credibility of the witnesses, **I FIND** the following:

L.H. and S.H. lived in Burlington City. In October of 2021, the Board received a letter that had been sent to petitioners by the Willingboro Township Board of Education stating that they had been residing at 52 Country Club Road in Willingboro and were no longer considered homeless. Petitioners were advised that their children could continue school in the Burlington City District until December 23, 2021, but that the District would no longer be providing transportation. In light of the educational disruptions caused by the COVID-19 pandemic, Dr. Russell allowed the children to continue attending school in the District through the end of the 2021-2022 school year. The children finished the school year enrolled in the Burlington City District. Thereafter, the District required petitioners to enroll in the school district of their domicile. I so **FIND** as **FACT** that

petitioners do not have domicile in Burlington City. **I** so **FIND** as **FACT** that petitioners are domiciled in Willingboro.

I must make credibility determinations with regard to these potentially material facts. A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Daiichi Pharm. Co. v. Apotex, Inc., 441 F. Supp. 2d 672 (D.N.J. 2006). 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 witnesses, I am convinced that petitioners' testimony was credible but was somewhat exaggerated in some of the insignificant details.

Petitioners' testimony did not hang together or make sense in light of the mailings or some of the communications, and **I** so **FIND**. However, I do not believe that it was intentional. **I FIND** that the petitioners are attempting to provide a stable environment for their children, and **I** so **FIND** that as **FACT**.

These findings are further supported by the lack of the usual documentary indicia of residence and occupancy, such as utility bills, pay stubs, insurance, construction invoices. I concur with the District that the lack of production of this common evidence by the petitioners generate, at the very least, a rebuttable presumption that their production would not have helped her case.[1] Petitioners carry the burden of proving their domicile in Burlington City for eligibility for free public education there and their lack of documentary evidence or buttressing testimonial proof weighs against them in this case. See State by Comm'r of Transp. v. Council in Div. of Res. Dev., etc., 60 N.J. 199, 202 (1972) (litigant's failure to produce may be inferred to have been prompted by a conscious appreciation that the evidence would or might be hurtful to his position), citing Interchemical Corp. v. Uncas Printing & Fishing Co., 39 N.J. Super. 318, 328 (App. Div. 1956).

[1] Insofar as there has been no demonstration of bad faith or destruction, nor is this a jury trial, a formal sanction of an "adverse inference" is not appropriate, nor has it been sought. See, e.g., Bozic v. City of Wash., 912 F. Supp. 2d 257 (W.D. Pa. 2012).

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 6A:3-1.6(b), and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that petitioner has proved all of the following:

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.

Irreparable Harm

Regarding the requirement that the petitioner must show that irreparable harm will result if emergent relief is not granted, "irreparable harm" is defined as the type of harm "that cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. In addition, the irreparable harm standard contemplates that the harm be both substantial and immediate. Subcarrier Communications v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977) Continental Group v. Amoco Chemicals Corp., 614 F.2d 351 (D.N.J. 1980). The threshold standard for irreparable harm in education is showing that once something is lost, it cannot be regained. M.L. ex rel. S.L. v. Bd. of Educ. of Ewing, EDU 4949-09, Initial Decision (June 15, 2009), modified, Acting Comm'r (June 15, 2009), http://njlaw.rutgers.edu/collections/oal/. Since money damages are not available in education cases, and compensatory education is the only relief available, the analysis to be used is that if compensatory education, provided at a later date, cannot remedy the situation, then the harm is irreparable. Howell Twp. Bd. of Educ. v. A.I. & J.I. ex rel. S.I., EDU 5433-12, Order Granting Emergent Relief (May 2, 2012).

In the petition of appeal, L.H. and S.H. failed to describe the irreparable harm that could result. Although I disagree that every speculative event satisfies the irreparable harm standard, I note that the action taken by the Board may in fact result in irreparable harm if the children were currently not in school and not being educated.

In New Jersey, the obligation of each school district to provide free and appropriate public education generally extends only to those children domiciled within the district and, therefore:

> [I]f in the judgment of the board the parent or guardian is not domiciled within the district, or the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person's own child . . . 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 commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this 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 commissioner.
>
> [N.J.S.A. § 18A:38-1 (emphasis added).]

As petitioners stated, the Board "denied entry" of the children to the school. Even if we concede that the Board acted appropriately, the intent of the law is to prevent the exact situation that has resulted here: children, one of whom allegedly receives special education services, are not in school anywhere. I question if the Board ignored the procedure the Legislature established to protect children from losing academic ground during the course of this residency dispute.

I CONCLUDE that the action of the Board to refuse entry to children that do not live in the district is not a violation of N.J.S.A. § 18A:38-1 but will result in irreparable harm

to them if they are not being properly educated. Although the petitioners testified that the children are being educated in Willingboro, they intimated that one of the children is simply placed and not being properly educated.

The Legal Right Is Settled and Likelihood of Prevailing on the Merits

To grant a motion for emergent relief in advance of a plenary hearing, a judge also must be satisfied that "[t]he legal right underlying petitioner's claim is settled [and] that petitioner has a likelihood of prevailing on the merits of the underlying claims." N.J.A.C. 6A:3-1.6(b)(2), (3). Regarding whether the petitioner has a likelihood of prevailing on the merits of the underlying claim, there are no material facts in dispute that indicate petitioner's likelihood of success. In fact, the speculative assertions by petitioners of ethnicity and their beliefs that they are disenfranchised people are not at all persuasive. Petitioners' unsupported beliefs are not enough for this tribunal to conclude on unsupported speculation. As stated above, children have the right to a free and appropriate public education in the district in which they are domiciled. N.J.S.A. 18A:38-1(a). If, however, the parents cannot produce evidence to prove that the children actually are domiciled in the District, they will be responsible to pay "the resident tuition for the student prorated to the time of [each] student's ineligible attendance in the school district." N.J.S.A. 18A:38-1(b)(1).

Petitioners testified that they "lost their housing in Burlington City due to unstable housing". Also, they claim that they moved the children to Willingboro on a permanent basis but, never changed their permanent residence. Despite the explanation given by petitioners at oral argument, the fact remains that the documented address is now in Willingboro. **I CONCLUDE** that the action of the Board to refuse entry to children that do not live in the district is not a violation and I am not able to conclude that petitioners demonstrated that a legal right is settled, nor have they established a likelihood of prevailing on the merits.

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief. The petitioners argue that at least one of the children has "special learning needs" and will suffer.

Respondent spoke of the harm to the taxpayers, who would essentially be funding the education of children who do not live in the District. This is a strong argument; the taxpayers trust the Board to make fiscally responsible decisions, to keep costs as low as possible, and to ensure continued strong academic performance by the students who live in the community.

It is not lost on me that both parents are loving and want to provide for their children. In the end, though, the children are most likely to suffer if not properly educated. Of course, parents want their children in the strongest academic environment that they can find.

ORDER

Accordingly, it is **ORDERED** that petitioners' emergent appeal from the Burlington City Board of Education residency determination is hereby **DENIED** for failure to satisfy Crowe v. DeGoia and the determination of the Burlington City Board of Education on residency 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 27, 2022
DATE

DEAN J. BUONO, ALJ

Date Received at Agency

Date Mailed to Parties:

DJB/cb

APPENDIX

WITNESSES

For petitioners

L.H.

S.H.

For respondent

None

EXHIBITS

For petitioners

P-1 Gloucester County Special Services Migrant Education Program

P-2 Certified Mail Receipts

P-3 Pro Se Appeal

For respondent

R-1 Willingboro Public Schools correspondence, October 5, 2021

R-2 Gloucester County Special Services Migrant Education Program Report

R-3 Burlington City Public Schools correspondence, October 20, 2021

R-4 Burlington City Public Schools correspondence, July 20, 2022

R-5 Burlington City Public Schools correspondence, August 1, 2022

R-6 Burlington City Public Schools correspondence, September 8, 2022

317-22
OAL Dkt. No. EDU 05348-19
Agency Dkt. No. 30-2/19

New Jersey Commissioner of Education

Decision

Donnie Harrell,

Petitioner,

v.

Board of Education of the City of Plainfield, Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The parties did not file exceptions.

Petitioner challenges his termination from the Plainfield Board of Education (Board), alleging he had obtained tenure as a teacher in accordance with *N.J.S.A.* 18A:28-5(b). Petitioner was first employed by the Board as a music teacher on April 16, 2014. He was reassigned to the District's Central Office on March 24, 2016, pending an investigation into allegations of sexual misconduct by petitioner toward a student. Petitioner returned to teaching at the start of the 2017-18 school year, but was again reassigned to the Central Office on March 29, 2018 following a second complaint alleging sexual misconduct by petitioner toward another student. Petitioner remained at the Central Office until his termination on January 11, 2019.

[1] The Commissioner was not provided with a transcript of the July 11, 2022 hearing at the OAL.

Upon review, the Commissioner agrees with the Administrative Law Judge that petitioner had not acquired tenure prior to his termination. According to *N.J.S.A.* 18A:28-5(b), teaching staff members employed in the position of teacher, provided they hold a valid certificate, are under tenure after employment by a board for:

> (1) Four consecutive calendar years; or
>
> (2) Four consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (3) The equivalent of more than four academic years within a period of any five consecutive academic years.
>
> In order to achieve tenure pursuant to this subsection, a teacher shall also complete a district mentorship program during the initial year of employment and receive a rating of effective or highly effective in two annual summative evaluations within the first three years of employment after the initial year of employment in which the teacher completes the district mentorship program. . . .
>
> For purposes of this subsection, "effective" or "highly effective" means the employee has received an annual summative evaluation rating of "effective" or "highly effective" based on the performance standards for his position established through the evaluation rubric adopted by the board of education and approved by the commissioner.

The Commissioner is in accord with the ALJ's determination that petitioner had not obtained tenure because he had not received the annual summative evaluations as required by the statute. The Board was unable to evaluate petitioner because he was not teaching from March 24, 2016 through completion of that school year, for the entire 2016-17 school year, and from March 28, 2018 until his termination on January 11, 2019.[2]

[2] To the extent that petitioner also argues that the Board failed to follow procedures for termination of non-tenured employees, the Commissioner agrees with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner, or contrary to law, in terminating petitioner.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED. [3]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 21, 2022
Date of Mailing: November 23, 2022

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05348-19
AGENCY DKT. NO. 30-2/19

DONNIE HARRELL,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,
Respondent.

Charles J. Uliano, Esq., for petitioner (Chamlin, Uliano & Walsh, attorneys)

Michelle M. Schott, Esq., for respondent (Flanagan, Barone & O'Brien, attorneys)

Record Closed: September 6, 2022 Decided: October 6, 2022

BEFORE **SUSANA E. GUERRERO,** ALJ:

STATEMENT OF THE CASE

Petitioner Donnie Harrell (Petitioner or Harrell), a teacher employed by the respondent, Board of Education of the City of Plainfield, Union County (the Board or respondent), asserts that the Board violated his tenure rights by terminating his employment. The Board denies that Harrell had tenure when he was terminated. The

predominant issue to be addressed in this matter is whether Harrell achieved tenure prior to being terminated by the Board in January 2019.

PROCEDURAL HISTORY

On or around February 7, 2019, Harrell filed a Petition with the New Jersey Department of Education (DOE) alleging that respondent Board terminated his position with the Board in violation of his tenure rights. The Petition requests that the termination be vacated, and that he be reinstated to the payroll and benefits plan and reimbursed for all benefits withheld since the day of his termination. Respondent filed an Answer to the Petition on or around April 3, 2019, denying petitioner's claims and asserting that Harrell did not serve in the position of teacher for the requisite time to obtain tenure, and that he never achieved tenure since his performance could not be evaluated while he was suspended. The Department of Education, Bureau of Controversies and Disputes, transmitted petitioner's claim to the Office of Administrative Law (OAL), where it was filed on April 18, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A hearing was initially scheduled for April 24 and April 27, 2020, but adjourned at the request of the parties and rescheduled to October 8, 2021. Due to a scheduling conflict, the hearing was then adjourned to November 10, 2021. That hearing date was adjourned again, at the request of the parties, to April 11, 13 and 14, 2022 but rescheduled as counsel needed more time to serve witnesses. A hearing took place at the Office of Administrative Law on July 11, 2022, and the parties agreed to file post-hearing summations. The record closed on September 6, 2022, upon receipt of all post-hearing summations.

FACTUAL DISCUSSION

The parties submitted a Joint Stipulation of Facts and Joint Exhibits. Harrell testified on his own behalf and Carletta Jones (Jones), the District's Director of Human Resources, testified on behalf of the Board. Based on the documentary and testimonial evidence presented, as well as my assessment of the credibility of the witnesses, I **FIND** the following **FACTS**:

Respondent is a public school in Union County, New Jersey. Prior to joining the Plainfield School District, petitioner taught in other school districts for at least ten years.

Harrell was hired by the Board as a substitute teacher and as a teacher's assistant, and worked part-time in those positions from November 20, 2013 until April 16, 2014. On April 16, 2014 he began to work full-time and was paid his full salary as a full-time music teacher at the Clinton Elementary School. Harrell testified that he received evaluations that academic year, but none were presented at the hearing. He continued to work for Plainfield during the 2015–2016 school year, but was removed from the classroom in March 2016.

On March 23, 2016, student A.R. complained to District personnel of sexual misconduct towards her by petitioner. On March 24, 2016, petitioner was assigned to the District's Central Office pending an investigation of the allegations against him by A.R. When Harrell was assigned to the Central Office, he continued to get paid but he did not teach students, and did not do any work for the District, with the exception of making photocopies once or twice. He remained in Central Office through the end of the 2016–2017 school year.

On June 1, 2017, the Department of Children and Families' Institutional Abuse Investigation Unit (IAIU) found ". . . the investigation could not conclusively determine" if an incident sexual in nature occurred between petitioner and A.R. The Union County Prosecutor's Office investigated the allegations and issued a report on July 26, 2017 in which they determined ". . . there was insufficient evidence to prosecute at this time."

In September 2017, Harrell was assigned as a full-time music teacher to the District's Barlow Elementary School for the 2017–2018 school year. On March 28, 2018, that same school year, a second complaint against petitioner was reported, alleging sexual misconduct by Harrell towards another student, N.G., which occurred in 2016. On March 29, 2018, Harrell was again assigned to Central Office pending an investigation of the new allegations against him. At this time, the District informed Harrell that he was immediately being placed on administrative leave, with pay, pending the outcome of the

investigation, and that in the meanwhile he was not to have any contact with any students. Carletta Jones testified credibly that the District had a legal obligation to continue to pay Harrell and maintain his benefits when he was placed on administrative leave—i.e., when he was suspended.

Petitioner provided a doctor's note dated May 18, 2017, requesting leave that was granted from May 18, 2017 to June 20, 2017. Also, a Statement of Reasons dated May 11, 2017 was provided to petitioner for non-renewal based upon "Economy and Efficiency."

An investigation by the Union County Prosecutor's Office followed the more recent allegations of sexual misconduct, and criminal charges were filed against Harrell on December 14, 2018 for sexual misconduct involving minors A.R. and N.G. A Grand Jury Hearing took place on June 12, 2019. On December 20, 2019, a superseding incident against petitioner added additional charges to the June 12, 2019 indictment that included Sexual Assault and Endangering – Sexual Conduct with child A.R. and N.G. The additional charges in the Superseding Indictment included two counts of official misconduct towards A.R. and N.G. This criminal matter was still pending at the time of this hearing.

Harrell did not teach during the time he was assigned to Central Office. Specifically, he was assigned to Central Office from March 24, 2016 until September 2017 (i.e., he did not teach the last week plus two days in March, April, May or June 2016 or the 2016–2017 school year, totaling one school year plus three months of not teaching); and again from March 28, 2018 through his termination on January 11, 2019 (totaling seven months of not teaching). Harrell continued to receive this salary through the date of his termination on January 11, 2019.

Petitioner taught at the District: from April 16 to June, 2014 (about three months); the entire 2014–2015 school year (totaling one school year); September to March 23, 2016 (totaling seven months); and September 2017 to March 27, 2018 (totaling seven months).

Harrell never submitted a request for a Donaldson hearing or Statement of Reason related to his termination on January 11, 2019.

While petitioner was employed by the District, it had in place a mentorship program for new, novice teachers' first year of teaching in the District. Harrell did not participate in a mentorship program in the District, and there is insufficient evidence that he was ever evaluated by the District.

Petitioner alleges that he acquired tenure on April 16, 2018, four years after being hired by the District on April 16, 2014, because he "worked continuously" and was paid for four years and a day.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The purpose of teaching-staff 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)). In order to acquire tenure, a teaching staff member "must comply with the precise conditions articulated in the [tenure] statute." Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962).

Acquisition and effect of tenure are statutorily defined by the Teacher Effectiveness and Accountability for the Children of New Jersey Act, or the TEACHNJ Act, N.J.S.A. 18A:28-5 (TEACHNJ). The purpose of TEACHNJ is to "raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions." N.J.S.A. 18A:6-118. Through TEACHNJ, in 2012, New Jersey not only increased the length of time required to obtain tenure from three to four years, it also requires school district to adopt and use an evaluation process to measure teacher effectiveness, and it requires the teacher to achieve a rating of "effective" or "highly effective" pursuant to the evaluation in order to accrue tenure.

Specifically, "teaching staff members"[1] employed on or after August 6, 2012, including those employed in the position of teacher, who hold appropriate certificates, "shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . . after employment in such district or by such board for:

> (1) Four consecutive calendar years, or
>
> (2) Four consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (3) The equivalent of more than four academic years within a period of any five consecutive academic years."
>
> [N.J.S.A. 18A:28-5 (b).]

In order to achieve tenure, TEACHNJ also requires teaching staff members to:

> complete a district mentorship program during the initial year of employment and receive a rating of effective or highly effective in two annual summative evaluations within the first three years of employment after the initial year of employment in which the teacher completes the district mentorship program . . . . "[E]ffective" or "highly effective" means the employee has received an annual summative evaluation rating of "effective" or "highly effective" based on the performance standards for this position established through the evaluation rubric adopted by the board of education and approved by the commissioner.[2]
>
> [N.J.S.A. 18A:28-5(b).]

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[1] A "teaching staff member" is defined as: a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer. [N.J.S.A. 18A:6-119.]

[2] "Evaluation" is defined as "a process based on the individual's job description, professional standards and Statewide evaluation criteria that incorporates analysis of multiple measures of student progress and multiple data sources. Such evaluation shall include formal observations, as well as post conferences, conducted and prepared by an individual employed in the district in a supervisory role . . . ." [N.J.S.A. 18A:6-119.]

A school district may terminate a teacher prior to the teacher obtaining tenure for service time except for arbitrary and capricious reasons; the district is not required to provide a reason for termination. See Donaldson v. Bd. Of Educ. of N. Wildwood, 65 N.J. 236, 240 (1974); Dore v. Bd. Of Educ. Of the Twp. of Bedminster, Somerset County, 185 N.J. Super. 447, 453 (App. Div. 1982).

Here, Harrell argues that he acquired tenure with the District because he completed four consecutive calendar years of employment, and received his full salary as a full-time teacher from April 16, 2014 through the date of his termination on January 11, 2019. He asserts that the Board had the responsibility of evaluating him, even though he was suspended from his classroom for several months during that time, and of having him complete a mentorship program, which was not done. Harrell argues that the Board had an affirmative duty under the statute to conduct evaluations and provide a mentorship program, and that they should not be permitted to deny him tenure as a result of the District's own failure.

The District maintains that while Harrell continued to receive a salary and benefits while assigned to the Central Office, he did not actually "hold" a position in the District and was not held to a "valid and effective standard" requiring certification as set forth in the definitions in N.J.S.A. 18A:1-1 for the time he spent in Central Office. Respondent also argues that Harrell did not have the required evaluations for tenure because they could not have been done while he was suspended, and not teaching in the Central Office. The District argues that the fact that evaluations were not done does not alter the statutory requirements for obtaining tenure, and references McDonald v. State-Operated Newark Public Schools, OAL Docket No. EDU 01771-18, Agency Docket No. 2-1/1/18, where the Commissioner of Education concurred with the ALJ that the Board's failure to evaluate McDonald did not prevent the Board's refusal of tenure based on equity principles. The District asserts that the time Harrell spent in Central Office, not teaching and not permitted to be near children, and could not have been evaluated, cannot be considered to secure tenure. Finally, the District asserts that since Harrell did not have tenure, the District appropriately complied with N.J.S.A. 18A:27-10 and N.J.S.A. 18A:4.1(b) when it terminated his employment, and that despite Harrell's assertion, there was no legal

requirement to either provide him with a statement of reason of hearing absent a request for same.

While Harrell was hired by the District as a teacher, and may have been an employee of the District for over four years, the passage of time alone does not guarantee tenure. To acquire tenure under TEACHNJ, the teaching staff member must also achieve a performance rating of "effective" or "highly effective" in two annual summative evaluation within the first three years of employment after completing a mentorship program during the initial year of employment. The evaluation process is based in part on the employee's job description, measures of student progress, and it includes formal observations. The record is unclear why Harrell did not participate in a mentorship program when he was hired as a full-time teacher, but the District seems to imply that since he had many years of teaching experience in other public school districts before coming to Plainfield, they were not required to provide a mentorship program. While I cannot conclude that the District was not obligated to offer Harrell such a program because this was not his first year teaching, in order to achieve tenure, the clear language of TEACHNJ not only requires the teacher to complete a "district mentorship program," it also requires that the teacher receive a rating of "effective" or "highly effective" in two annual summative evaluations.

In order for Harrell to have been evaluated as a music teacher pursuant to TEACHNJ and receive a summative evaluation rating of "effective" or "highly effective," he had to have been teaching since evaluations must include, for example, formal observations and an analysis of student progress, which cannot be accomplished when the teacher is not teaching. The time Harrell spent in the Central Office, and not teaching, amounted to a significant portion of the time he spent in the District—i.e., about three months during the 2015–2016 school year; the entire 2016–2017 school year; three months during the 2017–2018 year; and from September 2018 until his termination in January 2019. During that time, the District could not have effectively evaluated him.

Even assuming arguendo that the District could have, and should have, evaluated Harrell during the 2014–2015 school year and the 2015–2016 school year before he was suspended in March 2016, the statutory requirements necessary to award tenure must

still be met and I am not persuaded by the petitioner's argument that the District's failure to evaluate bars its refusal to grant tenure. Harrell cites to no statute, regulation or caselaw to support his position. I, therefore, **CONCLUDE** that Harrell did not acquire tenure at the District because he did not receive the annual summative evaluation ratings of "effective" or "highly effective" required under TEACHNJ; and the District's failure to evaluate Harrell does not warrant the granting of tenure.

Harrell also appears to argue that he was entitled to a statement of reasons and a hearing when he was not renewed by the District. As a non-tenured employee, however, there is no such automatic right to a statement of reasons and hearing, and there is no evidence that Harrell ever requested a Donaldson hearing, or that he made a written request for a statement of reasons for the non-renewal. With respect to non-tenured employees, the District has no legal obligation to provide a statement of reasons absent a written request. See Hubbard v. Springfield Bd. of Educ., 80 Fed. Appx. 757, 761 (2003) and N.J.S.A. 18A:27-3.2. In fact, a district may terminate a teacher prior to the teacher obtaining tenure for service time except for arbitrary and capricious reasons; and the district is not required to provide a reason for termination. See Donaldson v. Bd. of Educ. of N. Wildwood, 65 N.J. 236, 240 (1974); Dore v. Bd. of Educ. of the Twp. of Bedminster, Somerset County, 185 N.J. Super. 447, 453 (App. Div. 1982). School boards have "virtually unlimited discretion in hiring or reviewing the contracts of non-tenured teachers." Dore at 453. Here, the evidence shows that the District complied with the requirements of N.J.S.A. 18A:27-10[3] when it provided Harrell notice of his termination. I **CONCLUDE** that Harrell was appropriately terminated by the District, and that no evidence was presented to suggest that the District's decision to terminate was arbitrary or capricious.

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[3] N.J.S.A. 18A:27-10 requires that: "On or before May 15 in each year, each non-tenured teaching staff member continuously employed . . . since the preceding September 30 shall receive either:

a. A written offer of a contract for employment from the board of education for the next succeeding year . . ., or

b. A written notice from the chief school administrator that such employment will not be offered."

ORDER

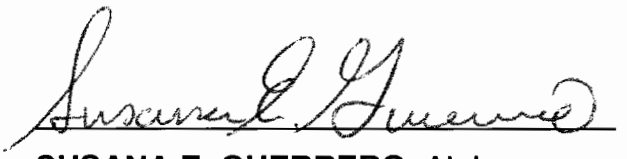
It is, therefore, **ORDERED** that the petitioner's Due Process Petition be **DENIED** in its entirety for the reasons stated herein.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 6, 2022
DATE



SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

APPENDIX

Witnesses

For Petitioner:

Donnie Harrell

For Respondent:

Carletta Jones

Exhibits

Joint:

J-1 Petition

J-2 Plainfield School District Online Application

J-3 New Hire Enrollment Plan

J-4 Plainfield Pay Records (December 13, 2018 to January 19, 2019)

J-5 Union County Prosecutor's Office Investigation Report dated July 26, 2017

J-6 Letter to petitioner re Assigned to Central Office dated March 23, 2016

J-7 Letter to petitioner re Assigned to Central Office dated April 1, 2016

J-8 Letter to petitioner re Assigned to Central Office dated May 5, 2016

J-9 Prosecutor's Investigation Interview transcript cover pages of March 23, 2016 events: March 30, 2016 (A.R.), April 12, 2016 (G., Z. and P.), April 15, 2016 (E.L., D.R. and R.P.)

J-10 Prosecutor's transcript of petitioner on February 1, 2017

J-11 Institutional Abuse Investigative Unit Report dated June 1, 2017

J-12 DeWitt D. Barlow Elementary School Staff Roster 2017–2018 school year

J-13 Letter to petitioner re placed on administrative leave dated March 28, 2018

J-14 Prosecutor's Investigation Report of second student re March 27, 2018 allegations referenced from Division of Child Protection and Permanency

J-15 Not in evidence

J-16 Doctor's note dated May 18, 2017

J-17 Statement of Reasons for Non-Renewal for Economy and Efficiency 2017–2018 school year

J-18 Prosecutor's Investigation Interviews transcript and cover pages: May 15, 2018 (P.A. and N.G.), June 14, 2018 (V.C., S.G and N.G.) and November 25, 2019 (N.T.)

J-19 Prosecutor's Investigation Interview transcript of P.A.

J-20 Letter to petitioner dated November 8, 2018 regarding recommendation for termination at the November 20, 2018 Board meeting

J-21 Board Resolution dated November 20, 2018 terminating petitioner on January 11, 2019

J-22 Criminal charges filed dated December 14, 2018

J-23 Letter to District from State of New Jersey Criminal History Review Unit re petitioner date of arrest dated January 4, 2019

J-24 District Response to State of New Jersey Criminal History Review Unit dated January 10, 2019

J-25 Excerpt of Decision and Order dated November 24, 2020

J-26 Superseding Indictment including additional counts to June 12, 2019 Indictment

J-27 Prosecutor's Investigation transcript of P.A. dated May 15, 2018

J-28 Board meeting minutes dated April 15, 2014

318-22
SEC Dkt. No. T36-21
Agency Dkt. No. 278-10/22

New Jersey Commissioner of Education

Final Decision

In the Matter of Joseph Marolda,
Board of Education of the Township of
Rochelle Park, Bergen County.

The record of this matter and the decision of the School Ethics Commission (SEC) have been reviewed. The SEC found that respondent violated *N.J.S.A.* 18A:12-33 by failing to timely complete the required board member training. The SEC's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The SEC advises that the respondent ultimately completed training after the issuance of the September 14, 2022 Order to Show Cause but prior to the SEC's October 17, 2022 meeting; therefore, a penalty of reprimand is recommended. Respondent did not file exceptions to the recommended penalty, nor was the SEC's underlying finding of a violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon board members by law. Accordingly, the respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 21, 2022
Date of Mailing: November 23, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T36-21
Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Joseph Marolda,
Rochelle Park Board of Education, Bergen County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its special meeting on September 14, 2022, and also served on September 14, 2022, via electronic mail.[1] The OTSC directed Joseph Marolda (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on September 14, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (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.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Rochelle Park Board of Education (Board), located in Bergen County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 1 training program by December 31, 2021.

On or about March 11, 2022, NJSBA provided the Commission with the names of those school officials who failed to complete training by December 31, 2022. On or about April 29, 2022, NJSBA provided the Commission with an updated list, and the updated list included Respondent.

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[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. *See* Exhibit 1. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on September 14, 2022.

To date, there is no dispute that Respondent did not complete his required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed his training requirement on September 28, 2022, but did not respond to the Commission's OTSC as to why he did not complete training by December 31, 2021.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on October 17, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (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, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

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:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) 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 (thirteen (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: October 17, 2022

Resolution Adopting Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T36-21

Whereas, Joseph Marolda (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by December 31, 2021; and

Whereas, at its special meeting on September 14, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by December 31, 2021; and

Whereas, at its special meeting on October 17, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement he was obligated to complete; and

Whereas, at its special meeting on October 17, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its special meeting on October 17, 2022, 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 its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at a special meeting on October 17, 2022.

Kathryn A. Whalen

Kathryn A. Whalen, Esq., Director

319-22

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

November 21, 2022

George G. Frino, Esq.
Decotiis, Fitzpatrick, Cole & Giblin, LLP
61 S. Paramus Road
Paramus, NJ 07652

Dr. Roderick Knox
252 Mystic Drive
Egg Harbor Township, NJ 08234

Re: ***Roderick Knox v. Jerome Page, Board of Education of the City of Pleasantville, Atlantic County, Agency Dkt. No. 299-11/22, EEC 06500-22, SEC Dkt. No. C21-22***

Dear Parties:

I have considered the papers filed in connection with respondent Jerome Page's request for interlocutory review of Administrative Law Judge Kathleen M. Calemmo's November 2, 2022 decision denying respondent's motion to dismiss in the above-captioned matter.

Upon full consideration 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, the request for interlocutory review is hereby denied.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JS
c: State Law Library
Honorable Kathleen M. Calemmo, ALJ

319-22L

321-22
OAL Dkt. No. EDU 14182-18
Agency Dkt. No. 184-8/18

New Jersey Commissioner of Education

Final Decision

Union County Vocational Technical Association,

Petitioner,

v.

Board of Education of the Union County Vocational School District, Union County,

Respondent.

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

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 28, 2022
Date of Mailing: November 30, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 14182-18

AGENCY DKT. NO. 184-8/18

UNION COUNTY VOCATIONAL TECHNICAL ASSOCIATION,

Petitioner,

v.

UNION COUNTY VOCATIONAL SCHOOLS BOARD OF EDUCATION,

Respondent.

Randi April Doner Esq., petitioner (Oxfeld Cohen, attorneys)

Lester E. Taylor, Esq., for respondent (Florio Perrucci Steinhardt Cappelli Tipton and Taylor, attorneys)

Record Closed: October 27, 2022 Decided: October 31, 2022

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 18, 2018, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

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

2. Petitioner has agreed to withdraw this appeal.

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

4. The Board resolved to ratify this settlement at the Board meeting. It was signed afterwards by the Board President. No further action is needed by the Board.

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 31, 2022
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: October 31, 2022

Date Mailed to Parties: October 31, 2022
lr
Attachment

FLORIO PERRUCCI STEINHARDT CAPPELLI
TIPTON & TAYLOR LLC
David J. Kass, Esq.
430 Mountain Avenue, Suite 103
New Providence, New Jersey 07974
(908)246-4765
dkass@floriolaw.com
Attorneys for Union County Vocational-Technical Schools Board of Education

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

UNION COUNTY VOCATIONAL-TECHNICAL EDUCATION ASSOCIATION, Petitioner, v. UNION COUNTY VOCATIONAL-TECHNICAL SCHOOLS BOARD OF EDUCATION, Respondent.	:	OAL DOCKET NO. EDU 14182-18 AGENCY DKT. NO. 184-8/18 BEFORE: ANDREW M. BARON, ALJ **SETTLEMENT AGREEMENT**

The Union County Vocational-Technical Schools Board of Education (the "Board") and the Union County Vocational-Technical Education Association (the "Association") (collectively the "Parties"), hereby enter into this Settlement Agreement (the "Agreement").

WHEREAS, the Parties are parties to Collective Bargaining Agreement covering the period of July 1, 2020 through June 30, 2024 (the "CBA"); and

WHEREAS on August 2, 2018, the Association filed a Petition of Appeal (the "Petition") with the Commissioner of Education alleging the Board violated N.J.S.A. 18A:30-2 by denying part-time Association members statutory sick leave; and

WHEREAS, the Office of Administrative Law docketed the Petition as Dkt. No. EDU 14182-18 and the matter was transmitted to Administrative Law Judge Andrew M. Baron for a hearing; and

WHEREAS, the Parties have decided to resolve this matter amicably to avoid additional costs, appeals, and/or legal proceedings; and

NOW, THEREFORE, in consideration of mutual promises contained herein, the sufficiency of which are acknowledged, and intending to be legally bound hereby, the Parties agree as follows:

1. The Board agrees to provide the following part-time employees with the corresponding sick leave to resolve this matter as follows:
   a. Michael Castelluci shall receive thirty-four (34) days of sick leave;
   b. Suzanne Doherty shall receive five and one-half (5.5) days of sick leave;
   c. Frances Mirabelli shall receive twenty-five and one-half (25.5) days of sick leave;
   d. Denise Worts shall receive one and three-quarters (1.75) days of sick leave; and
   e. Marta Zeien shall receive thirty-seven and one-half (37.5) days of sick leave.
2. The sick leave provided to Association members identified herein shall be considered earned leave as of June 30, 2022 and shall not affect any prospectively earned sick leave pursuant to the CBA.
3. The Parties agree that all present and future part-time Association members shall continue to accrue earned sick leave in accordance with the provisions of the CBA.
4. The Association, for itself and/or the members of its negotiations unit, agrees to release the Board from all claims that could have been filed and/or which

accrued on or prior to the date the that the Board executed this Agreement, including but not limited to grievances, arbitrations, mediations, unfair practice charges, lawsuits, and appeals, filed by or on behalf of the Association.

5. Once this Agreement is executed by both Parties and the Association members listed above in paragraphs (1)(a)-(e) have been made whole, the Association shall dismiss the above-captioned Petition with prejudice.

6. This Agreement constitutes the entire agreement between the Parties. It is further understood and agreed that no agreements, promises, representations, warranties, and understandings have been made or reached by or among any of the Parties to this Agreement regarding its subject matter, other than what is expressly contained in this Agreement.

7. The terms and conditions of this Agreement shall be construed according to their plain meaning and shall not be construed in favor of or against any Party.

8. The Parties agree and acknowledge that this Agreement shall not be interpreted to render any Party to be a prevailing party for any purpose, including but not limited to, an award of attorneys' fees under any contract, statute or otherwise.

9. This Agreement shall not be construed as an admission by any Party of any violation of any federal or state law, administrative code, ordinance or regulation, violation of any express or implied contract with the Board, or breach or violation of any public policy of the State of New Jersey.

10. If any provision of this Agreement is found invalid under federal or state law the remainder of the Agreement shall remain in full force and effect.

THE BOARD

Jean Perkins

JEAN PERKINS, BOARD PRESIDENT

DATED: 10/24/22

THE ASSOCIATION

Julie Klikus

JULIE KLIKUS, ASSOCIATION PRESIDENT

DATED: 10/24/22

322-22
OAL Dkt. No. EDU 05888-22
(OAL Dkt. No. EDU 04273-19 On Remand)
Agency Dkt. No. 238-9/18

New Jersey Commissioner of Education

Final Decision

A.A., on behalf of minor child, A.A.,

Petitioner,

v.

Board of Education of the Township of Montgomery, Somerset County,

Respondent.

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

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 28, 2022
Date of Mailing: November 30, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05888-22
AGENCY DKT. NO. 238-9/18

ON REMAND

(OAL DKT. NO. EDU 04273-19)

A.A. ON BEHALF OF MINOR CHILD A.A.,

Petitioner,

v.

BOARD OF EDUCATION, TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,

Respondent.

A.A., petitioner, pro se

Rita F. Barone, Esq., for respondent (Purcell, Mulcahy, Flanagan, attorneys)

Record Closed: October 26, 2022 Decided: October 31, 2022

BEFORE **JEFFREY N. RABIN,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on July 17, 2022, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On October 26, 2022, the parties filed a fully executed Settlement Agreement and the Board Resolution approving the settlement. The Agreement and Resolution are attached and fully incorporated herein.

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 31, 2022
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: 11/1/2022

Date Mailed to Parties: 11/2/2022

/dw

RECEIVED
2022 OCT 26 A 10:12
STATE OF NEW JERSEY

RITA F. BARONE, ESQ.
ATTORNEY ID: 038211995
FLANAGAN, BARONE, & O'BRIEN, LLC
4 Essex Avenue, Suite 200
P.O. BOX 259
Bernardsville, New Jersey 07924
(908) 658-3800
Attorneys for Respondent, Montgomery Township Board of Education
Our File: 304-26067-RFB

A.A, o/b o A.A., Petitioner,	BEFORE THE COMMISSIONER OF EDUCATION STATE OF NEW JERSEY
v.	AGENCY Ref. No. 258-9 18
MONTGOMERY TOWNSHIP BOARD OF EDUCATION. Respondent.	OAL Docket No. EDU 05888-22

WHEREAS, A.A. is a student residing within the Montgomery Township Board of Education School District (hereinafter referred to as the 'District"); and

WHEREAS, A.A. o/b/o A.A. (hereinafter referred to as the "Parent") and the Montgomery Township Board of Education (hereinafter referred to as the "Board") have had a dispute regarding whether A.A.'s conduct on March 19. 2018 rose to the level of a violation under the Anti-Bullying Bill of Rights Act wherein the Parent filed a Petition of Appeal and the Board filed an Answer; and

WHEREAS, since the time the dispute arose, A.A. has successfully been promoted from grade-to-grade within the District from Orchard Hill Elementary School to Village Elementary School, and then to Montgomery Lower Middle School and remains in good standing; and

WHEREAS, the Parent and Board have agreed to resolve all issues as follows:

1. The Board agrees to review its original decision and reverse the determination that A.A.'s actions on March 19, 2018 violated the Anti-Bullying Bill of Rights Act.

2. A.A.'s student file will reflect that the allegation of a violation against A.A. arising out of her comment about a student's jacket size in March of 2018 did not rise to the level of a violation under the Anti-Bullying Bill of Rights Act.

3. A.A.'s student file will reflect that A.A violated the Orchard Hill Elementary School's code of conduct only on one occasion based on a comment about a student's jacket size in March of 2018, specifically the provision regarding being respectful, for which a consequence of receiving counseling has already been implemented. The alleged incident involving A.A. and the student identified as S.J.G. as described in the HIB investigation report will not be part of A.A.'s code of conduct violation agreed to herein or part of A.A.'s discipline file.

4. The Parent, individually, and on behalf of A.A., hereby releases, acquits and forever discharges the Board, its current and former members, officers, directors, servants, employees, agents, attorneys, successors, and assigns, of and from any and all issues, causes of action, claims, liabilities, demands, indemnities, as set forth in the Petition of Appeal, under Agency Ref. No. 258-9/18 and OAL Docket No. EDU 05888-22 including any and all claims and demands directly or indirectly arising from or in any way connected with the allegations by A.A. o/b/o A.A. that the Board's determination under the Anti-Bullying Bill of Rights Act were erroneous, arbitrary, mistaken or capricious; claims for compensatory damage they have or may have raised against the Board; whether such

claims arise under the Anti-Bullying Bill of Rights Act; and any regulations promulgated under that Act or any other State or Federal law, statute, rule or regulation related to that Act, and regardless of the forum for the claim with jurisdiction over the Parent's allegations, up until the date of this Agreement.

5. This Agreement is made without any admission of liability by the Board and shall not be construed as an admission by the Board that it did not, at all times relevant hereto, properly perform its duties and obligations regarding A.A. in accordance with the law. This Agreement is a compromise of disputed claims by the Board in order to avoid the cost and expense of litigation only and is not an admission of liability.

6. This Agreement represents the entire Agreement between the Parties, and will not be modified in whole or in part except by a mutual subsequent written and signed Agreement. It is acknowledged that this Agreement has been entered into freely, willingly, and voluntarily and without duress or coercion. The Parties understand the contents of this Settlement Agreement and Release.

7. The terms of this Agreement shall be held in strictest confidence by all Parties and shall not be publicized or disclosed in any manner whatsoever, except that: (a) either party may disclose this Agreement in confidence to their attorneys, accountants, auditors, and tax preparers; (b) the Board may disclose this Agreement as necessary to fulfill its obligation under the Open Public Record Act, as well as all other standard or legally required reporting or disclosure requirements; and (c) if necessary with regard to any proceeding for the enforcement of this Agreement.

8. This Agreement shall be governed by the Laws of the State of New Jersey and constitutes a legal release of all claims that were or could have been raised as set forth

herein up until the date of this Agreement and does not prevent Petitioner from bringing future claims or an action to enforce the terms of this Agreement.

9. This Agreement, which shall be subject to approval by the Board on their next scheduled Board of Education meeting and is without prejudice to all parties if the terms are not approved. In the event that the Board fails to approve the Agreement, the parties retain all rights and shall resume the due process hearing before the Administrative Law Judge Assigned to this matter on the earliest possible date.

10. In the event that any provision of this Agreement is held to be void or unenforceable by any court or regulatory authority having jurisdiction thereof, such ruling will not affect the validity of this contract; the remaining provisions shall continue to be in full force and effect.

11. This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof, and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations.

12. This Agreement may be executed in one or more original, emailed or telecopied counterparts, all of which together shall be one instrument, and all of which shall be considered duplicate originals.

13. This Agreement may only be amended in writing by way of a document signed by all Parties and counsel.

14. The Parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to obtain the full force and effect of the basic terms and interest of this Settlement Agreement and General Release.

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

Assistant Board Secretary/
Assoc. Business Administrator
DATE: 10/11/22

Board President
DATE: 10.18.22

WITNESS
DATE: 10/18/22

WITNESS
DATE: 10/18/22

A.A., Parent
DATE: 10/13/2022

WITNESS
DATE: 10/13/2022

MONTGOMERY TOWNSHIP PUBLIC SCHOOLS

Office of the Board of Education

1014 Route 601, Skillman, NJ 08558

Phone: (609) 466-7601 ♦ Fax: (609) 466-0944

www.mtsd.k12.nj.us

EXTRACT OF MINUTES FROM A BUSINESS MEETING HELD AT THE MONTGOMERY TOWNSHIP LOWER MIDDELE SCHOOL CAFETERIA ON OCTOBER 18, 2022 AT 6:00 P.M. OF THE BOARD OF EDUCATION OF THE MONTGOMERY TOWNSHIP SCHOOL DISTRICT, IN THE COUNTY OF SOMERSET, IN THE STATE OF NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK

Motion: Introduced by: Ms. Bursh **Seconded by: Ms. Franco-Herman**
Roll Call Vote: Ayes – 8 Nays – 0 Abstain – 0 Absent 1 **Motion Adopted**

3.6 Settlement Agreement Approve the following resolution pertaining to a settlement agreement:

BE IT RESOLVED by the Montgomery Township Board of Education (hereinafter referred to as the "Board") that the terms, stipulations and conditions as established in the Settlement Agreement and Release (hereinafter referred to as "Agreement") between the Board and the Parents of a student whose name is on file in the Superintendent's office, and which Agreement is located in the student's file, are hereby adopted and approved by the Board. The Board President and Business Administrator/Board Secretary are hereby authorized and directed to execute the Agreement, and any other documents necessary to effectuate the settlement.

The foregoing 3.6 resolution was adopted by the following vote:

MEMBER	AYES	NAYS	ABSTAIN	ABSENT	REMARKS
Phyllis Bursh	x				
Martin Carlson	x				
Victoria Franco-Herman	x				
Christina Harris	x				
Douglas Herring, Esq.	x				
Richard Specht	x				
Dr. Zelda Spence-Wallace	x				
Maria Spina	x				
Patrick Todd				x	
	8	**0**	**0**	**1**	

STATE OF NEW JERSEY)
) ss:
COUNTY OF SOMERSET)

David F. Palumbo, being first duly sworn on oath, deposes and says:

That deponent is an Assistant Board Secretary of the School District and the Board of Education of the Township of Montgomery, in the County and State aforesaid and that the annexed extract from the minutes of a meeting of the Board of Education of the School District held on October 18, 2022 at the time and place therein stated has been compared by deponent with the original minutes of the meeting recorded in full in the official Minute Book of the Board and is a true copy thereof and of the whole of the original so far as it relates to the subject matters referred to in this extract.

Subscribed and sworn before me this 19th day of October, 2022

David F. Palumbo, Assistant Board Secretary
/ds

323-22
OAL Dkt. No. EDU 02597-22
Agency Dkt. No. 36-3/22

New Jersey Commissioner of Education

Final Decision

P.D., on behalf of minor child, A.D.,

Petitioner,

v.

Board of Education of the Kingsway Regional School District, Gloucester 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 have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement 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 Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 28, 2022
Date of Mailing: November 30, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
APPROVING SETTLEMENT
OAL DKT. NOS. EDU 02597-22
AGENCY DKT. NOS. 36-3/22

P.D. ON BEHALF OF MINOR CHILD A.D.,
Petitioner,
v.
KINGSWAY REGIONAL SCHOOL DISTRICT, BOARD OF EDUCATION, GLOUCESTER COUNTY,
Respondent.

P.D., petitioner, pro se

Stephen J. Edelstein, Esq., for respondent (Weiner Law Group, LLP, attorneys)

Record Closed: October 6, 2022 Decided: October 17, 2022

BEFORE **CATHERINE A. TUOHY**, ALJ:

This matter having been transmitted by the Department of Education, Office of Controversies and Disputes to the Office of Administrative Law (OAL), and filed as a contested case on April 5, 2022, arises from a dispute between petitioner and respondent arising under the school law (N.J.A.C. 18A:6-9). The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

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

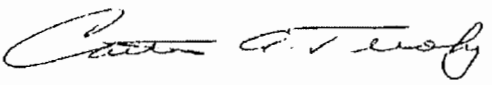
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and Board resolution authorizing same at its meeting of September 22, 2022.

2. The settlement fully disposes of all issues in controversy between them 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.



October 17, 2022
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: 10/21/2022

Date Sent to Parties: 10/21/2022

CAT/gd

APPENDIX

LIST OF EXHIBITS

Jointly Submitted

J-1 Settlement agreement signed by petitioner on August 27, 2022, and by the Board on September 30, 2022, and Board resolution approving agreement at meeting of September 22, 2022, received by the OAL on October 11, 2022

AGREEMENT AND RELEASE

WHEREAS, in or about December of 2021 and January of 2022, an investigation by the Kingsway Regional School District ("the District") determined that A.D. was guilty of an H.I.B. violation; and

WHEREAS, that determination was affirmed by the Kingsway Regional Board of Education; and

WHEREAS, the penalty which was imposed as a result of the determination of an H.I.B. violation has already been completed; and

WHEREAS, on or about March 4, 2022, P.D., on behalf of his minor child A.D. filed a Pro Se Petition of Appeal with the Commissioner of Education; and

WHEREAS, the Pro Se Petition was transferred to the Office of Administrative Law as a contested matter, and designated as P.D. o/b/o minor child, A.D. v. Board of Education of Kingsway Regional School District, Agency Ref. No. 36-3/22; OAL Docket No. EDU-02597-22; and

WHEREAS, the parties believe that it is in their mutual best interest to resolve this matter without further legal proceedings;

NOW, THEREFORE, the parties agree as follows:

1. The District agrees that the H.I.B. finding with respect to A.D. which is the subject of this dispute shall be changed to a Code of Conduct violation. All penalties imposed shall remain as is.
2. This Settlement Agreement is made for the purpose of a prompt resolution of this dispute and without any admission by either party that its legal position in this proceeding was incorrect or improper.

3. As a material part of this Agreement, on his own behalf, on behalf of A.D.'s mother, as to whom P.D. represents that he has the authority to act, and on behalf of A.D., Pro Se Petitioner P.D. specifically releases and waives all rights and claims of whatsoever nature relating to the events which are the subject of the Pro Se Petition as to the District, its officers, agents, and employees, including, but not limited to any claim for further action by the District or the Board of Education and any claims for money damages of any kind, including but not limited to legal fees and costs. Should a claim arising out of the same facts as are alleged in the Pro Se Petition be filed by A.D.'s mother, P.D. agrees to indemnify the District in full with respect to any such claim, including any reasonable legal fees and costs incurred.
4. This Settlement Agreement shall be governed by the laws of the State of New Jersey.
5. This Settlement Agreement represents the entire Agreement between the parties and will not be modified in whole or in part except by a mutual subsequent written and signed Agreement.
6. It is acknowledged that this Settlement Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity to consult with counsel of each party's choosing.
7. This Settlement Agreement is subject to approval by the Kingsway Regional Board of Education. Upon full execution and approval by the Board, this Agreement shall be submitted to the Hon. Catherine A. Tuohy for such further action as she deems appropriate.

IN WITNESS WHEREOF, the parties have signed this Settlement Agreement or caused their representatives to sign this Settlement Agreement on the dates set forth below.

Date: 8/27/22

PRO SE PETITIONER

P.D. o/b/o minor child A.D.

Date: 9/30/22

KINGSWAY REGIONAL
BOARD OF EDUCATION

By: _____

2421383

KINGSWAY REGIONAL SCHOOL DISTRICT

Committed to Excellence

Dr. James J. Lavender, ext. 4205
Superintendent of Schools

Mr. Jason Schimpf, ext. 4203
School Business Administrator

I certify that this is a true and exact copy of the motion approved by the Kingsway Regional School District Board of Education at their meeting held on Thursday, September 22, 2022.

Motion by Lauren Boerlin, second by Michele A Blair.

Settlement Agreement
BE IT RESOLVED, that the Kingsway Regional School District Board of Education authorize the execution of a settlement agreement with minor child A.D. per the attached

Final Resolution: Motion Carries
Yes: Lauren Boerlin, Michele A Blair, Deborah Cunningham, Christie Comerford, Jennifer Cavallaro-Fromm, Marilyn O'Rourke-Young, Kelly Bonapfel, Christopher Fay

Jason Schimpf
School Business Administrator/Board Secretary

324-22
OAL Dkt. No. EDU 10346-21
Agency Dkt. No. 233-12/21

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Melissa Screven, Board of Education of the Glassboro Public Schools, Gloucester County.

The record of this matter, the parties' 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 such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In so doing, however, the Commissioner notes the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.,* with respect to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

Accordingly, this matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 28, 2022
Date of Mailing: November 30, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10346-21
AGENCY DKT. NO. 233-12/21

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MELISSA SCREVEN, BOROUGH OF GLASSBORO BOARD OF EDUCATION, GLOUCESTER COUNTY.

Susan S. Hodges, Esq., for petitioner, Borough of Glassboro Board of Education (Parker McCay, P.A., attorneys)

Michelle J. Douglas, Esq., for respondent, Melissa Screven (Burnham Douglass, attorneys)

Record Closed: October 27, 2022 Decided: November 3, 2022

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 21, 2021, 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, along with the Board Resolution, indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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 3, 2022
DATE

Mary Ann Bogan
MARY ANN BOGAN, ALJ

Date Received at Agency: 11/3/2022

Date Mailed to Parties: 11/4/2022

MAB/kl

Glassboro Public Schools

560 Joseph Bowe Boulevard
Glassboro, New Jersey 08028

www.gpsd.us

Phone: 856-652-2700
Fax: 856-881-0884

Dr. Robert Preston
Chief Academic Officer

Lisa Ridgway, MSM, QPA
Business Administrator

Dr. Mark J. Silverstein, MBA, Superintendent of Schools

CERTIFICATION OF BOARD MINUTES

Be it resolved that the Board of Education does hereby approve the Separation Agreement and General Release between (hereinafter referred to as, "Screven") and Glassboro Board of Education/Glassboro Public Schools (hereinafter referred to as "Board of Education").

The motion was approved by unanimous roll call vote.

Ms. Dempster, Mr. Esgro, Mr. Hughes, Ms. Roth, Mr. Stephens, Ms. Volz, Mr. Calvo

I hereby certify this to be a true copy of the minutes of the Glassboro Board of Education meeting held September 21, 2022.

Lisa Ridgway, Business Administrator/Bd Secretary.

10/27/22
Date

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2022 OCT 27 P 1:53
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

PARKER McCAY

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Emily E. Strawbridge, Esq.
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F: 856.810.5852
estrawbridge@parkermccay.com

October 20, 2022

RECEIVED
2022 OCT 21 A 8:31
STATE OF NEW JERSEY

VIA EMAIL
Honorable Mary Ann Bogan, A.L.J.
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049
Kelly.Lee@oal.nj.gov

Re: Glassboro Public Schools Board of Education/ Melissa Screven
OAL Docket No.: EDU 10346-2021S/ Agency Ref. No. 233-12/21

Dear Judge Bogan:

With regard to the above-referenced matter, I sincerely apologize for missing the scheduled conference call this afternoon. Unfortunately, I was tied up in an IEP meeting that ran late, and by the time I attempted to join the in no one was on the line. Again my sincere apologies.

However, I am pleased to confirm that this matter has been resolved. The agreement was approved during the Board of Education meeting last night. Enclosed please find the Settlement Agreement. The certified Board resolution will be forthcoming as soon as I have received it from the Board Secretary.

Thank you for your assistance and should you require anything further, please let me know.

Respectfully submitted,

/s/ Emily E. Strawbridge
EMILY E. STRAWBRIDGE

EES/dc

Enclosures

cc: Michelle J. Douglass, Esq. (mdouglass@burnhamdouglass.com)

Philip S. Burnham, II, Esq. (pburnham@burnhamdouglass.com)

4888-9141-6885, v. 2

Law Offices of
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
Attorneys for Petitioner, Glassboro Public School District Board of Education

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MELISSA SCREVEN, GLASSBORO PUBLIC SCHOOLS, GLOUCESTER COUNTY	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY CIVIL ACTION OAL Docket No.: EDU 10346-2021S Agency Docket No. 233-12/21

SETTLEMENT AGREEMENT AND RELEASE

This **SETTLEMENT AGREEMENT AND RELEASE** is entered into on this 13 day of September, 2022 by and among Melissa Screven (hereinafter referred to as "Screven") and Respondent, Glassboro Board of Education (hereinafter referred to as "Board of Education" and/or "Board"); and

WHEREAS, Screven is a former employee of the Glassboro School District who terminated employment her employment on October 11, 2021; and

WHEREAS, the Glassboro Board of Education requires 60-days' notice of termination of employment by the terminating employee; and

WHEREAS, a dispute between the Parties arose regarding the amount of notice provided by Screven of termination of her employment with the Board; and

LAW OFFICE
Parker McCay P.A.

WHEREAS, the Parties desire to settle any and all claims and potential in this matter in an amicable way and therefore, after the ability to consult with legal counsel and following negotiations, have agreed to enter into this Settlement Agreement and Release in order to reach a compromise which will fully and finally resolve this matter; and

WHEREAS, the Parties, without alleging and/or admitting any wrongdoing or liability by any party, enter into this Settlement Agreement and Release in order to reach a compromise to fully and finally resolve their dispute in this matter, and agree as follows:

1. The Parties have reached this Agreement to avoid the expense, uncertainty and inconvenience of litigation. It is understood that the execution of this Agreement does not constitute an admission by the Glassboro Board of Education of any liability and/or wrongdoing by the Board. This Agreement represents the compromise of disputed claims and shall never be treated as an admission of liability by either party for any purposes whatsoever.

2. The Board agrees to withdraw its Petition for the Suspension of the Teaching Certificate of Screven.

3. In consideration therefore, Screven agrees that she will not seek, accept or obtain employment in any teaching position for any K-12 public school district board of education within the State of New Jersey for a period of six months of the date of this Agreement.

4. In the event that any party materially breaches any of the terms and provisions of this Settlement Agreement and Release, the other party shall be entitled bring or reinstate claims arising under this action.

5. It is expressly understood and agreed that neither party shall be considered a prevailing party under any statute, common law, or otherwise, for any purposes whatsoever, as a result of this Agreement or the compromise of claims as set forth herein. Except as provided in the Paragraphs above, each party shall be responsible for their own attorney's fees, expert fees, and/or costs incurred in connection with this matter.

6. The Parties acknowledge that they have read and understand the terms of this Agreement, that they had an opportunity to have the Agreement read by their respective counsel, that they are satisfied with the advice of their respective counsel, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the

influence of anything or anyone.

7. This Settlement Agreement and Release constitutes the entire agreement between the Parties regarding any and all aspects of the final and complete settlement of this matter. This Settlement Agreement and Release supersedes any and all prior agreements and understandings between and among the Parties pertaining to this matter. This Settlement Agreement and Release shall not be amended, modified or amplified without a specific written provision to that effect executed by all the Parties. No oral statements by any person shall, in any manner, amend, modify or amplify the terms and provisions of this Settlement Agreement and Release.

8. The 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 parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

9. Screven understand/s and agree that this Agreement is subject to formal approval by the Glassboro Board of Education, following its approval and full execution by Screven. In the event the Board thereafter approves the Agreement, it shall be executed forthwith by the Board and shall become effective immediately, and a copy of the formal approval resolution by the Board will be provided to Screven. In the event that this Agreement is not approved by the Board, no agreement shall have been formed between the Parties, who shall return to *status quo ante*, and this Agreement shall be deemed null, void, and of no force and effect.

10. This Settlement Agreement shall remain confidential to the maximum extent permitted by law and neither party shall volunteer to disclose its form or contents to any third parties except as may be required by and/or in accordance with operation of law or lawful subpoena or order of court or pursuant to official discovery proceedings. Neither party shall engage in disparaging or negative comments or statements regarding the other party and/or the conduct of the other party.

11. In the event that any provision or clause of this Agreement shall be held invalid or unenforceable by a court or tribunal of competent jurisdiction, the remaining provisions of this Agreement are deemed severable and shall remain in full force and effect to the fullest

extent permitted by law, unless the Agreement, as so construed, would substantially frustrate the purposes of the Parties in entering into this Agreement.

12. 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 Party. The Parties agree and acknowledge that this Agreement is the product of mutual draftsmanship and any rule of law requiring that it be construed against the drafter shall not apply.

13. This Agreement may be executed in one (1) or more counterparts, all of which shall be considered a single and the same, and shall become effective when one (1) or more counterparts have been signed by each party. It is understood that the parties need not sign the same counterpart, and this Agreement shall be fully valid, legally binding, and enforceable whether executed in a single document or in such counterparts.

IN WITNESS HEREOF, the parties have set their hands this day of September, 2022.

Melissa Screven

Dated: 9/13/2022

Pete Calvo, Board President
Glassboro Board of Education

Dated: 10/19/2022

4894-6919-7930, v. 1

Parker McCay P.A.

Lee, Kelly [OAL]

From: Emily E. Strawbridge <estrawbridge@parkermccay.com>
Sent: Thursday, October 20, 2022 4:15 PM
To: Lee, Kelly [OAL]
Cc: Susan S. Hodges; mdouglass@burnhamdouglass.com; pburnham@burnhamdouglass.com
Subject: [EXTERNAL] IMO Melissa Screvens, Glassboro Public Schools; Docket No. EDU 10346-2021 S
Attachments: 2022.10.20 - Ltr - ALJ Bogan - Enc Settlement Agmnt 4888-9141-6885 v.2.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Good Afternoon Ms. Lee,

Kindly forward the attached letter in regards to the above referenced matter to Judge Bogan. Thank you for your assistance in this matter.

Respectfully,

Emily E. Strawbridge, Esquire
Associate
School Law

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329-22E
OAL Dkt. No. EDU 10350-22
Agency Dkt. No. 304-11/22

New Jersey Commissioner of Education

Final Decision

J.A., on behalf of minor child,

Petitioner,

v.

Board of Education of the South Orange-Maplewood School District, Essex 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 thoroughly set forth in the recommended Order – that petitioner has demonstrated entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order, granting the Board's application for emergent relief, is adopted. Respondent is ordered to provide transportation for petitioner's minor child to and from school during the pendency of these proceedings. This case 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.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 12, 2022
Date of Mailing: December 12, 2022

330-22E
OAL Dkt. No. EDU 09468-22
Agency Dkt. No. 279-10/22

New Jersey Commissioner of Education

Order on Emergent Relief

Ingrid Fullerton,

Petitioner,

v.

Board of Education of the Borough of East Newark, Hudson 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 petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *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 stated 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.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 12, 2022
Date of Mailing: December 14, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 09468-22
AGY REF NO. 279-10/22

INGRID FULLERTON,
Petitioner,
v.

BOARD OF EDUCATION OF THE BOROUGH OF EAST NEWARK, HUDSON COUNTY,
Respondent.

Ingrid Fullerton, petitioner, pro se

Frances L. Febres, Esq., and **Danielle Panizzi**, Esq., for Respondent (Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys)

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Ingrid Fullerton filed a pro se Petition of Appeal, dated October 18, 2022, challenging her termination of employment with the Respondent District, and seeking Emergent Relief. The Office of Controversies and Disputes in the New Jersey Department of Education (DOE) transferred the matter to the Office of Administrative Law (OAL), where it was filed on October 19, 2022.

Petitioner is seeking payment of sixty days pay pursuant to her employment contract.

Respondent Board filed its brief in opposition to the request for emergent relief, and the Certification of Rosaura Bagolie, on October 31, 2022.

Oral argument via Zoom was held on October 31, 2022.

FACTUAL BACKGROUND

Petitioner was employed with the Respondent District pursuant to an Employment Agreement for East Newark Board of Education Employees, dated June 30, 2022. Petitioner was employed as a non-tenured teacher for the 2022-2023 school year, at a salary of $62,348.

Petitioner was terminated from her position via Notice of Determination dated October 7, 2022, with an effective date of termination of September 23, 2022.

Initially, Petitioner was terminated via letter dated October 22, 2022, from Rosaura Bagolie, the Superintendent of the District. Said letter was referenced as a 60-Day Notice of Termination. Said letter relieved Petitioner of her duties immediately, and provided that she be on Administrative Leave with pay for the sixty-day period.

Thereafter, in a letter dated September 23, 2022, Superintendent Bagolie advised Petitioner that her termination was re-examined based upon recent conduct, and the termination of employment be immediate and without pay. This letter stated the termination was for cause. The letter also served as a Rice[i] notice.

[i] Rice v. Union City High School Regional Board of Education, 155 N.J. Super. 64 (1977)

LEGAL ANALYSIS AND CONCLUSION

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:3-1.6(b)).

The four factors ("the Factors"), include:

> 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.
>
> [N.J.A.C. 6A:3-1.6(b).]

The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Factor One. Petitioner contends she will suffer irreparable harm as she is not being paid. Petitioner posits that her termination was in violation of her contractual rights as the employment contract stipulates that either party may terminate upon sixty days notice. There is no dispute that either party can terminate with said sixty-day notice. Herein, Petitioner was initially terminated pursuant to this contractual provision. She was then, the next day, terminated for cause. In any event, monetary concerns generally cannot be used to determine irreparable harm. "Harm is generally considered Irreparable in equity if it cannot be redressed adequately by monetary damages." See Crowe, at 133. Herein, if Petitioner is successful after a plenary hearing the most she could hope to receive would be the equivalent of sixty days of salary. This can be redressed by monetary damages.

Having determined that Petitioner cannot satisfy the first prong of Crowe, that of irreparable harm, there is no need to conduct an analysis of the three remaining factors.

The matter will be scheduled for a pre-hearing conference and a plenary hearing.

Based upon the above noted, I **CONCLUDE** that Petitioner has failed to meet first prong, irreparable harm, of Crowe v. DeGioia, and that the request for Emergent Relief should be **DENIED**.

ORDER

It is hereby **ORDERED** that the Petitioners' request for Emergent Relief is **DENIED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/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.

November 1, 2022
DATE

THOMAS R. BETANCOURT, ALJ

db

APPENDIX

List of Moving Papers

For Petitioner:

Pro Se Petition of Appeal

Motion for Emergent Relief with attachments

For Respondent:

Brief in opposition to request for emergent relief

Certification of Rosaura Bagolie with Exhibits A to E

331-22
Agency Dkt. No. 223-8/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of
Maria Granata Davis, School District of the
Township of Neptune, Monmouth County.

For the Petitioner, Mark A. Tabakin, Esq.

For the Respondent, Maria Granata Davis

This matter was opened before the Commissioner of Education on August 31, 2022, through tenure charges of incapacity and other just cause certified by Tami Crader, Superintendent of the Neptune Township School District ("District"), together with supporting evidence against respondent, Maria Granata Davis, a tenured teacher in the District's employ.

On August 31, 2022, the Commissioner directed the respondent to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. On October 5, 2022 the Commissioner again directed the respondent to file an answer to the charges.

In a correspondence dated October 20, 2022, the respondent provided a justification of her actions upon which the District's tenure charge allegations were based. By correspondence dated October 21, 2022, the Commissioner explained to respondent that if she would like to dispute the tenure charges filed in this matter, the case would be referred to an Arbitrator to hear and decide this matter pursuant to *N.J.S.A.* 18A:6-16. Further, the Commissioner sought confirmation from the

respondent that she would like to proceed with the assignment of the case to an Arbitrator. The respondent did not respond to the October 21, 2022 correspondence. By correspondence dated October 31, 2022, the Commissioner informed the respondent that a response to the October 21, 2022 correspondence had not been received, and that if no response was received by November 10, 2022, pursuant to *N.J.A.C.* 6A:3-5.3(c), the charges filed against her would be deemed admitted and the matter decided on a summary basis. The respondent did not respond to the October 31, 2022 correspondence.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent was employed by the District as a tenured teacher. The respondent was granted medical leave until March 31, 2022 and was expected to return to work on April 1, 2022. Since April 1, 2022, the respondent has failed to report to work and has been absent without leave.

Deeming the allegations to be admitted and noting that the respondent has failed to return to work since April 1, 2022, the Commissioner finds that the District's charge of incapacity has been proven and warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from her tenured position with the Neptune Township School District.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 12, 2022
Date of Mailing: December 14, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

332-22

New Jersey Commissioner of Education

Final Decision

Robert Strauss,

Petitioner,

v.

Board of Education of the Borough of Metuchen, Middlesex County,

Respondent.

Synopsis

Petitioner, a teacher in the Metuchen school district, challenged the respondent Board's decision denying his request to use accumulated sick leave to remain absent from school because his purported high-risk status for the COVID-19 virus does not constitute a "personal disability" under the relevant sick leave statute, *N.J.S.A.* 18A:30-1. Petitioner argued that he has underlying medical conditions which put him at high risk for contracting the COVID-19 virus and developing serious complications, severe illness, and/or death, and provided a note from his doctor stating that it was essential that petitioner be granted a leave of absence or sick leave to avoid significant risks to his health. The parties filed opposing motions for summary decision, which were denied. The petitioner, with the consent of the Board, later requested that the case be decided on the papers.

The ALJ found, *inter alia*, that: Petitioner is a tenured teacher serving Metuchen students at all grade levels; beginning September 16, 2020, Metuchen schools returned in-person programming following a period of remote instruction during the Covid-19 pandemic; petitioner was previously diagnosed and had been treated for several autoimmune conditions which he contends put him at significant risk of contracting Covid-19 and developing serious complications, severe illness, and/or death; petitioner claims that if he were placed in the school setting, he would be at increased risk, even if strict six-foot social distancing, reduced class sizes, and mask wearing could be monitored and enforced; the key question here is whether petitioner's elevated risk of contracting the COVID-19 virus renders him personally disabled under *N.J.S.A.* 18A:30-1; the medical documents submitted in support of petitioner's request for sick leave do not establish that he has a personal disability; there is no proof nor does the petitioner contend that he is unable to work because of his existing medical conditions; rather, he contends that he *may* be unable to work *if* he contracts the COVID-19 virus; and the risk of an illness is not the equivalent of having an illness. The ALJ concluded that the petitioner is not rendered personally disabled and is not entitled to sick leave under *N.J.S.A.* 18A:30-1. Accordingly, the petition was denied.

The Commissioner adopted the Initial Decision of the OAL in this matter. In so doing, the Commissioner noted, *inter alia*, that petitioner's health conditions did not prevent him from performing his job duties prior to the pandemic; further, the risk of developing Covid-19, as a matter of law, is insufficient to entitle petitioner to use sick leave under *N.J.S.A.* 18A:30-1. Petitioner's 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.

332-22
OAL Dkt. No. 00254-21
Agency Dkt. No. 246-12/20

New Jersey Commissioner of Education

Final Decision

Robert Strauss,

Petitioner,

v.

Board of Education of the Borough of Metuchen, Middlesex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

Petitioner, who is a tenured teacher, has been diagnosed with several autoimmune conditions and contends that if he were placed in a school setting to teach, the Metuchen Board of Education (Board) would put him at substantial risk of contracting the COVID-19 virus and developing serious complications, severe illness, and/or death. With the support of a note from his doctor, he requested to use accumulated sick leave to be absent from school.[2] The Board denied his request, instead placing him on unpaid administrative leave, and petitioner

[1] The Board did not file a reply to petitioner's exceptions.

[2] Petitioner had previously applied for a remote work accommodation under the Americans with Disabilities Act, which the Board denied, and for childcare leave under the Families First and Coronavirus Response Act, which the Board granted. He applied for sick leave when his childcare leave was exhausted.

appealed. The Administrative Law Judge concluded that petitioner's medical documentation did not establish that he has a personal disability and that he is therefore not entitled to use sick leave.

In his exceptions, petitioner argues that his serious medical conditions constitute a disability during the COVID-19 pandemic. Petitioner points to his doctor's recommendation that petitioner avoid exposure to the COVID-19 virus and refrain from in-person instruction. Petitioner disagrees with the ALJ that allowing sick leave in his circumstances would result in an overly expansive interpretation of the sick leave statute. Finally, petitioner argues that if there were any doubt as to the doctor's report or recommendation, additional fact-finding should have occurred before denying his petition.

Upon review, the Commissioner concurs with the ALJ that petitioner is not entitled to use sick leave. *N.J.S.A.* 18A:30-1 defines sick leave as an absence "because of personal disability due to illness or injury."[3] This language demonstrates that being diagnosed with an illness or injury is not sufficient; the illness or injury must cause a personal disability. Case law regarding sick leave also supports the conclusion that sick leave is for circumstances in which the employee is unable to work. *See Castellano v. Linden Bd. of Educ.*, 79 *N.J.* 407, 412 (1979) ("A woman giving birth to a child becomes physically disabled and *unable to attend to her teaching duties* for that reason." (emphasis added)); *Castellano v. Linden Bd. of Educ.*, 158 *N.J. Super.*350, 362 (App. Div. 1978), *aff'd*, 79 *N.J.* 407 (1979) ("Sick leave benefits are intended to alleviate economic losses resulting from *inability to work* because of disability." (emphasis added)); *In re Hackensack Bd. of Educ.*, 184 *N.J. Super.* 311, 319 (App. Div. 1982) (rejecting "the use of

[3] Petitioner does not contend that he meets the other possible definitions for sick leave contained in the statute.

accumulated statutorily required sick leave to deprive a school of the services of a teacher *who is simply not sick or disabled*." (emphasis added)).

Having a medical condition does not necessarily render a teacher unable to work. Petitioner's medical documentation does not indicate that any of his medical conditions prevent him from appearing at work and performing his duties.[4] Petitioner has the same medical conditions that he had while appearing for work in person before the pandemic, and there is no indication in petitioner's medical documentation that his conditions changed in nature or severity. The only change is the risk presented by COVID-19. While the Commissioner acknowledges the unprecedented circumstances of the pandemic and the concerns it continues to cause for many individuals, there is no legal basis in *N.J.S.A.* 18A:30-1 to allow for the use of sick leave by an individual without a personal disability. Moreover, while there is a public interest in allowing a teacher who is actually sick to use paid sick leave, "use of sick leave by a teacher not sick will deprive the school and students of [his] services. Surely there is a strong public interest in a teacher's performing the service for which [he] is paid." *Id.* at 381-19.

Additionally, the Commissioner finds that it was appropriate for the ALJ to decide this matter on the papers. While petitioner now argues that additional fact-finding should have been conducted, he requested during the course of the proceedings that the case be tried on the papers, representing to the ALJ that because the parties had stipulated to the contents of his medical report and certification, live testimony from his physician was no longer necessary.

[4] The Commissioner notes that these conditions could, in and of themselves, impact an individual's duty to perform the functions of their job and could therefore rise to the level of a personal disability that would entitle the individual to use sick leave. However, petitioner made no such argument here, nor did his medical documentation provide any support for such a contention.

Furthermore, this case does not present a situation where a medical expert, being unfamiliar with legal requirements, simply failed to include a "magic word" in his certification. The medical certification contains no suggestion that petitioner's conditions prevent him from performing the duties of his job. The certification instead recommends that petitioner not teach in person because of the risk presented by COVID-19. But that risk, as a matter of law, is insufficient to entitle petitioner to use sick leave.

Accordingly, the Initial Decision is adopted as the final decision in this matter. Petitioner's request to use sick leave under *N.J.S.A.* 18A:30-1 is denied, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[5]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 14, 2022
Date of Mailing: December 14, 2022

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00254-21
AGENCY NO. 246-12/20

ROBERT STRAUSS,
Petitioner,
v.
BOROUGH OF METUCHEN BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, PC, attorneys)

Ashley E. Malandre, Esq., for respondent (Methfessel & Werbel, PC, attorneys)

Record Closed: August 10, 2022 Decided: September 26, 2022

BEFORE **KIM C. BELIN**, ALJ:

STATEMENT OF THE CASE

Petitioner, Robert Strauss, challenges respondent Borough of Metuchen Board of Education's (respondent or Board) decision denying the use of his accumulated unused sick leave because his purported high-risk status for the COVID-19 virus does not

constitute a "personal disability" under the relevant sick leave statute (N.J.S.A. 18A:30-1).

PROCEDURAL HISTORY

On December 8, 2020, petitioner filed a Petition of Appeal challenging respondent's determination that petitioner was not entitled to sick leave with pay because petitioner had underlying medical conditions which purportedly made him high risk of contracting the COVID-19 virus and of developing serious complications, severe illness, and/or death. The Department of Education (DOE) transmitted this matter as a contested case to the Office of Administrative Law (OAL) where it was filed on January 5, 2021. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On December 28, 2020, respondent filed a motion to dismiss in lieu of an answer. N.J.A.C. 6A:3-1.5(g). On June 25, 2021, the undersigned denied the motion. On July 2, 2021, the Board requested an interlocutory appeal with the Commissioner of Education (Commissioner) which was denied on July 16, 2021. On September 9, 2021, the petitioner and respondent filed motions for summary decision. The respondent submitted a letter brief in opposition to the petitioner's motion for summary decision on September 28, 2021, and a reply letter brief on October 11, 2021. Petitioner submitted his letter brief in opposition to the respondent's motion for summary decision on September 29, 2021, and reply letter brief on October 11, 2021. On November 26, 2021, the undersigned denied both motions. A hearing was scheduled for May 25, 2022, however, the parties requested and were granted an adjournment. In a letter dated May 31, 2022, petitioner, with the consent of the respondent, requested that the case be tried on the papers and requested a briefing schedule.

In accordance with the briefing schedule, the petitioner filed his brief on July 11, 2022. The respondent elected to rely upon the briefs submitted in support of the respondent's motion for summary decision. The record closed on August 10, 2022.

FACTUAL DISCUSSION AND FINDINGS

The parties stipulated to the following facts and I, therefore **FIND**:

1. Petitioner, Robert Strauss, is a tenured teacher employed by the Metuchen School District. (See, Petitioner of Appeal, Exh. A., ¶1.)

2. The respondent serves students in grade pre-kindergarten through high school.

3. For the 2020-2021 school year, the respondent operated with in-person programming. Specifically, all teachers were in-school since September 16, 2020. (See, Certification of Dr. Vincent Caputo, Exh. B, ¶5.)

4. Petitioner was previously diagnosed with and is treated for the autoimmune conditions of IgA Auto-immune deficiency, celiac disease, and hypothyroidism. (Exh. A, ¶2.)

5. As a result of these medical conditions, petitioner contends that he is at substantial risk of contracting the COVID-19 virus and of developing serious complications, severe illness, and/or death. (Exh. A, ¶3.)

6. Petitioner further claims that if he were placed in a school setting, he would be at an increased and significant risk of contracting and experiencing serious complications, severe illness, and/or death. This is the case even if strict six-foot social distancing, reduced class sizes, and mask wearing could be monitored and enforced. (Exh. A, ¶4.)

7. On or around November 6, 2020, petitioner received a letter from Shalini Sirisena, MS, PA-C and William Rossy, MD stating, in part, that his "severe underlying conditions, as well as the fact that he has multiple disease processes and not merely one, will result in a great likelihood of having a severe course of COVID-19 and significant life-threatening complication, if he were to

be exposed to this complex virus." (See, Letter from Shalini Sirisena, MS, PA-C and William Rossy, MD., Exh. C.)

8. Accordingly, his treating physicians stated: "Due to these reasons, it is essential that he be granted a leave of absence/sick leave to avoid a significant and severe risk to his health." (Id.)

9. Subsequently, petitioner applied for a remote work accommodation under the Americans with Disabilities Act, (ADA) 42 U.S.C. §12101 et seq., which was denied after a meeting was held between him and the respondent. (Exh. A, ¶5.)

10. Thereafter, petitioner applied for childcare leave under the Families First and Coronavirus Response Act (FFCRA), 116 P.L. 127, 2020 Enacted H.R. 6201, 116 Enacted H.R. 6201, 134 Stat. 178, which was granted. (Exh. A, ¶6.)

11. Upon exhaustion of the childcare leave, petitioner requested leave with use of his accrued sick days, which was denied. (Id.)

12. Board policy 3212 provides, in pertinent part, the following regarding sick leave:

> In accordance with N.J.S.A. 18A:30-1, sick leave is defined to mean the absence from work because of a personal disability due to injury or illness or because the staff member has been excluded from school by the school medical authorities on account of contagious disease or of being quarantined for such a disease in the staff member's immediate household. (Exh. D.)

13. As of December 2, 2020, petitioner was placed on an unpaid leave of absence. (Exh. A, ¶8.)

14. On December 8, 2020, petitioner filed a Petition of Appeal against the Board.

LEGAL ANALYSIS AND CONCLUSIONS

In accordance with N.J.S.A. 18A:30-2, petitioner is entitled to a minimum of ten paid sick days annually. The statute at the heart of this controversy, N.J.S.A. 18A:30-1 provides:

> Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household.

The key question here is whether petitioner's elevated risk of contracting the COVID-19 virus renders him personally disabled under this statute. The petitioner maintains that he suffers from a personal disability due to illness because of his high-risk status and susceptibility to severe illness and/or death if exposed to COVID-19, and thus he is entitled to use his accrued sick leave from December 2, 2020, through June 15, 2021. The petitioner does not assert entitlement to sick leave because he was excluded from school by the school district's medical authorities on account of a contagious disease or because he was quarantined. Accordingly, those factors are not at issue and will be not included in this legal analysis.

To establish personal disability, the petitioner relies upon his doctor's notes and asserts that they should be given deference. The note from Shalini Sirisena, MS, PA-C, dated November 6, 2020, explains the petitioner's medical conditions, the dates of petitioner's last office visits and recommends that the petitioner is granted sick leave or other leave of absence "to avoid significant and severe risk to his health." This note does not say that the petitioner's medical conditions render the petitioner disabled and unable to work. The note speaks to an increased *risk of illness* not to the existence of a present disability. (Petitioner's Exh. C.) In accordance with this note, the petitioner was granted a leave of absence under the FFCRA.

In a certification, dated August 31, 2021, Dr. Rossy similarly states that the petitioner suffers from three illnesses and is immunocompromised and "likely to get severely ill from COVID-19." (Petitioner's Exh. E.) Dr. Rossy recommends that the petitioner "refrain from performing in-person instruction at the start of the 2020-2021 school year. Exposure to others in the classroom setting placed [the petitioner] at an increased and substantial risk of suffering severe illness and/or death from COVID-19." Id. Dr. Rossy also states that fear of contracting COVID-19 is not why the petitioner was unable to report to work but that "[h]e faced a certain risk of contracting COVID-19 and having significant health repercussions." Id. Dr. Rossy's focus is on the *risk* of contracting COVID-19 and its potential impact.

While Dr. Rossy's certification provides greater detail into the petitioner's IgA autoimmune deficiency, Dr. Rossy does not state that the petitioner is unable to work because of his existing illnesses. Rather, Dr. Rossy's certification says that the petitioner has a weakened immune system, and therefore is susceptible to getting the COVID-19 virus if exposed and may experience life-threatening conditions. He also recommends a sick leave which was granted as stated above. Dr. Rossy's certification was signed eight months after the note from Shalini Sirisena, and yet, Dr. Rossy is silent on whether the petitioner is currently disabled. Accordingly, I **CONCLUDE** that these medical documents do not establish that the petitioner has a personal disability.

Petitioner relies upon Laning v. Bd. of Ed. of Twp. of Deerfield, 2014, N.J. AGEN LEXIS 819, for the claim that his doctor's certification entitles him to a presumption of disability. Laning addressed whether a school employee was legitimately disabled justifying her request for extended sick leave before she retired. The board of education requested verification of the specific nature of her disability. The physician's note did not specify the nature of Laning's disability but merely stated that she would be out of work until further notice. Id. at *3. The Administrative Law Judge denied the cross-motions for summary decision and cited to the decision in Hynes v. Board of Education, 190 N.J. Super. 36 (App. Div. 1983) to address the verification of sick time issue. In Hynes, the petitioner was a teacher who applied for sick leave for four weeks before and after the birth of her child. The board of education denied her request on the basis that she failed to provide sufficient evidence of her disability. The State Board of Education (State

Board) determined that the doctor's certification establishing the expected due date and actual birth date created a presumptive period of disability. The State Board stated that the statute did not specify what the physician's certificate had to contain. The petitioner herein highlights this sentence to support his presumption of disability claim. The statute upon which the State Board relied is N.J.S.A. 18A:30-4 which provides:

> In case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education in order to obtain sick leave.

However, the physician's certification in Hynes (citation omitted) had specific information about the expected and actual birth date of the child. Indeed, it was undisputed that the petitioner was pregnant. In Laning, the petitioner had an illness, but the specific nature of the illness was not disclosed to the employer. Here, there is no expectant due date, end date, or any identified current condition given by either Dr. Rossy or Shalini Sirisena to create a presumptive period of disability. There is only the *risk* of an illness. Thus, I **CONCLUDE** the Hynes and Laning cases are inapposite to the present controversy.

N.J.S.A. 18A:30-1 and 18A:30-4 when read together logically lead to a conclusion that to qualify for sick leave under N.J.S.A. 18A:30-1, the employee must be absent due to a personal disability which can be established by a physician's certification although the certification need not contain any special language. In the case at hand, there is no proof nor does the petitioner contend that he is unable to work because of his existing medical conditions. He contends that he *may* be unable to work *if* he contracts the COVID-19 virus. Moreover, Dr. Rossy's certification, and the November 6, 2020, note are silent on whether the petitioner currently has a disability that prevents him from working. There is no language to address this issue. The medical note and certification only speak of the risk of illness.

Petitioner also relies upon Ellen M. Brockmann v. Totowa Bd. of Ed., 1995 N.J. AGEN LEXIS 1317, 95 N.J.A.R.2d (EDU) 502, July 18, 1995, as support for granting sick leave for his circumstances. Ms. Brockmann was permitted to use her accumulated sick leave because she had a pre-existing medical condition and suffered a medical episode in school which triggered a series of severe complications preventing her from working.

Her physician certified that she would be disabled through June 1995. Id. at *4. These facts are at odds with the present controversy. The petitioner herein has not suffered a medical episode at school that has rendered him unable to work and his physician has not stated that the petitioner is disabled. While the undersigned is not insensitive to the petitioner's desire to use his accumulated sick days to avoid contracting a potentially fatal disease, N.J.S.A. 18A:30-1 does not support the use of this leave for a disability that does not yet exist.

The COVID-19 virus is not the only potentially fatal contagious disease facing the immunocompromised population. The Center for Disease Control reports, for example, that an estimated 36,000 people die annually from influenza.[1] If the petitioner's logic is followed to its natural conclusion, any employee with a compromised autoimmune system would be entitled to paid sick leave by submitting a physician's certification that says the employee may potentially become gravely ill by exposure to a contagious disease, including the flu. This would include people suffering from AIDs or HIV, leukemia, or taking medication such as chemotherapy or radiation or medication that suppresses the immune system. Such an expansive interpretation of N.J.S.A. 18A:30-1 would open the floodgate of claims for paid sick leave due to potential disability because of exposure to any contagious disease. A risk of an illness is not the equivalent of having an illness.

N.J.S.A. 18A:30-7 permits a board of education to grant a leave of absence or sick leave "over and above the minimum sick leave" at its discretion. However, the respondent has chosen not to do so. Accordingly, for the reasons outlined above, I **CONCLUDE** the petitioner is not rendered personally disabled and thus is not entitled to sick leave under N.J.S.A. 18A:30-1.

ORDER

Based upon the foregoing, I hereby **ORDER** that the petitioner's petition seeking sick leave under N.J.S.A. 18A:30-1 is **DENIED**.

[1] https://usafacts.org/articles/how-many-people-die-flu/.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 26, 2022
DATE

Kim C. Belin
KIM C. BELIN, ALJ

KCB/am

APPENDIX

WITNESSES

For petitioners

None

For respondent

None

EXHIBITS

For petitioner

- Letter Brief with Joint Stipulation of Facts and exhibits A through E

For respondent

- Motion for Summary Decision with certification and exhibits, dated September 9, 2021
- Response Letter Brief in opposition to the respondent's Motion for Summary Decision, dated September 28, 2021
- Reply Letter Brief in further support of the respondent's Motion for Summary Decision, dated October 11, 2021

333-22

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 14, 2022

VIA EMAIL ONLY
Geoffrey N. Stark, Esq.
Capehart & Scatchard, PA
8000 Midlantic Ave., Suite 300S
P.O. Box 5016
Mount Laurel, NJ 08054

Daniella McFadden
29 Mansfield Drive
Sewell, NJ 08080

Re: ***D.M., on behalf of minor child, A.H. v. Board of Education of the Township of Washington, Gloucester County, Agency Dkt. No. 60-4/21, Commissioner Decision No. 145-22***

Dear Parties:

I have reviewed the materials filed in connection with respondent's Motion for Reconsideration of the Commissioner's June 30, 2022 decision.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)(2), a motion for reconsideration shall be determined 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.

Upon review and consideration of the submissions, I find that respondent has failed to satisfy the factors set forth in *N.J.A.C.* 6A:3-1.15(b)(2). Respondent argues that the Commissioner made a mistake of law, failing to consider the regulatory definition of "guardian" found in *N.J.A.C.* 6A:22-1.2. According to this provision, a guardian is "a person to whom a court of competent jurisdiction has awarded

guardianship or custody of a child, provided that a residential custody order shall entitle a child to attend school in the residential custodian's school district unless it can be proven that the child does not actually live with the custodian."

The decision in this matter was predicated, in part, on the unprecedented circumstances of the COVID-19 pandemic. The time period at issue in this matter is September 18, 2020, through December 23, 2021. The surveillance conducted by the Board's investigator occurred in between September 2020 and February 2021. During that time, as D.M. admitted, A.H. stayed with his parents in Philadelphia because D.M. is immunocompromised and was at greater risk from COVID-19 until she was vaccinated in April 2021. The Board did not present any information to dispute that A.H. was residing with D.M. beginning in April 2021. Therefore, the Board has not proved that the child did not actually live with respondent, and *N.J.A.C.* 6A:22-1.2 does not apply. The Commissioner's decision further explains that when there is a court order that designates the school district of attendance, the amount of time spent with either party does not dictate where the children must attend school. Here, even if A.H. stayed with his parents for a portion of the time period at issue, the undisputed testimony also demonstrates that A.H. resided with D.M. for another portion of that time period.[1] Accordingly, it was appropriate for A.H. to attend school in Washington Township, the school district of attendance according to the custody order.

Accordingly, the Motion for Reconsideration is hereby DENIED.[2]

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

AAM/JS
c: State Law Library
333-22L

[1] The Commissioner notes that the ALJ found that some of D.M.'s testimony was inconsistent with her answers to interrogatories, affecting her credibility. However, D.M.'s testimony regarding the timing of her COVID-19 vaccine and ability to have A.H. reside with her thereafter was consistent with her answers to interrogatories, and the Commissioner therefore concludes that the ALJ's credibility determination does not extend to this information.

[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).

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334-22

New Jersey Commissioner of Education

Final Decision

Eric Nathaniel Gordon,

Petitioner,

v.

Board of Education of the Township of Sparta,
Sussex County,
Respondent.

Synopsis

Petitioner, a tenured Spanish teacher, received a summative performance evaluation at the end of the 2020-2021 school year with a score of 2.04, which is a "partially effective" rating. The Board imposed a corrective action plan (CAP). Petitioner appealed, challenging the correctness of his evaluation and the lawfulness of the CAP. Petitioner also argued that the Board unlawfully withheld his salary increment for the 2021-2022 school year and alleged violations of various provisions of federal and State laws concerning discrimination. The petitioner filed the within appeal on October 12, 2021. The Board filed a motion to dismiss in lieu of an answer.

The ALJ found, *inter alia*, that: the Commissioner does not have jurisdiction over whether the Board's actions violate the Americans with Disabilities Act, 42 *U.S.C.*§ 12101 *et seq.*, the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, the National Labor Relations Act, 29 *U.S.C.* § 151 *et seq.*, or the Age Discrimination in Employment Act of 1967, 29 *U.S.C.* § 621 *et seq.*; the petition of appeal was untimely pursuant to *N.J.A.C.* 6A:3-1.3(i); and the doctrine of substantial compliance does not apply in this case. Accordingly, the ALJ granted the Board's motion to dismiss the petition.

Upon a comprehensive review, the Commissioner concurred with the ALJ that she does not have jurisdiction over petitioner's discrimination claims, as her authority is limited to controversies and disputes arising under New Jersey school laws, *N.J.S.A.* 18A:6-9; and further agreed that petitioner's claims regarding his evaluation and CAP were untimely. Accordingly, the Commissioner concluded that the ALJ appropriately granted the Board's motion to dismiss as it relates to petitioner's discrimination, evaluation, and CAP claims. However, the Commissioner disagreed with the ALJ that petitioner's claims regarding his salary increment are time-barred, as there is a genuine issue of material fact as to whether the Board actually withheld petitioner's salary increment for 2021-2022 and, if so, when petitioner became aware of the withholding. Accordingly, the Commissioner denied the Board's motion to dismiss as it relates to petitioner's increment withholding claim and remanded the matter for further proceedings consistent 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.

334-22
OAL Dkt. No. EDU 09328-21
Agency Dkt. No. 193-10/21

New Jersey Commissioner of Education

Final Decision

Eric Nathaniel Gordon,

Petitioner,

v.

Board of Education of the Township of Sparta, Sussex County,

Respondent.

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

Petitioner, a tenured Spanish teacher, received a summative performance evaluation at the end of the 2020-2021 school year with a score of 2.04, which is a "partially effective" rating. The Board imposed a corrective action plan (CAP). Petitioner appealed, challenging the correctness of his evaluation and the lawfulness of the CAP. Petitioner also argued that the Board unlawfully withheld his salary increment for the 2021-2022 school year and alleged violations of various provisions of federal and State laws concerning discrimination. The Administrative Law Judge (ALJ) granted the Board's motion to dismiss, concluding that the Commissioner does not have jurisdiction over whether the Board's actions violate the Americans with Disabilities Act, 42 *U.S.C.*§ 12101 *et seq.*, the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, the National Labor Relations Act, 29 *U.S.C.* § 151 *et seq.*, or the Age Discrimination in Employment Act of 1967, 29 *U.S.C.* § 621 *et seq.* (collectively, the "discrimination claims"). The ALJ also concluded that the

petition of appeal was untimely pursuant to *N.J.A.C.* 6A:3-1.3(i) and that the doctrine of substantial compliance does not apply.

Upon review, the Commissioner concurs with the ALJ that she does not have jurisdiction over petitioner's discrimination claims, as her authority is limited to controversies and disputes arising under New Jersey school laws. *N.J.S.A.* 18A:6-9. The Commissioner further agrees with the ALJ that petitioner's claims regarding his evaluation and CAP were untimely. The evaluation was dated June 4, 2021 and signed by petitioner on June 21, 2021. Even accepting the later date as the beginning date to calculate the 90-day deadline to appeal, that deadline expired on September 20, 2021, and the petition was not filed until October 12, 2021. Regarding petitioner's CAP, it was proposed to petitioner on June 16, 2021, and the 90-day deadline to appeal therefore expired on September 14, 2021. Pursuant to *Giannetta v. Bd. of Educ. of Egg Harbor*, Commissioner Decision 147-05 (April 25, 2005), any negotiations that occurred between petitioner and the Board regarding the CAP do not toll the time limitation. Furthermore, for the reasons detailed in the Initial Decision, the Commissioner concludes that the doctrine of substantial compliance does not apply. Accordingly, the Commissioner concludes that the ALJ appropriately granted the Board's motion to dismiss as it relates to petitioner's discrimination, evaluation, and CAP claims.[1]

However, the Commissioner disagrees with the ALJ that petitioner's claims regarding his salary increment are time-barred.[2] Petitioner's opposition to the motion to dismiss suggests that he became aware that his salary had not increased for the 2021-2022 school year when he received his first two checks in September 2021. If the Board did withhold petitioner's increment and

[1] The claims are identified in items I, II, and III(a)-(i) of the section of the petition titled "Specific Allegations and Essential Supporting Facts."

[2] This claim is identified in item III(j) of the section of the petition titled "Specific Allegations and Essential Supporting Facts."

petitioner did not become aware of that fact until he received his checks in September 2021, the 90-day deadline to appeal had not expired when the petition was filed on October 12, 2021.[3] The Commissioner notes that the Board has represented, through a certification by petitioner's supervisor, that petitioner's salary increment for the 2021-2022 school year was not withheld. However, petitioner disputes the certification, such that there is a genuine issue of material fact that precludes dismissal of this claim.

Accordingly, the Initial Decision is modified as stated herein. The Board's motion to dismiss is granted as to petitioner's discrimination, evaluation, and CAP claims. The Board's motion to dismiss is denied as to petitioner's increment withholding claim. This matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 14, 2022
Date of Mailing: December 14, 2022

[3] The record does not contain sufficient information to allow the Commissioner to reach a conclusion about when petitioner was on notice of the amount of his salary for the 2021-2022 school year. If, on remand, it is determined that the Board did withhold petitioner's salary increment for the 2021-2022 school year, the Board is free to present evidence demonstrating that petitioner was aware of that fact prior to September 2021 and to argue that this portion of the petition of appeal was also untimely.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION TO DISMISS
OAL DKT. NO. EDU 09328-21
AGENCY DKT. NO. 193-10/21

ERIC NATHANIEL GORDON,
Petitioner,
v.
BOARD OF THE EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,
Respondent.

Damiano M. Fracasso, Esq., for petitioner

Marc H. Zitomer, Esq., (Schenck, Price, Smith and King, attorneys) for respondent

Record Closed: February 18, 2022 Decided: November 3, 2022

BEFORE **IRENE JONES**, ALJ (ret. on recall):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 12, 2021, petitioner, Eric Nathaniel Gordon (petitioner or Gordon), filed a petition with the State Board of Education challenging the correctness of his performance evaluation and the lawfulness of the associated corrective action plan

(CAP). Petitioner also alleged that the Board discriminated against him in compensation, conditions, and privileges of employment in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50; discriminated against him because of his age in violation of N.J.S.A. 10:5-1 to -50; unlawfully failed to accommodate his disabilities, in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq.; subjected him to discriminatory treatment based on his union and organizing activities in violation of the National Labor Relations Act, 29 U.S.C. 151 to 169; engaged in an ultra vires act by imposing a performance evaluation in violation of N.J.A.C. 6A:10-2.1 et seq.; and unlawfully withheld his salary increment for the 2021–2022 school year.

On November 3, 2021, the respondent, the Board of Education of the Township of Sparta, Sussex County (the "District") filed a motion to dismiss in lieu of an answer, pursuant to N.J.A.C. 6A:3-1.5(g).

On October 19, and November 4, 2021, the State Board of Education (State Board) accepted for filing the petition and motion to dismiss, respectively. On November 5, 2021, the State Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. A prehearing conference was held on December 21, 2021, wherein a procedural schedule was established. On February 18, 2022, petitioner filed an answer to the motion to dismiss.[1]

FINDINGS OF FACTS

I **FIND** the following facts to be undisputed, thus they are adopted as the facts herein:

1. Petitioner was employed by the District as a Spanish teacher at Sparta High School. Petitioner was hired by the District in 2014 and is tenured.

2. Petitioner is a member of the Sparta Education Association.

[1] In lieu of an answer, petitioner filed an "Opposition Certification."

3. Petitioner's direct supervisor was Scott Kercher (Kercher), who is the K–12 supervisor of Social Studies, World Languages, and English as a Second Language for the District.

4. On June 4, 2021, Kercher prepared a "Summative Report" of petitioner's teaching performance for the 2020–2021 school year. The report gave petitioner an overall score of 2.04, which rated him as "partially effective."

5. Petitioner did not file an appeal from the evaluation.

6. A "partially effective" rating required that Kercher develop a CAP with the petitioner's input.

7. Kercher and petitioner, along with his union representative, met on June 16, 2021. Kercher gave them a draft CAP proposal for their review. The two reviewed the proposed CAP and suggested revisions.

8. The revised draft CAP was sent to the petitioner on September 12, 2021. A final CAP meeting was scheduled for September 14, 2021.

9. On September 13, 2021, petitioner's attorney sent a letter to the District superintendent requesting that petitioner be removed from the CAP to accommodate numerous disabilities.

10. The District and Kercher allege that they were unaware that petitioner had any disabilities or that he had previously requested any accommodations.

11. Petitioner met with Kercher on September 14 but refused to participate in the review and demanded that any further communications go through his attorney.

12. Petitioner asserts that he was denied a salary increment for the 2021–2022 school year.

13. The District denies that petitioner was denied an increment for the 2021–2022 school year. It asserts that petitioner's increment was withheld by the prior superintendent for the 2019–2020 school year due to insubordination, failure to complete professional responsibilities, and attendance issues.

14. Petitioner refused to provide his medical records to Kercher but stated that he was willing to provide his medical records to a "District employee who is authorized and competent to grant him accommodation under LAD and ADA."

LEGAL ARGUMENT

The District moves to dismiss the petition on several grounds. First, it contends that the Commissioner does not have jurisdiction over claims arising under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. It asserts that N.J.S.A. 18A:6-9 provides that the Commissioner "shall have jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws . . .." The petitioner's claims of disability do not arise under the school laws of New Jersey. The District relies on Fitzgibbons v. New Jersey State Board of Examiners, 2018 N.J. AGEN LEXIS 971, Initial Decision (August 8, 2018), aff'd, Commissioner (November 2, 2018), where a teacher's assistant filed a petition of appeal with the Commissioner alleging that he was entitled to an exemption to a requirement for the issuance of a certificate due to a disability. He alleged that the denial of his request for an accommodation violated the Americans with Disabilities Act. The administrative law judge found that the Commissioner did not have jurisdiction to consider the issue, concluding:

> The Commissioner of Education is without jurisdiction to consider claims arising under this Federal law [referring to the American with Disabilities Act]. The Commissioner's jurisdiction is defined by statute and is limited to "controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9.

The administrative law judge (ALJ) granted the Board of Examiners' motion to dismiss the claim for lack of jurisdiction. The Commissioner affirmed the decision, finding that

"the Commissioner does not have jurisdiction over whether the Board's action violates the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., as his authority is limited to controversies and disputes arising under New Jersey school laws. N.J.S.A. 18A:6-9."

The District further argues that the matter must be dismissed because the Commissioner has no jurisdiction over discrimination claims under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 to 169, or under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 to 634.

Moreover, the District asserts that the courts have regularly determined that federal civil-rights actions do not fall within the jurisdiction of the Commissioner. See Cirasa v. State-Operated Sch. Dist. of Paterson, 1993 N.J. AGEN LEXIS 1810, aff'd, No. A-2408-93T2 (App. Div. January 10, 1995). In Cirasa, school employees sought to litigate before the Commissioner of Education, in pertinent part, "various claims arising under assorted federal civil rights and antidiscrimination laws," with one of those laws being the Age Discrimination in Employment Act of 1967. The ALJ found that, "[i]n general, state administrative agencies lack subject matter jurisdiction over federal civil rights actions." On final review, the Commissioner affirmed.

Petitioner contends that the District violated the law by imposing a CAP on him for the 2021–2022 school year. See Petition ¶¶ I and II. The District rebuts this contention, arguing that it had the lawful authority to impose a corrective action plan pursuant to N.J.A.C. 6A:10-2.5(a). The regulation provides:

> For each teaching staff member rated ineffective or partially effective on the annual summative evaluation, as measured by the evaluation rubrics, a corrective action plan shall be developed by the teaching staff member and the teaching staff member's designated supervisor. If the teaching staff member does not agree with the corrective action plan's content, the designated supervisor shall make the final determination.
>
> [Emphasis added.]

Petitioner does not dispute that he received a cumulative evaluation rating of 2.04 on the 2020–2021 summative evaluation. This score falls under the category of "partially effective." Respondent contends that as a result, Kercher was legally obligated to develop a corrective action plan for petitioner for the 2021–2022 school year. While Kercher made every effort to make the CAP development process as collaborative as possible, petitioner was mostly uncooperative outside of the first CAP meeting in June 2021. Kercher included petitioner's input from the first meeting into the draft of the CAP. When petitioner refused to cooperate, Kercher fulfilled his regulatory duty by making a final determination pursuant to N.J.A.C. 6A:10-2.5(a).

The District further asserts that petitioner's LAD claims are without merit, as they fail to state a cause of action under the LAD. Petitioner has not suffered any loss of compensation, terms, conditions, or privileges of employment. Petitioner did not have an increment withholding for the 2021–2022 school year, he holds the same position as a Spanish teacher as he held the previous school year, and he has all the same privileges in his position that he had prior to this school year.

Further, the District argues that the petition fails to state a single specific incident that forms the basis of the alleged discriminatory conduct. N.J.A.C. 6A:3-1.4(a) states, in pertinent part, that "[a] petition shall include . . . a statement of the specific allegation(s) and essential facts supporting them that have given rise to a dispute under the school laws. . . . The petition should also cite, if known to petitioner, the section or sections of the school laws under which the controversy has arisen." Moreover, "[w]hile a court will accept well-pled allegations as true for the purpose of the motion [here, a petition of appeal], it will not accept bald accusations, unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations." Ayala v. N.J. Dep't of Law & Pub. Safety, 2011 N.J. Super. Unpub. LEXIS 2663 at *9 (App. Div. 2011). Petitioner merely re-states the LAD statutory language without so much as a single specific discriminatory allegation. Petitioner has neither provided the "specific allegation(s) and essential facts" nor identified "the section or sections of the school laws under which the controversy has arisen."

The petitioner asserts that the District's imposition of the annual performance report and rubric was an ultra vires act in violation of the regulations and the Board's policies and procedures. The District moves to dismiss this contention, as it is time barred. It notes that Kercher prepared the 2020–2021 summative evaluation on June 4, 2021, and it was signed by the petitioner on June 21, 2021. N.J.A.C. 6A:3-1.3(i) governs the filing of an action arising under the school laws, and states in pertinent part:

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

In Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572, 582 (1993), the New Jersey Supreme Court held that the Commissioner and the State Board of Education have the authority to establish a time limitation for the resolution of disputes arising under the school laws. The Court addressed the public policy reasons behind the 90-day rule:

> The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. . .. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days.
>
> [Ibid.]

Thus, the Kaprow decision provides that the notice requirement set forth in the regulation should accommodate the dual purposes of the 90-day limitation period:

> 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 the stale claims. The second purpose is "'to penalize dilatoriness and serve as a measure of repose'" by giving security and stability to human affairs.

[Id. at 587 (citations omitted).]

In Kous v. Old Bridge Township Board of Education, Middlesex County, 2012 N.J. AGEN LEXIS 116 (March 2, 2012) at *10 (citations omitted), aff'd, 2012 N.J. AGEN LEXIS 595 (April 3, 2012), the administrative law judge held that "[t]ime-bars in litigation before the Commissioner are promulgated for a reason, and are uniformly enforced. These time limitations are strictly enforced—at times to the detriment of a litigant filing an action two days too late." Accord Coles v. Bayonne Bd. of Educ., 2008 N.J. Super. Unpub. LEXIS 2593 (App. Div. 2008) at *3–4 (citation omitted) ("The 90-day rule for petitions to the Commissioner has been strictly construed."). The District asserts that there are no circumstances here that would justify relaxing the 90-day rule. Even accepting June 21, 2021, the date on which petitioner signed his 2020–2021 summative evaluation, as the date that the clock began ticking, petitioner would have been required to file an appeal by September 20, 2021, at the latest. The instant petition was not filed until October 12, 2021.

Finally, the District moves to dismiss the petitioner's allegation that he was denied a salary increment for the 2021–2022 school year. Respondent asserts that it did not withhold the respondent's salary increment for the 2021–2022 school year. The withholding took place in the 2019–2020 school year, from which the petitioner did not file an appeal. In any event, the District asserts that the claim is time barred.

Petitioner filed an "Opposition Certification" to the motion to dismiss. The certification denies that this tribunal and the Commissioner lack subject-matter jurisdiction. Petitioner concludes that it is within the discretion of this tribunal "as to whether it is satisfied that it has subject matter jurisdiction over these claims." Petitioner denies that he has failed to state a claim or cause of action and generally states that his pleadings and 129 exhibits attached to his petition exceed the pleading requirements in N.J.A.C. 6A:3-1.4(a).

Further, petitioner concedes that the District had the authority to impose a CAP, but asserts that there was no bona fide factual basis for the annual performance report.

Petitioner further asserts that he was indeed denied an increment for the 2022–2021 school year, and relies on exhibits ENG 120, 121 and ENG 122, 123. The paychecks are for two different years, but the amounts remain the same.

Petitioner denies that this matter is time barred. In support, petitioner relies on the matter of D. R. Horton, Inc.—New Jersey v. New Jersey Department of Environmental Protection, 383 N.J. Super. 405, 408–09 (App. Div. 2006) (citation omitted), which holds that "a time limitation on a party requesting an adjudicatory hearing . . . is also subject to the substantial compliance doctrine, even though that limitations period has been characterized as 'mandatory and jurisdictional.'" In the instant case, the purposes underlying the 90-day filing requirement are not undermined by application of the substantial-compliance doctrine. Petitioner asserts that he meets the required criteria for application of the doctrine.

Petitioner also asserts that he was "constructively terminated" from his position on January 21, 2022. He was forced to resign because of various violations to his rights and a hostile work environment.[2]

FINDINGS AND CONCLUSIONS

The law is clear that a matter is justiciable before this tribunal only if jurisdiction exists. Here, the District asserts that the matter must be dismissed because the Commissioner lacks jurisdiction over ADA and LAD matters. N.J.S.A. 18A:6-9 confers jurisdiction to the Commissioner of Education over controversies and disputes arising under the school laws of New Jersey. The ADA is a federal law, 43 U.S.C. §§ 12101 et seq., applicable to the states via the Fourteenth Amendment. As noted by the District and undisputed by the petitioner, the Commissioner has affirmed that the Commissioner has no jurisdiction over ADA claims since the dispute does not arise under the school laws. See Fitzgibbons, 2018 N.J. AGEN LEXIS 971. Thus, I **FIND** and **CONCLUDE** that petitioner's claims of ADA and LAD disability discrimination must be dismissed due to a lack of jurisdiction.

[2] This allegation was not a part of the petition and therefore it will not be addressed on the merits.

I further **FIND** and **CONCLUDE** that the Commissioner does not have jurisdiction over the matters concerning the NLRA disputes. As the District aptly argues, petitioner's claim that he was subject to discrimination because of his union activities and his age under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 to 634, are federal claims that are outside of the jurisdiction of the Commissioner. Notably, petitioner has not distinguished or disputed the holding in Cirasa that makes clear that the Commissioner does not have jurisdiction over NLRA and age-discrimination matters.

I **FIND** that the filing of the instant petition was untimely. N.J.A.C 6A:3-1.3(i) provides that a 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 taken by the district board of education. Here, petitioner concedes that his petition was filed well outside of the required 90-day timeframe. Petitioner requests application of the substantial-compliance doctrine as set forth in D. R. Horton, 383 N.J. Super at 408–09. To establish substantial compliance, a party must show: "(1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim; and (5) a reasonable explanation why there was not a strict compliance with the statute." Bernstein v. Bd. of Trs., 151 N.J. Super. 71, 76–77 (App. Div. 1977). The District argues that it will be prejudiced if the doctrine is imposed. Further, it notes that petitioner failed to provide notice to the District and failed to explain why he filed the claim beyond the 90-day limitation. As the District argues, the D. R. Horton case is factually distinguishable from the instant matter. In that matter, the appellant mailed a request for a hearing to the New Jersey Department of Environmental Protection (DEP) four days prior to the expiration of the statute of limitations. However, the post office did not deliver the request to the DEP until six days later, and, thus, the DEP denied the request for a hearing because it received the request two days late. The Appellate Division found that the purposes of the limitation statute were "not undermined by the application of [the substantial-compliance doctrine] that allows a challenge to agency action to be maintained where the aggrieved party has taken reasonable steps to initiate the challenge within the prescribed period, but the agency has failed to receive timely notice of the challenge due to circumstances beyond the aggrieved party's control." Id. at 409.

I am not persuaded that there exists a reason for application of the doctrine here, as the events surrounding this matter were in the total control of the petitioner and his attorneys. The petition could have been filed before or during the negotiations with the District, thereby preserving the petitioner's rights. Further, I am persuaded that the District will in fact be prejudiced if the doctrine is applied here. Thus, I **FIND** and **CONCLUDE** that the petition, inclusive of CAP and salary-increment claims, must be dismissed, as the claims were filed outside of the 90-day time limitation.

ORDER

For the foregoing reasons, 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, 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 3, 2022

DATE

IRENE JONES, ALJ (ret. on recall)

Date Received at Agency: 11/3/22

Date Mailed to Parties: 11/3/22

id

335-22

New Jersey Commissioner of Education

Final Decision

Michael Smurro,

Petitioner,

v.

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

Respondent.

Synopsis

This matter stems from tenure charges of unbecoming conduct that were brought against petitioner by the Board following a single incident that occurred off school grounds at a restaurant in April 2021. Pursuant to *N.J.S.A.* 18A:6-16, tenure charges against petitioner were assigned to an arbitrator, who found that petitioner was guilty of one charge of unbecoming conduct which did not warrant his removal; rather, the arbitrator imposed a penalty of suspension without pay for six months. Petitioner, a tenured Vice Principal in the Neptune School District, sought an order finding that his motion to dismiss in lieu of an answer to the charges did not constitute a "delay" that would otherwise toll a 120-day unpaid suspension period under *N.J.S.A.* 18A:6-14. The respondent Board opposed the petitioner's motion, contending that petitioner had caused the delay.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; it is evident from the plain language of 6A:3-5.3(a)1 that a motion to dismiss in lieu of an answer is expressly permitted as a response by an individual against whom tenure charges are certified; therefore, a filing specifically set forth in the regulations governing this process does not constitute a delay of the proceedings before the arbitrator. Accordingly, the ALJ granted summary decision in favor of petitioner and denied the respondent Board's motion for summary decision. Further, the ALJ ordered the Board to reimburse petitioner for the full amount of time he was suspended without pay beyond the six-month period that the arbitrator imposed.

Upon review, the Commissioner agreed with the ALJ that petitioner's motion to dismiss the tenure charges filed against him was not a delay requested by petitioner within the meaning of *N.J.S.A.* 18A:6-14. Accordingly, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, granted petitioner's motion for summary decision and denied the Board's motion for summary decision. The Board was ordered to reimburse petitioner for the full amount of his salary for thirty-one days, the amount of time he was suspended without pay beyond the six-month period of suspension imposed by the arbitrator.

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

335-22
OAL Dkt. No. 00198-22
Agency Dkt. No. 218-11/21

New Jersey Commissioner of Education

Final Decision

Michael Smurro,

Petitioner,

v.

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

Respondent.

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

Upon review, the Commissioner agrees with the Administrative Law Judge that petitioner's motion to dismiss the tenure charges filed against him was not a delay requested by petitioner within the meaning of *N.J.S.A.* 18A:6-14.

Accordingly, the Initial Decision is adopted as the final decision in this matter. Petitioner's motion for summary decision is granted and respondent's motion for summary decision is denied. The Board is ordered to reimburse petitioner for the full amount of his salary for thirty-one days, the amount of time he was suspended without pay beyond the six-

month period of suspension imposed by the arbitrator.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 14, 2022
Date of Mailing: December 14, 2022

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CROSS-MOTIONS FOR SUMMARY DECISION
OAL DKT. NO. EDU 00198-22
AGENCY DKT. NO. 218-11/21

MICHAEL SMURRO,

Petitioner,

v.

TOWNSHIP OF NEPTUNE BOARD OF EDUCATION, MONMOUTH COUNTY,

Respondent.

Andrew L. Schwartz, Esq., for petitioner (Schwartz Law Group, LLC, attorneys)

Stephen J. Edelstein, Esq., for respondent (Weiner Law Group, attorneys)

BEFORE **JACOB S. GERTSMAN**, ALJ t/a:

Record Closed: September 28, 2022 Decided: November 17, 2022

STATEMENT OF THE CASE

Petitioner seeks an order finding that his motion to dismiss in lieu of an answer did not constitute a "delay" that would otherwise toll the 120-day unpaid suspension period under N.J.S.A. 18A:6-14. Respondent opposes the petition contending that petitioner caused the delay.

PROCEDURAL HISTORY

The petition was filed on November 23, 2021, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on January 6, 2022, as a contested case and assigned to the undersigned. N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15; N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13. Petitioner filed a motion for summary decision on February 16, 2022, and the initial telephone prehearing conference was held on the March 8, 2022. During the prehearing conference, respondent notified the undersigned that they would be filing a cross-motion for summary decision, and a briefing schedule was established. Respondent's cross-motion was filed on March 25, 2022, petitioner's reply brief was filed on April 5, 2022, and the joint stipulation of facts was filed on April 7, 2022. Oral argument was held on May 16, 2022.

On July 25, 2022, petitioner submitted a letter to the undersigned advising of "certain actions the District appears poised to take at its next meeting of Wednesday, July 27, 2022." The record was reopened, and a telephone status conference was held on July 27, 2022, where the parties agreed to submit a supplemental joint stipulation of facts. Following the submission of the stipulation on August 19, 2022, a telephone status conference was held to discuss outstanding issues with the submission. The revised and executed supplemental joint stipulation was submitted on September 28, 2022, and the record once again closed.

FACTUAL DISCUSSION AND FINDINGS

JOINT STIPULATION OF FACTS[1]

The following Joint Stipulation of Facts was duly submitted by the parties and are hereby **FOUND** as **FACT**:

1. Pursuant to N.J.S.A. 18A:6-10 et seq., the District served tenure charges upon petitioner Smurro on May 26, 2021 (the "tenure charge matter"). (Exhibit 1, at ¶4; Exhibit 2, at ¶4.)

2. Petitioner filed his Answer with the Board on June 10, 2021. (Exhibit 1, at ¶5; Exhibit 2, at ¶5.)

3. The Board, by way of a special meeting held on June 28, 2021, voted to certify tenure charges against Smurro to the Commissioner of Education ("Commissioner"). (Exhibit 1, at ¶6; Exhibit 2, at ¶6.)

4. Pursuant to N.J.S.A. 18A:6-14, at the special meeting of June 28, 2021, the Board also voted to suspend Smurro without pay for 120 days or until final determination of the tenure charges, effective June 29, 2021. (Exhibit 1, at ¶7; Exhibit 2, at ¶7.)

5. The District filed its certified tenure charges with the Commissioner on June 29, 2021 ("Commissioner's Receipt of Certified Charges"). (Exhibit 4.)

6. Petitioner was receiving his full salary as well as his concomitant medical benefits from the District up until it suspended him without pay. (Exhibit 1, at ¶8; Exhibit 2, at ¶8.)

[1] ¶1 though ¶25 were submitted by the parties on March 24, 2022. ¶26 through ¶35 were submitted on September 28, 2022. The Joint Stipulations were modified by the undersigned for stylistic purposes.

7. Despite voting to suspend Smurro's pay effective June 29, 2021, the District actually began Smurro's unpaid suspension on July 16, 2021. (Exhibit 1, at ¶9; Exhibit 2, at ¶9.)

8. On July 14, 2021, Smurro filed a motion to dismiss the tenure charges in lieu of an answer pursuant to N.J.A.C. 6A:3-5.3(a)(1). (Exhibit 1, at ¶12; Exhibit 2, at ¶12.)

9. On July 19, 2021, the Commissioner of Education assigned an arbitrator to the tenure charges pursuant to N.J.S.A. 18A:6-16. (Exhibit 1, at ¶13; Exhibit 2, at ¶13.)

10. By letter dated July 19, 2021, the arbitrator assigned to the matter asked counsel to the District how long it needed to respond to the motion to dismiss, to which the District requested two weeks. (Initial Motion Timeline Email; Exhibit 5.)

11. On August 2, 2021, the District sought, and the arbitrator granted, a request for a seven-day extension of time to respond to Smurro's motion to dismiss. (Exhibit 1, at ¶15; Exhibit 2, at ¶15.) (Extension Request Email; Exhibit 6.)

12. The District submitted its opposition to the motion to dismiss on August 9, 2021. (Exhibit 1, at ¶16; Exhibit 2, at ¶16.)

13. Petitioner submitted his reply brief on August 16, 2021. (Exhibit 1, at ¶17; Exhibit 2, at ¶17.)

14. The arbitrator assigned to the tenure charges issued her Decision denying the motion on October 17, 2021, and ordered that the tenure charges proceed to a hearing. (Exhibit 1, at ¶18; Exhibit 2, at ¶18.) (Decision on Motion; Exhibit 7.)

15. On October 28, 2021, counsel for petitioner Smurro sent the District a letter inquiring about the resumption of petitioner's salary. (Exhibit 1 at ¶18; Exhibit 2, at ¶24.) (Letter re Resumption of Salary; Exhibit 8.)

16. On November 2, 2021, the District sent a letter indicating that the District would not consider resuming the payment of Smurro's salary before February 14, 2022, because it contended that petitioner's motion to dismiss operated as a request for a delay of the proceedings. (November 2, 2021, District Letter; Exhibit 9.)

17. The District's November 2 letter asserted that the time period between Smurro's filing of the motion to dismiss on July 14, 2021, and the arbitrator's determination of that motion on October 17, 2021, should not count for purposes of the 120-day period under N.J.S.A. 18A:6-14. (Exhibit 9.)

18. Petitioner responded to the District's November 2 letter that same day contending that the District violated N.J.S.A. 18A:6-14 and that the arbitrator appointed to preside over the underlying tenure matter had the authority to order the resumption of petitioner's salary. (Petitioner's November 2, 2021, Reply Letter; Exhibit 10.)

19. The District then responded on November 4, 2021, contending that based upon N.J.S.A. 18A:6-9 only the Commissioner of Education had jurisdiction to decide issues under N.J.S.A. 18A:6-14. (November 4, 2021, District Letter; Exhibit 11.)

20. After further letters on this issue, along with oral arguments before the arbitrator, the arbitrator on November 11, 2021, signed an order determining "that she lacks jurisdiction over the issue of the resumption of [petitioner's] salary pursuant to N.J.S.A. 18A:6-14[.]" (Executed Order - Resumption of Salary; Exhibit 12.)

21. The arbitrator's November 11, 2021, order was "without prejudice to [petitioner's] right to file a Petition of Appeal before the Commissioner of Education seeking an order requiring that the District reinstate Mr. Smurro to the payroll pursuant to N.J.S.A. 18A:6-14." (Exhibit 12.)

22. Also on November 11, 2021, the arbitrator sent her first request to the Commissioner of Education, Office of Disputes and Controversies, for an extension of time regarding the forty-five-day period from which to hold the hearing after the assignment of the arbitrator pursuant to N.J.S.A. 18A:6-17.1(b)(1). (Exhibit 1, at ¶34; Exhibit 2 at ¶34.)

23. Thereafter, on November 16, 2021, Office of Disputes and Controversies granted the arbitrator's request for an extension to hold the hearing beyond forty-five days from the arbitrator's assignment. (Exhibit 1 at ¶37; Exhibit 2, at ¶37.) (Email re Extension of forty-five-day timeline; Exhibit 13.)

24. By way of email dated, February 11, 2021, the District confirmed that petitioner would be reinstated to the payroll effective February 14, 2022. (Email Confirming Resumption of Pay Feb. 14, 2022; Exhibit 14.)

25. One hundred and twenty-one days following the receipt of the certified tenure charges by the Commissioner, which occurred June 29, 2021, is October 28, 2021. (Commissioner's Receipt of Certified Charges; Exhibit 4.)

26. The merits of the tenure charge matter were decided by Decision of Arbitrator Deinhardt dated July 11, 2022 (the "Decision").

27. That Decision imposed a six-month unpaid suspension on petitioner Smurro.

28. During the pendency of the tenure charge matter, the District suspended petitioner Smurro without pay for a total of 213 days, from July 16, 2021, until February 14, 2022.

29. Of those 213 days, ninety-five days were during the pendency of a motion to dismiss filed in lieu of an answer, from July 14, 2021, until it was decided on October 17, 2021.

30. Among the original issues before this tribunal is whether the filing of a motion to dismiss in lieu of an answer pursuant to N.J.A.C. 6A:3-5.3(1)(1) operates to toll the 120-day time period for which a district filing tenure charges is permitted to suspend an employee without pay pursuant to N.J.S.A. 18A:6-14.

31. Petitioner Smurro takes the position that the filing of a motion to dismiss in lieu of an answer pursuant to N.J.A.C. 6A:3-5.3(1)(1) does not operate to toll the 120-day unpaid suspension time period set forth by N.J.S.A. 18A:6-14.

32. Respondent District takes the position that the time during which a motion to dismiss in lieu of an answer pursuant to N.J.A.C. 6A:3-5.3(1)(1) is pending does operate to toll 120-day unpaid suspension time period set forth by N.J.S.A. 18A:6-14.

33. Despite the District's resumption of petitioner Smurro's regular salary effective February 14, 2022, he remained suspended with pay until August 15, 2022, when the District ended his suspension and provided him with an assignment.

34. If this tribunal determines that petitioner Smurro's legal position is correct, given that the arbitrator imposed a six-month unpaid suspension and he was suspended without pay for a total of 213 days during the pendency of the tenure charge matter, this tribunal should order that the District is

required to reimburse petitioner Smurro for the full amount of time he was suspended without pay beyond the six-month period[2] the arbitrator imposed, his full salary for thirty-one days, or the difference between 213 days and 182 days.

35. If this tribunal determines that respondent District's legal position is correct, meaning that the time during the pendency of petitioner's motion to dismiss pursuant to N.J.A.C. 6A:3-5.3(1)(1) did not count as part of the 120-day unpaid suspension time period set forth by N.J.S.A.18A:6-14 and the additional unpaid suspension of petitioner beyond 120 days was due to petitioner's strategic choice and cannot count against the District, then this tribunal should order that petitioner is required to serve an additional sixty-four days of unpaid suspension to the District, representing the difference between 182 days and 118 days[3], to satisfy the requirements of the arbitrator's six-month unpaid suspension penalty.

LEGAL ANALYSIS AND CONCLUSION

Summary Decision Standard

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995):

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the

[2] For purposes of this matter, the parties agree that six-months is 182 days.
[3] One hundred and eighteen days represents the difference between the 213 days that petitioner has been on unpaid suspension with the ninety-five days that the District claims should not count as part of that unpaid suspension because they were during the pendency of the motion to dismiss.

> motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242 (1986).]

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.

Accordingly, the undisputed facts and the arguments of both parties will be evaluated utilizing the Brill standard.

N.J.S.A. 18A:6-14 provides in pertinent part that

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made . . . . (emphasis added)

The Legislature's intent in enacting the statute was "to alleviate 'the economic hardship endured by teachers . . . suspended without pay pending the outcome of charges filed against them and certified for [a] hearing. . . .'" Pugliese v. State-Operated Sch. Dist. of City of Newark, 454 N.J. Super. 495, 505 (App. Div. 2018) (quoting In re Grossman, 127 N.J. Super. 13, 35-36 (App. Div. 1974)).

The issue before this tribunal is whether petitioner's filing of a motion to dismiss in lieu of an answer otherwise constitute a delay that would toll the 120-day unpaid suspension period under N.J.S.A. 18A:6-14.[4]

N.J.A.C. 6A:3-5.3(a) provides

> Except as specified in N.J.A.C. 6A:3–5.1(c)(5), an individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges. Except as to time for filing, the answer shall conform to the requirements of N.J.A.C. 6A:3–1.5(a) through (d).
>
> 1. Consistent with N.J.A.C. 6A:3–1.5(g), nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time allotted for the filing of an answer. Briefing on the motions shall be in the manner and within the time fixed by the Commissioner, or by the arbitrator if the motion is to be briefed following transmittal to an arbitrator.

Petitioner argues that N.J.S.A. 18A:6-10 et seq. "has numerous references to the timelines and how to request an extension of time. However, not once in the statue is there any reference, or suggestion, that a motion to dismiss in lieu of an answer constitutes such a request. The specific section that discusses extensions of time N.J.S.A. 18A:6-17.4 provides only that the 'commissioner shall have the authority to extend the timelines in the tenure charge process upon a showing of exceptional circumstances.' However, this section makes no mention of the filing of a Motion to Dismiss constituting a request for an extension." (Petitioner motion at 11.) Respondent contends that the Board did not cause the delay and "[t]he one and only reason that the

[4] The petition additionally sought an order that "the arbitrator appointed to the underlying tenure proceeding had the authority to make that determination and order the respondent-District to resume petitioner's salary on the 121st day following the certification of the tenure charges—October 28, 2021." (Petitioner motion at 17.) The Commissioner has transmitted this matter to the OAL which maintains jurisdiction pursuant to N.J.A.C. 1:1-3.1 and 3.2. This tribunal takes no position on the merits of petitioner's argument, as it is purely a question of law that should be addressed by the Appellate Division. (See Wendling v. New Jersey Racing Comm'n, 279 N.J. Super 477, 484). Accordingly, I **CONCLUDE** that the OAL is not the proper forum for consideration of this issue.

arbitration of this case was delayed for just over three months is because Mr. Smurro's counsel chose to file an ill-fated Motion to Dismiss." (Respondent motion at 4.)

The parties agree that if petitioner prevails, respondent will reimburse petitioner for the full amount of time he was suspended without pay beyond the six-month period the arbitrator imposed, his full salary for thirty-one days, or the difference between 213 days and 182 days. If respondent prevails, petitioner is required to serve an additional sixty-four days of unpaid suspension to the District, representing the difference between 182 days and 118 days, to satisfy the requirements of the arbitrator's six-month unpaid suspension penalty. (Joint Stipulation at ¶¶ 34, 35)

First and foremost a court's analysis begins with the plain language of a statute. State v. Smith, 197 N.J. 325, 332 (2009) (citing State v. Brannon, 178 N.J. 500, 505-06 (2004)). The language of statute should be given its ordinary meaning and used to determine intent of the legislature; the courts cannot arbitrarily expand the scope of a statute beyond plainly expressed legislative intent. DiProspero v. Penn, 183 N.J. 477, 492 (2005); Smith, 197 N.J. at 332 (it is not the function of the court to rewrite a plainly written enactment of the Legislature or presume that the Legislature intended something other than that expressed by way of the plain language).

The language of both N.J.S.A. 18A:6-14 and N.J.A.C. 6A:3-5.3(a) is clear and unambiguous. The individual against whom the charges have been certified must file a written response within fifteen days of the charges being filed and N.J.A.C. 6A:3-5.3(a)1 provides that "nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time allotted for the filing of an answer." Put simply, it is evident from the plain language of 6A:3-5.3(a)1 that a motion to dismiss in lieu of an answer is expressly permitted as a response by an individual against whom tenure charges are certified. Therefore, it stands to reason that a filing specifically set forth in the regulations governing this process does not constitute a delay of the proceedings before the arbitrator.

Based upon the foregoing, I **CONCLUDE** that petitioner's motion to dismiss in lieu of an answer was not a delay requested by petitioner as set forth in N.J.S.A. 18A:6-14.

ORDER

I **ORDER** that petitioner's motion for summary decision be and hereby is **GRANTED** and respondent's motion for summary decision be and hereby is **DENIED**. I **FURTHER ORDER** that respondent shall reimburse petitioner for the full amount of time he was suspended without pay beyond the six-month period the arbitrator imposed, his full salary for thirty-one days, or the difference between 213 days and 182 days.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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 17, 2022
DATE

JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency: _____

Date Mailed to Parties: _____

JSG/jm

336-22

New Jersey Commissioner of Education

Final Decision

Stephanie Florio,

Petitioner,

v.

New Jersey State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent New Jersey State Board of Examiners (SBE) that she had not met the requirements for issuance of a Reading Specialist Certificate because she failed to complete the required three credit hours in a supervised practicum in reading. Petitioner argued that her alternative education and experience satisfied a one-to-one-correspondence to the missing credits, in accordance with *N.J.A.C.* 6A:9B-4.12(b). The SBE did not accept petitioner's alternative education and experience, finding that petitioner did not establish a compelling one-to-one correspondence with the Reading Specialist certification requirements. Petitioner thereafter filed the within appeal.

The ALJ found, *inter alia*, that: the issue in this case is whether petitioner satisfied her burden of demonstrating, by a preponderance of the evidence, that the SBE acted in a manner that was arbitrary, capricious, or contrary to law when it determined not to accept petitioner's alternative education to satisfy the remaining requirements that petitioner needed to receive a Reading Specialist Certificate; *N.J.A.C.* 6A:9B-14.13 sets forth the requirements for issuance of this certificate; the SBE determined that petitioner did not satisfy the requirements for certification because she lacks three credit hour credits in a supervised practicum in reading and her alternative education and experience was not deemed equivalent to satisfy that deficiency; and petitioner failed to establish that the SBE's decision to deny her application for a Reading Specialist Certificate was arbitrary, capricious or unreasonable. Accordingly, the ALJ affirmed the SBE's decision and dismissed the petition.

Upon review, the Commissioner found, *inter alia,* that: the ALJ mistakenly applied the wrong standard of review in the Initial Decision, stating that the SBE's decision will not be overturned unless the petitioner proves that the SBE acted in a manner that was arbitrary, capricious or contrary to law; the appropriate standard of review here is whether the SBE's decision was consistent with the applicable statutory and regulatory provisions of *N.J.A.C.* 6A:3; applying the appropriate standard of review, the Commissioner found that the record does not contain sufficient information to determine whether the Board's denial of petitioner's application was consistent with the applicable statutory and regulatory provisions; petitioner has raised material issues of fact that preclude dismissal at this stage, as a full record must be developed and considered pursuant to the appropriate standard of review before a decision can be made as to whether the Board's decision should be affirmed or reversed. Accordingly, the Initial Decision of the OAL was rejected and the matter remanded for further proceedings consistent 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.

336-22
OAL Dkt. No. EDU 06851-22
Agency Dkt. No. 172-7/22

New Jersey Commissioner of Education

Final Decision

Stephanie Florio,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

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.

In this matter, petitioner challenges the New Jersey State Board of Examiners' (Board) denial of her application for a Reading Specialist Certificate. The Board denied petitioner's application because she did not satisfy the required three credit hours in a supervised practicum in reading. Petitioner argued that her alternative education and experience satisfied a one-to-one-correspondence to the missing credits, in accordance with *N.J.A.C.* 6A:9B-4.12(b). Following a motion to dismiss, the Administrative Law Judge (ALJ) concluded that the Board's decision to deny petitioner's application was not arbitrary, capricious, or unreasonable, and dismissed the petition.

As a threshold matter, a discussion of the applicable standard of review for petitions of appeal that are filed under *N.J.A.C.* 6A:3 is necessary. When there is a challenge to a determination made by an office within the Department of Education, the Commissioner is not mandated to give deference to her staff, but instead determines if the finding was legally appropriate. *See, Jaroslaw Nimczyk v. New Jersey State Board of Examiners*, Commissioner Decision No. 98-22, dated

May 16, 2022, and *Melody Travisano v. Dept. of Educ., State Board of Examiners*, Commissioner Decision No. 190-22, dated August 8, 2022 (both comprehensively detailing the appropriate standard of review to be applied in matters filed against the Board of Examiners pursuant to *N.J.A.C.* 6A:3); *Board of Trustees of the Passaic County Elks Cerebral Palsy Center v. New Jersey Dept. of Educ., Office of Fiscal Accountability and Compliance*, Commissioner's Decision No. 334-14, dated August 14, 2014 (finding that a decision of the Office of Fiscal Accountability and Compliance is not given deference by the Commissioner). Moreover, where the Department of Education has limited the scope of review of a subordinate office or division, it has done so by regulation, *i.e.* appeals filed under *N.J.A.C.* 6A:4 challenging a decision of the State Board of Examiners revoking or suspending a certificate, or a decision of the School Ethics Commission.

In the Initial Decision, the ALJ mistakenly referenced *N.J.A.C.* 6A:4-4.1(a), applied deference to the Board, and stated that the Board's decision in this case would not be overturned unless the petitioner proves that the Board acted in a manner that was arbitrary, capricious or contrary to law.[1] It is important to recognize that a decision by the Board denying an application for a certificate is not entitled to the arbitrary, capricious or unreasonable standard of review that is afforded to appeals filed under *N.J.A.C.* 6A:4, challenging a decision of the Board revoking or suspending a certificate. *See, Jessica Walder v. New Jersey Department of Education, State Board of Examiners*, Commissioner's Decision No. 503-14, decided December 29, 2014 (finding that the Commissioner does not give deference to a decision of the State Board of Examiners denying a request for issuance of a certificate). The petition of appeal in this matter was filed in accordance with *N.J.A.C.* 6A:3, which consists of completely different regulatory provisions than *N.J.A.C.* 6A:4; these two Administrative Code Sections should never be conflated. *Nimczyk, supra at* 2. As such,

[1] The Motion to Dismiss filed by the Board of Examiners also referenced *N.J.A.C.* 6A:4-4.1(a) and the incorrect standard of review that applies in this matter.

the standard of review that governs appeals filed under *N.J.A.C.* 6A:4 does not apply to this case. The appropriate standard of review of the Boards' decision is whether the decision is consistent with the applicable statutory and regulatory provisions.

Upon review of the record and applying the appropriate standard of review, the Commissioner finds that the record does not contain sufficient information to determine whether the Board's denial of petitioner's application was consistent with the applicable statutory and regulatory provisions. In opposition to the motion to dismiss, petitioner submitted evidence in support of her argument that her alternative education and experience satisfied a one-to-one-correspondence to the missing credits. The Commissioner concludes that petitioner has raised material issues of fact that preclude dismissal at this stage. A full record must be developed, and then considered pursuant to the appropriate standard of review, before a decision can be made as to whether the Board's decision should be affirmed or reversed.

Accordingly, the Initial Decision of the OAL is rejected. This matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 14, 2022
Date of Mailing: December 14, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 06851-22
AGY. DKT. NO. 172-7/22

STEPHANIE FLORIO,
Petitioner,
vs.
NEW JERSEY DEPARTMENT OF EDUCATION, BOARD OF EXAMINERS,
Respondent.

Stephanie Florio, petitioner, pro se

Colin Klika, Deputy Attorney General, for respondent, State Board of Examiners (Matthew J. Platkin, Attorney General of New Jersey)

Record Closed: September 21, 2022 Decided: November 15, 2022

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Stephanie Florio, applied for a Reading Specialist Certification. The State Board of Examiners (Board) determined that Petitioner satisfied all requirements, except for a one-to-one correspondence between alternative education and experience presented and the practicum requirement.

Petitioner appealed that decision to the Office of Controversies and Disputes. The matter was transferred to the Office or Administrative Law (OAL) as a contested case, where it was filed on August 8, 2022.

A prehearing conference was held on August 22, 2022, and a prehearing order was entered the same date.

Respondent filed a motion to dismiss in lieu of an answer with the Commissioner of the Department of Education prior to the matter being transmitted to the OAL, which was refiled at the OAL on August 30, 2022. Petitioner filed her response to said motion on September 21, 2022, whereupon the record closed.

ISSUE

Whether Board's denial is supported by the evidence and is not arbitrary, capricious, or contrary to the law. If not, the Commissioner may reject the Board's determination. N.J.A.C. 6A:4-4. 1 N.J.A.C. 6A:9B-14.5(b)(6); N.J.A.C. 6A:9B-4.12(b).

FINDINGS OF FACT

The parties do not dispute many of the background facts in this case. I **FIND** the following **FACTS**:

1. Petitioner applied for a Reading Specialist Certificate (RSC).
2. The Board denied the application for a RSC based upon her failure to satisfy all the requirements of N.J.A.C. 6A:9B-14.13, in its Decision dated April 7, 2022.
3. In said Decision, the Board determined that Petitioner did satisfy three credit hours in reading foundations, but denied the application as it found Petitioner did not satisfy three credit hours in a supervised practicum in reading.
4. The above decision was made after the Board considered Petitioner's request for the Board to consider alternate education and/or experience equivalent to the areas of deficiency (lack of three credit hours in reading foundations and three credit hours in a supervised practicum in reading).

DISCUSSION AND CONCLUSIONS OF LAW

N.J.A.C. 6A:3-1.10 states:

> At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason.

In the instant matter, Respondent filed its motion to dismiss with the Commissioner. The matter was than transferred to the OAL, where Respondent re-filed its motion.

N.J.A.C. 6A:3-1.10 is similar to New Jersey Court Rule 4:6-2(e). The inquiry in a motion to dismiss is "limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). Herein, the petition of appeal equates to the complaint.

A careful review of the petition of appeal does not reveal a claim upon which relief may be granted. Nothing contained therein adds to what the Board considered. The Petitioner seems to indicate in her petition that the burden was on the Board to ask questions to further her application for a RSC.

Here, Petitioner "carries the burden of demonstrating by a preponderance of the credible evidence that she is entitled to the endorsement she seeks." McQuilken v. N.J. St. Bd. of Exam'rs, OAL Dkt. No. EDU8374-11, Initial Decision (Dec. 13, 2011), adopted Comm'r (January 27, 2012). http://njlaw.rutgers.edu/collections/oal/search.html. In evaluating determinations by the Board of Examiners, "the Commissioner . . . shall not disturb the decision if the "decision is supported by sufficient credible evidence in the record" unless the appellant has demonstrated that the Board . . . acted in a manner that was arbitrary, capricious, or contrary to law." N.J.A.C. 6A:4-4.1 The Department of Education intended the standard

of review for Commissioner determinations under Chapter Six to be "appellate in nature." 40 N.J.R. 4606(a).[2]

The arbitrary, capricious, or unreasonable standard consists of three inquiries:

(1) whether the agency action violates the enabling act's express or implied legislative policies;

(2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and

(3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors. [Public Serv. Elec. and Gas Co. v. New Jersey Dep't. of Envtl. Protect., 101 N.J. 95, 103 (1985).]

However, where there is room for two opinions the action is not arbitrary or capricious when exercised honestly and upon due consideration even though the court may believe that an erroneous conclusion has been reached." Bayshore Sewerage Co. v. Department of Environmental Protection, 122 N.J. Super. 184, 199 (App. Div. 1973) (Internal citations omitted). Significantly, a "court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling." Ibid.

All teaching staff members in the state's public schools must hold a valid certificate before serving in any role in which they "teach, administer, direct or supervise the teaching, instruction, or educational guidance" of students. N.J.S.A. 18A:26-2. Under N.J.S.A. 18A:6-38 and N.J.S.A. 18A:26-2.7, the Board promulgated regulations for the required certification of persons employed in a public school district. Under those regulations, the Board issues three categories of educational certificates: instructional, administrative, and educational services. N.J.A.C. 6A:9-5.2(a). Endorsements for an educational services certificate include staff members such as a school psychologist or a school social worker. See N.J.A.C. 6A:9B-14.5, -14.9. These endorsements "coincide with the educational subjects or positions that share common

attributes and thus are grouped under a particular certificate." Dennery v. Bd. of Educ., 131 N.J. 626, 633 (1993). Accordingly, a person can work in the particular field based upon the endorsement(s) enumerated on the certificate.

N.J.A.C. 6A:9B-14.13 states:

> (a) The reading specialist endorsement authorizes the holder to serve as a reading specialist in preschool through grade 12. A reading specialist conducts in-service training of teachers and administrators; coordinates instruction for students or groups of students having difficulty learning to read; diagnoses the nature and cause of a student's difficulty in learning to read; plans developmental programs in reading for all students; recommends methods and materials to be used in the school district reading program; and contributes to the evaluation of the reading achievement of students.
>
> (b) A candidate for this endorsement shall have completed a master's degree from a regionally accredited college or university, two years of successful teaching experience, and one of the following:
>
> 1. A Department-approved graduate-degree program in reading; or
>
> 2. A program of graduate studies of 30 semester-hour credits consisting of the following:
>
> i. Reading foundations;
>
> ii. Diagnosis of reading problems;
>
> iii. Correction of reading problems;
>
> iv. Supervised practicum in reading; and
>
> v. Study in at least three of the following areas: children's or adolescent literature; measurement; organization of reading programs; psychology; staff supervision; linguistics; special education; research; and foundations of education.
>
> (c) An emergency certificate may be issued to a candidate who has obtained the following:
>
> 1. A master's degree from a regionally accredited college or university;
>
> 2. Two years of successful teaching experience; and
>
> 3. Completion of 12 graduate credits in the areas listed in (b)2 above.

While the Board cannot waive the requirements, it can consider alternative education or experience if Petitioner demonstrates, by a preponderance of the credible evidence, that the alternative education or experience is the one-to-one equivalent with the statutory requirements. Hutchinson v. New Jersey State Board of Examiners, EDU16373-12, Initial Decision (April 5, 2013), aff'd, Commissioner (May 15, 2013).

The Board determined that Petitioner satisfied the requirements for RSC, except for six of the thirty semester hours, including study in reading foundations and supervised practicum in reading. Petitioner requested the Board consider alternate education and/or experience equivalent to the deficiency noted herein. Upon review of what Petitioner supplied, the Board found Petitioner satisfied the required study in the area of reading foundations. It did not find that Petitioner satisfied the requirement of supervised reading practicum. Accordingly, the Board denied the application as to the three remaining credits in a supervised practicum in ready.

Petitioner fails to demonstrate that the Board acted in a manner that was arbitrary, capricious or contrary to law. Pointedly, the Board considered Petitioner's request for alternative education and/or experience in the areas of deficiency it originally noted. Based upon that review the Board found Petitioner satisfied three credit hours in the area of reading foundations, but still lacked three credit hours in a supervised practicum in reading.

Petitioner argues that the Board did not provide clear guidelines for her to provide additional information that may be relevant to her application. It is the burden of Petitioner to provide what she contends satisfies the requirements for the certification. It is not the Board's obligation to guide her.

Against this backdrop, petitioner bears a substantial evidentiary burden to establish a case sufficient to set aside a decision by the Board of Examiners. A decision by the Board of Examiners will not be disturbed unless petitioner "has demonstrated [that] the State Board of Examiners . . . acted in a manner that was arbitrary, capricious, or contrary to law." N.J.A.C. 6A:4-4.1(a). It is not within the province of this forum to substitute its judgment for that of the Board of Examiners even if there is room for two

opinions regarding the sufficiency of petitioner's coursework. Rather, the pertinent inquiry is to "ascertain whether the decision is supported by sufficient credible evidence in the record[.]" N.J.A.C. 6A:4-4.1(a). Judged against this standard of review and based on a consideration of the testimony and documentary evidence presented, I **CONCLUDE** that petitioner has failed to shoulder her burden of proof and that the Board of Examiners' decision is supported by sufficient credible evidence.

Therefore, I **CONCLUDE** that the Board's denial of the RSC, as set forth in its Decision dated April 7, 2022, should be **AFFIRMED**.

ORDER

It is hereby **ORDERED** that the Board's denial of the RSC, as set forth in its Decision dated April 7, 2022, should be **AFFIRMED**; and, it is further **ORDERED** that Petitioner's appeal is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 15, 2022
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:
db

APPENDIX

List of Moving Papers

For Respondent:

Brief in support of Motion to Dismiss
Exhibit A – State Board of Examiners Decision

For Petitioner:

Brief in Opposition to Motion for Summary Decision
Exhibit A – Reading Specialist Standard Certificate (Endorsement Code: 3310)
Exhibit B – Credentials Review Summary

Pleadings:
Pro se Petition of Appeal

337-22
OAL Dkt. No. EDU 03579-22
(OAL Dkt. No. EDU 10980-18 On Remand)
Agency Dkt. No. 150-6/18

New Jersey Commissioner of Education

Final Decision

Jamie B. Truncellito,

Petitioner,

v.

Board of Education of the Township of Lyndhurst, Bergen County,

Respondent.

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

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 15, 2022
Date of Mailing: December 19, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03579-22
AGENCY DKT. NO. 150-6/18
(ON REMAND)
OAL DKT. NO. EDU 10980-18

JAMIE B. TRUNCELLITO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,

Respondent.

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

Dennis McKeever, Esq., for respondent (Cornell, Merlino, McKeever & Osborne, attorneys)

Record Closed: November 7, 2022 Decided: November 10, 2022

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

The foregoing matter was remanded by the New Jersey Superior Court, Appellate Division, to the Commissioner of the Department of Education on January 24, 2022. On May 4, 2022, 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 Settlement Agreement via e-mail on November 7, 2022.

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.

November 10, 2022

DATE

JUDE-ANTHONY TISCORNIA., ALJ

Date Received at Agency: November 10, 2022

Date Mailed to Parties: november 10, 2022

id

CORNELL, MERLINO
McKEEVER & OSBORNE, LLC

ATTORNEYS AT LAW

E-mail: dmckeever@cmmolaw.com

November 7, 2022

Sent via Electronic Mail (Jude.Tiscornia@oal.nj.gov)
Judge Jude-Anthony Tiscornia, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Jamie Truncellito v. The Lyndhurst Board of Education ("Board")
OAL Docket No. EDU 03579-2022
Agency Ref. No.: 150-6/18
Settlement Agreement

Dear Judge Tiscornia:

Enclosed please find, a fully executed copy of the Settlement Agreement ("Agreement") for the above-referenced matter. As you recall, the Board requested that Your Honor review this Agreement and submit same to the Commissioner.

Should you have any questions, please contact me.

Thank you.

Very Truly Yours,

CORNELL, MERLINO/McKEEVER & OSBORNE, LLC

Dennis McKeever
DM:klb
Enclosure
cc: Alfred Maurice, Esq. (via email)

SETTLEMENT AGREEMENT

THIS AGREEMENT, entered into as of the day of September 2022, by and between **Lyndhurst Township BOARD OF EDUCATION, BERGEN COUNTY,**

(Hereinafter referred to as the "Board") -and-

JAMIE TRUNCELLITO
(Hereinafter referred to as the "TRUNCELLITO")

(Collectively "the parties")

WHEREAS, the Parties have been involved in litigation for a period of years, as set forth below, resulting in a great expenditure of time and resources that could be better applied elsewhere. In the public interest and the interest of the parties, the Board and Truncellito agree to settle the actions set forth below:

Jamie B. Truncellito v. Lyndhurst Board of Education,
Appellate Division/Commissioner of Education Remand 5/4/22
Appellate Division No. A-1306-19
New OAL Docket No.: EDU 03579-2022N
Agency Dkt. No. 150-6/18,
Commissioner Decision N. 270-19,
OAL Dkt. No. EDU 10980-18

In accord with this agreement;

WHEREAS, a proceeding currently pending before the Office of Administrative Law on remand from the Appellate Division of the Superior Court and the Commissioner of Education; and

Whereas, the Board and the Truncellito desire to settle all of the claims between them arising out of the referenced litigation; and

WHEREAS, the parties have set forth the terms of their agreement below and consent to be bound thereby;

NOW, THEREFORE, in consideration of the mutual promises, covenants and the exchange for the consideration, as more particularly noted below, it is hereby agreed as follows:

1. The Board agrees to immediately pass a resolution granting tenure as a guidance counsellor to Truncellito in the Lyndhurst Township School District, retroactive to September 1, 2018.
2. Truncellito will be reemployed by the Board effective July 1, 2023.
3. The Lyndhurst school district will maintain its current staffing levels for the for 2022-2023 school year ending June 30, 2023.
4. Truncellito will waive any right to recall to her tenured position prior to July 1, 2023, so that no change in counsellor staffing will be necessary by the Lyndhurst School District for the 2022-2023 school year.
5. Truncellito will complete her duties as a counsellor in the North Brunswick School District for the 2022-2023 school year.
6. Truncellito will return to Lyndhurst as a tenured counsellor on July 1, 2023, and be placed on the salary guide as if she never left the district at step MAX. Ms. Truncellito will receive salary and seniority credit in the district for all years from the date of her departure until her return.
7. Upon execution of this agreement the Board will pay Truncellito a lump sum of $29,890.00 as the acknowledged loss suffered by Truncellito arising out of the Board's non-retention of her for the 2018-2019, 2019-2020, 2020-2021 ,2021-2022 and 2022-2023 school years.
8. The Board will not take any deductions from the sum payable to Truncellito but will issue IRS Form 1099 representing said payment.
9. Truncellito will provide a letter of resignation to the North Brunswick School District effective June 30, 2023

10. Upon the execution and delivery of the Tenure Resolution by the Board set forth in paragraph 1 and the payment outlined in paragraph 7, Truncellito will withdraw the pending action before the Office of Administrative Law, with prejudice, subject to the approval of the Commissioner of Education. if required.

11. The Board agrees to take no adverse action against Truncellito arising out of the litigation which is the subject of this agreement.

12. 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.

13. This agreement may be executed in counterparts, which when taken together, will constitute a completely and properly executed document.

14. This is the entire agreement of the parties. It may not be altered or amended, except in writing, with the same formality as this agreement.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals on the dates set forth below.

LYNDHURST TOWNSHIP
BOARD OF EDUCATION:

By: _____, President

Dated: 11/7/22

JAMIE TRUNCELLITO, Petitioner

Dated: 10/28/22

Dhabliwala, Ila [OAL]

From: Kim Berry <kberry@cmmolaw.com>
Sent: Monday, November 7, 2022 3:32 PM
To: Tiscornia, Jude [OAL]
Cc: Dhabliwala, Ila [OAL]; afm.smlaw@optonline.net
Subject: [EXTERNAL] Jamie Truncellito v. Lyndhurst Board of Education - OAL Docket No.: EDU 03579-2022; Agency Ref. No.: 150-6/18 - Settlement Agreement
Attachments: SKM_C750i22110716200.pdf; Signed Settlement.pdf

Judge Tiscornia:

Please see attached correspondence in regards to the above-referenced matter.

Thank you.
Dennis McKeever
Kim L. Berry on behalf of Dennis McKeever, Esq.

Kim L. Berry | Legal Assistant
Cornell, Merlino, McKeever & Osborne, LLC
238 St. Paul Street | Westfield, NJ 07090
(P) 908.481-5000 Ext. 5007 (F) 908.264.2045
kberry@cmmolaw.com
www.cmmolaw.com

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338-22
OAL Dkt. No. EDU 11839-19
Agency Dkt. No. 153-6/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Piscataway, Middlesex County,

Petitioner,

v.

Board of Education of the Borough of North Plainfield, Somerset County, and Board of Education of the City of Plainfield, Union County,

Respondents.

The record of this matter, the parties' 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 such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In so doing, however, the Commissioner notes the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.,* with respect to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential. Further, the Commissioner notes that the Agreement references actions that were to take place in a time frame that preceded the 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 the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 15, 202
Date of Mailing: December 19, 2022



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

OAL DKT. NO. EDU 11839-19
AGENCY DKT. NO. 153-6/19

TOWNSHIP OF PISCATAWAY BOARD OF EDUCATION, MIDDLESEX COUNTY

Petitioner,

v.

BOROUGH OF NORTH PLAINFIELD, BOARD OF EDUCATION, SOMERSET COUNTY AND CITY OF PLAINFIELD BOARD OF EDUCATION, UNION COUNTY,

Respondents.

David B. Rubin, Esq., for petitioner, Piscataway Township Board of Education, (Busch Law Group, LLC, attorneys)

Anthony P. Sciarrillo, Esq., for respondent, North Plainfield Board of Education, (McKeever & Osborne, LLC, attorneys)

Sandra N. Varano, Esq., for respondent, Plainfield Board of Education, (Nirenberg & Varano, LLP, attorneys)

Record Closed: November 1, 2022 Decided: November 3, 2022

BEFORE **ELIA A. PELIOS,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 23, 2019, 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 November 1, 2022, the parties filed a fully executed Settlement Agreement and Board Resolutions approving the settlement. The Agreement and Resolutions are attached and fully incorporated herein.

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision 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, 2022
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: 11/10/2022

Date Mailed to Parties: 11/10/2022

EAP/tat

J-1 ALJ Docs rec'd 11/1/22

DocuSign Envelope ID: 5AA35114-C0F4-457F-AF13-E044D1D65A15

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") shall be by and between the NORTH PLAINFIELD BOARD OF EDUCATION (hereinafter "North Plainfield") and the PISCATAWAY BOARD OF EDUCATION (hereinafter "Piscataway") and the PLAINFIELD BOARD OF EDUCATION (hereinafter "Plainfield") (collectively the "Parties").

WHEREAS, four Lewis Family children (hereinafter "Students") were registered and attended the North Plainfield schools at such times that the Students were residing in Piscataway, North Plainfield, or Plainfield;

WHEREAS, on or about May 20, 2019, Somerset County Executive Superintendent of Schools, Roger Jinks, conducted a homeless/residency determination for the Students and concluded that Piscataway was the school district of residence;

WHEREAS, on or about June 26, 2019, Piscataway filed a Verified Petition of Appeal against North Plainfield and Plainfield, OAL Docket N0. EDU 11839-2019 S, pending before the Honorable Elia A Pelios, ALJ, regarding the residency of the Students;

NOW THEREFORE, the parties having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. DISMISSAL OF VERIFIED PETITION OF APPEAL

In settlement of the within controversy, Piscataway agrees to dismiss the Verified Petition of Appeal and withdraw with prejudice any and all claims it may have against North Plainfield and/or Plainfield.

This settlement represents the final resolution of the matter involving the education and residency of the four Students.

DocuSign Envelope ID: 5AA35114-C0F4-457F-AF13-E044D1D65A15

2. COMPENSATION:

a. Piscataway agrees to make a payment of $52,500.00 to North Plainfield within thirty (30) days after the North Plainfield, Piscataway, and Plainfield Boards approve the Settlement Agreement.

b. Plainfield agrees to make a payment of $22,500.00 to North Plainfield within thirty (30) days after the North Plainfield, Piscataway, and Plainfield Boards approve the Settlement Agreement.

3. RELEASES: North Plainfield hereby releases, waives and forever discharges any and all past, present or future claims that relate to the education and residency of the Students that predates this Agreement that it may have against Piscataway and Plainfield. North Plainfield acknowledges that it had the opportunity to consult with legal counsel and representatives of choice regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; and that it represents that it has read this Agreement and the General Release and Waiver and fully understands them and agrees to be bound by them. North Plainfield also acknowledges that it 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.

Piscataway hereby releases, waives and forever discharges any and all past, present or future claims that relate to the education and residency of the Students that predates this Agreement that it may have against North Plainfield and Plainfield. Piscataway acknowledges that it had the opportunity to consult with legal counsel and representatives of choice regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; and that it represents that it has read this Agreement and the General Release and Waiver and fully understands them and agrees to be bound by them. Piscataway also acknowledges that it 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.

Plainfield hereby releases, waives and forever discharges any and all past, present or future claims that relate to the education and residency of the Students that predates this Agreement that it may have against Piscataway and North Plainfield. Plainfield acknowledges that it had the opportunity to consult with legal counsel and representatives of choice regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; and that it represents that it has read this Agreement and the General Release and Waiver and fully understands them and agrees to be bound by them. Plainfield also acknowledges that it 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.

4. WAIVER: North Plainfield agrees to accept the compensation referred to in paragraph 2 in full and final settlement and waiver of claims that related to the education and residency of the Students. Such compensation shall be in full satisfaction and settlement and waiver which North Plainfield now has or may have had against Piscataway and Plainfield related to the education and residency of the Students, and in recognition of and consideration for North Plainfield's promise to provide Piscataway and Plainfield and its agents, employees, and representatives with a Release of claims against them related to the education and residency of the Students.

5. CONFIDENTIALITY: The parties agree that the terms and conditions of this Agreement shall remain confidential to the maximum extent permitted by law.

6. ENTIRE AGREEMENT: This Agreement and General Release and Waiver contain the entire Agreement and understanding between the Parties and constitute a full and final agreement in any and all issues relating to this matter, except that the Parties reserve their right to enforce this Agreement, if necessary.

7. CHOICE OF LAW: This Agreement shall be governed by the laws of the State of New Jersey.

8. 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.

9. 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.

10. APPROVAL: The terms and conditions of this Agreement are subject to ratification and approval by the North Plainfield, Piscataway, and Plainfield Boards. If any of the Boards does not approve the Agreement, any copies of the Agreement will be held by the attorney for that Board and will have no effect and will not be binding to either party.

11. 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.

12. ADMISSION OF LIABILITY: The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have entered into this Agreement solely to compromise disputed claims.

13. OPPORTUNITY TO CONSULT WITH COUNSEL: The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this Agreement freely and voluntarily and without coercion or duress. The Parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

14. COOPERATION: Each Party agrees to cooperate and assist should any of the facts or circumstances that lead to this Agreement become the subject matter of a litigation wherein any of the Boards is named as a party. Failure to cooperate will be defined to be a breach of this Agreement.

15. BREACH: If any 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 but not limited to, reasonable attorneys' fees.

16. RATIFICATION: The undersigned representatives of the Boards hereby acknowledge that they have been duly authorized by their respective Board to sign this Agreement and bind that Board to its terms.

17. GOOD FAITH: The Parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement and General Release and Waiver. The Parties mutually agree to refrain from retaliation, in any manner, against any other party (or, their families, members, agents and employees). The Parties further mutually agree not to make any derogatory comments, statements or misrepresentations about any other Party (or, their families, members, agents and employees).

18. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement effective on this 17 day of August, 2022.

On Behalf of the North Plainfield Board:

By: Mark A. Kunzyzynski
Board President
North Plainfield Board of Education

By:
School Business Administrator/Board Secretary
North Plainfield Board of Education

Dated: August 20, 2022

On Behalf of the Plainfield Board:

By: _____
Board President
Plainfield Board of Education

By: _____
School Business Admin./Board Secretary
Plainfield Board of Education

Dated: 2022

On Behalf of the Piscataway Board:

By:
Board President
Piscataway Board of Education

By:
School Business Administrator/Board Secretary
Piscataway Board of Education

Dated: , 2022

16. RATIFICATION: The undersigned representatives of the Boards hereby acknowledge that they have been duly authorized by their respective Board to sign this Agreement and bind that Board to its terms.

17. GOOD FAITH: The Parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement and General Release and Waiver. The Parties mutually agree to refrain from retaliation, in any manner, against any other party (or, their families, members, agents and employees). The Parties further mutually agree not to make any derogatory comments, statements or misrepresentations about any other Party (or, their families, members, agents and employees).

18. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement effective on this ___ day of _____, 2022.

On Behalf of the North Plainfield Board:

By: _____
Board President
North Plainfield Board of Education

By: _____
School Business Administrator/Board Secretary
North Plainfield Board of Education

Dated: _____, 2022

On Behalf of the Plainfield Board:

By: Josley Ciliro
Board President
Plainfield Board of Education

By: Rashon K. Hasan
School Business Admin./Board Secretary
Plainfield Board of Education

Dated: September 26, 2022

On Behalf of the Piscataway Board:

By: D. Tfc
Board President
Piscataway Board of Education

By: _____
School Business Administrator/Board Secretary
Piscataway Board of Education

Dated: 10/26, 2022

GENERAL RELEASE AND WAIVER

In consideration for the promises and undertakings described in the Settlement Agreement dated _____, 2022, North Plainfield hereby releases, waives and discharges the Piscataway Board of Education and the Plainfield Board of Education, and their present and former board members, officers, employees and representatives, and their estates and/or heirs thereof from claims related to the education and residency of the Students which North Plainfield may have against any of them. This releases and waives all claims, known and unknown, resulting from anything which has happened up to now related to the education and residency of the Students, including claims for attorney's fees. Without limiting the scope of the foregoing provision in any way, North Plainfield specifically releases all claims related to the education and residency of the Students which were or could have been asserted.

North Plainfield also promises not to sue and waives all claims against the Piscataway Board of Education and the Plainfield Board of Education covered by the Settlement Agreement and this General Release and Waiver. If one Party breaches this promise by suing another Party for any such claims, the breaching Party will pay all costs and expenses the other Party incurs defending against the suit, including reasonable attorney's fees and costs. Notwithstanding the foregoing, the Parties reserve their right to enforce the terms of this Settlement Agreement and General Release anc Waiver.

North Plainfield acknowledges that it was advised to consult with attorneys regarding this General Release and Waiver; and that North Plainfield has read and fully understands it and agrees to be bound by it. North Plainfield also acknowledges that it has been given a reasonable period of time within which to consider this settlement and the terms of this General Release and Waiver prior to executing it.

ACKNOWLEDGMENT

NORTH PLAINFIELD HAS CAREFULLY READ AND FULLY UNDERSTANDS THE TERMS AND CONDITIONS OF THIS RELEASE AND WAIVER. NORTH PLAINFIELD ACKNOWLEDGES THAT IT HAD THE OPPORTUNITY TO REVIEW THIS RELEASE AND WAIVER WITH ANYONE OF ITS CHOOSING, AND TO DISCUSS WITH SUCH PERSONS THE TERMS AND CONDITIONS OF THIS RELEASE AND WAIVER AND ITS RIGHTS UPON EXECUTION. NORTH PLAINFIELD AGREES AND ACKNOWLEDGES THAT NO REPRESENTATIONS CONCERNING THE TERMS OR EFFECT OF THIS RELEASE WERE MADE BY THE PISCATAWAY BOARD OF EDUCATION OR ITS ATTORNEYS, OR THE PLAINFIELD BOARD OF EDUCATION OR ITS ATTORNEYS, OTHER THAN AS SET FORTH IN THE DOCUMENT AND THAT NORTH PLAINFIELD HAS VOLUNTARILY SIGNED THIS RELEASE AND WAIVER AS A FREE ACT WITH FULL KNOWLEDGE OF ITS TERMS AND CONDITIONS, WHICH ARE FINAL AND BINDING.

Mark A. Kwiatkowski

BOARD PRESIDENT
NORTH PLAINFIELD BOARD OF EDUCATION

DATED: 8/25/22, 2022

SCHOOL BUSINESS ADMINISTRATOR/BOARD SECRETARY
NORTH PLAINFIELD BOARD OF EDUCATION

DATED: 8/30, 2022

11/1/22 rec'd ae

PLAINFIELD BOARD OF EDUCATION
PLAINFIELD, NEW JERSEY

CERTIFIED RESOLUTION FROM THE SEPTEMBER 20, 2022 WORK & STUDY/BUSINESS MEETINGS

REPORT OF THE FINANCE COMMITTEE

K7. **Legal Settlement**

The following is recommended for adoption moved by Ms. Pile and seconded by Mrs. Anderson-Person:

RESOLUTION

RESOLVED, that the Plainfield Board of Education approves the payment of $22,500.00 to North Plainfield BOE within thirty (30) days after the North Plainfield, Piscataway, and Plainfield Boards approve the settlement agreement.

The resolution passed on a roll-call vote with Ms. Castro, Mrs. Wyatt, Mrs. Anderson-Person, Mr. Andrews, Mrs. Hembree, Ms. Pile, Mrs. Virgo, and Ms. Workman in favor. None were opposed.

THE FOREGOING RESOLUTION IS A CORRECT COPY OF THE MINUTES OF THE PLAINFIELD BOARD OF EDUCATION WORK & STUDY/BUSINESS MEETING CONDUCTED ON SEPTEMBER 20, 2022.

Rashon K. Hasan

Rashon K. Hasan, Board Secretary

RKH/bsc

11/1/22 rec'd

NORTH PLAINFIELD BOARD OF EDUCATION

33 Mountain Avenue
North Plainfield, NJ 07060-5315
908-769-6050
www.nplainfield.org

This is a true and certified copy of the minutes of the North Plainfield Board of Education approving the recommendation of August 17, 2022 as follows:

> Mr. Reginald McRae moved, seconded by Mr. Thomas Allen and approved by roll call (below) that BE IT RESOLVED, upon the recommendation of the Superintendent, the Board approves the settlement agreement between Piscataway Board of Education and the Plainfield Board of Education as attached. Piscataway agrees to make payment of $52,500 and Plainfield agrees to make payment in the amount of $22,500 to the North Plainfield Board of Education.

Thomas Allen – Aye
Carli Dougherty - Absent
Dr. Mark Kruszczynski – Aye
Isela Lopez - Aye
Reginald McRae – Aye
Amnet Ramos-Hernandez - Aye
Willie Vick Jr. – Aye

I, Pamela Graziano, Secretary of the Board of Education of the Borough of North Plainfield, in the County of Somerset, state of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on August 17, 2022 has been compared by me with the original minutes as officially recorded in my office in the minute book of said North Plainfield Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same related to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 27th day of September 2022.

Pamela Graziano, Board Secretary

PISCATAWAY
TOWNSHIP SCHOOLS

1515 Stelton Road
Piscataway, NJ 08854
732 572-2289
Fax 732 572-7889
www.piscatawayschools.org

Dr. Frank Ranelli
Superintendent of Schools

David Oliveira
Business Administrator/Board Secretary

BE IT RESOLVED that a settlement in the matter of *Piscataway Township Board of Education v. North Plainfield Board of Education, et als*, OAL Dkt. No. EDU-11839-2019, is hereby approved, subject to execution of a written settlement agreement in a form acceptable to the Board's General Counsel.

Moved by: Mrs. Lane Seconded by: Ms. Cherry

Roll Call Vote: Yeas 5 Nays 0 Abstain 0

****

I certify that the foregoing is a true and correct abstract of a resolution passed at a meeting of the Piscataway Township Board of Education held on August 11, 2022 and in that respect is a true and correct copy of its minutes.

School Business Administrator/
Board Secretary

339-22R
OAL Dkt. No. EDU 07402-21
Agency Dkt. No. 99-6/21

New Jersey Commissioner of Education

Final Decision

Michele Fekete and Ben Kenion,

Petitioners,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

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

Upon review, the Commissioner notes that the Administrative Law Judge (ALJ) indicated in the Initial Decision that the parties had advised the ALJ that a Board resolution approving the settlement was not required in this case. However, pursuant to *N.J.A.C.* 6A:3-1.13(d), when a district board of education is a party to a contested matter, a proposed settlement agreement must either include a copy of a Board resolution approving the settlement or the signature of the Board's attorney, who is the Board's duly authorized representative in litigation. Without either a Board resolution or the Board attorney's signature approving the agreement, the Commissioner cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement consistent with the 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.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 15, 2022
Date of Mailing: December 19, 2022

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07402-21

AGENCY DKT. NO. 99-6/21

MICHELE FEKETE AND BEN KENION,

Petitioners,

v.

CITY OF TRENTON BOARD OF EDUCATION,

Respondent.

Stephen B. Hunter, Esq., for petitioners (Detzky, Hunter & DeFillippo, LLC, attorneys)

James Rolle, Jr., Esq., for respondent (General Counsel for the City of Trenton Board of Education, attorney)

Record Closed: October 27, 2022[1] Decided: November 9, 2022

BEFORE **MARY ANN BOGAN**, ALJ:

[1] The fully executed settlement agreement was received on September 30, 2022. However, after several attempts to retrieve the Board resolution from the parties, a telephone conference was scheduled for October 27, 2022, at which time the parties advised a Board resolution was not required.

This matter was transmitted to the Office of Administrative Law September 1, 2021, 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 the settlement, and I **FIND**:

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

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

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 9, 2022
DATE

Mary Ann Bogan
MARY ANN BOGAN, ALJ

Date Received at Agency: 11/10/2022

Date Mailed to Parties: 11/10/2022

MAB/kl

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made on this 27th day of June 2022, by and between Michele Fekete and Benjamin Kenion ("Petitioners") and the Trenton Board of Education ("District and/or "Board") (hereinafter collectively referred to as the "Parties").

RECITALS

WHEREAS, Petitioners served as tenured Occupational Therapists for the Board until a reduction in force in June terminated their employment on June 30, 2016 ("Separation Date"); and

WHEREAS, in the matter of *Michele Fekete and Ben Kenion v. Board of Education of the City of Trenton, Mercer County*, Agency Docket Number 99-6/21, Petitioners sought to enforce their rights to be recalled to employment by the Board; and

WHEREAS, the Board filed a Motion to Dismiss Petitioners' claim; and

WHEREAS, the above-referenced Motion to Dismiss is pending before Judge Bogan in the Office of Administrative Law; and

WHEREAS, now, the Board desires to hire District employees in the role of Occupational Therapist, effective July 1, 2022 ("Recall Date"), and

WHEREAS, Petitioners are the most senior Occupational Therapist with recall rights to the newly opened positions; and

NOW, THEREFORE, in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, the Parties agree as follows:

1. Petitioners, upon execution of this agreement, agree to voluntarily dismiss, with prejudice, the above referenced Petition filed against the Board.

STATE OF NEW JERSEY
2022 SEP 20 P 2:16

2. In consideration of the dismissal, Petitioners shall be recalled to the position of Occupational Therapist effective July 1, 2022. Petitioners will be recalled with full recognition of their tenure and seniority rights.

3. Petitioners will return to the negotiated TEA salary guide at the next step to which they were entitled at the time of separation. Petitioner Fekete was on Step 14 in her last year of service, and thus, she will return on Step 15. Petitioner Kenion was on Step 15 in his last year of service, and thus, he will return on Step 15, as Step 15 is the highest step on the negotiated guide. Petitioners will be given the appropriate degree and credit recognition.

4. Petitioners are not entitled to and will not receive any compensation in recognition of the period between the Separation Date and Recall Date.

5. Petitioners will be recalled with full restoration of their leave time at the time of their separation, less any leave time for which Petitioners were compensated after separation.

6. In further consideration, of the foregoing, Petitioners agree to and hereby release and gives up any and all claims and rights which they may have against the District. This releases all claims, including those of which they are not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened from the beginning of time up to now. Petitioners, specifically releases any and all claims, direct and indirect, and rights for any injury and/or damages which they may have against the District, including but not limited to, contract, torts, negligence discrimination, harassment, hostile environment, retaliation, civil rights violations, wrongful discharge, physical injury, emotional distress, and any and all claims arising under federal, state, or local laws, or ordinance. Petitioners specifically release all claims arising under the Constitution of the United States of America, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Civil Rights Acts of 1866 and 1991, the

Americans with Disabilities Act, the Employee Retirement Income Security Act, the Equal Pay Act, the Family and Medical Leave Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Worker Adjustment and Retraining Notification Act, the Ledbetter Fair Pay Act, the Fair Credit Reporting Act, the Employee Polygraph Protection Act, the Constitution of the State of New Jersey, the New Jersey Law Against Discrimination, the New Jersey Public Employer-Employee Relations Act, the Conscientious Employee Protection Act, the New Jersey Family Leave Act, the New Jersey Wage and Hour Law, the New Jersey Domestic Partnership Act, the New Jersey Equal Pay Act, the New Jersey Occupational Safety and Health Law, and the New Jersey Labor and Workman's Compensation laws.

7. To comply with the Older Workers Benefit Protection Act, this Release advises Petitioners of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Release. Accordingly, by executing this Agreement, Petitioners acknowledge that they: (i) fully understand the terms and conditions of this Release; (ii) have consulted with an attorney to review the Release; (iii) specifically waive their right to pursue any current claims they may have under the Act; (iv) have been given 21 days within which to consider this Release; and (v) have 7 days from the date of the execution of this Release to revoke it. Petitioners understand that they may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7-day period.

8. Petitioners warrant they have not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the District. Further, Petitioners agree that they will not commence any legal proceedings against the District arising from or relating to anything that has happened through the date of this Agreement. In the

event of a violation of this paragraph, Petitioners agree that the District shall be entitled to immediate dismissal of the legal proceedings

9. This 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 Agreement. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

10. This 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.

11. This 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.

12. This Agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument. The Parties further agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

13. This Agreement is not, and may not be construed as, an admission of liability by either Party.

14. The Parties to this Agreement acknowledge and agree that they have entered into this Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party

relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Agreement.

15. Petitioners acknowledges their representation, Stephen B. Hunter, Esq., throughout this process and represents that he has fully explained the terms of this Agreement and that Petitioners are satisfied that such representation has been adequate and appropriate. Petitioners further acknowledge that they understand the terms of this agreement and willfully, knowingly, and voluntarily enters into this agreement, free of coercion or duress.

16. The terms of this Agreement are the product of good faith negotiations between the Parties and their respective counsel, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

BY SIGNING THIS AGREEMENT, THE PARTIES ACKNOWLEDGE:

A. THEY HAVE READ IT;

B. THEY UNDERSTAND IT AND KNOW THEY ARE GIVING UP IMPORTANT RIGHTS;

C. THEY AGREE WITH EVERYTHING IN IT;

D. THEIR RESPECTIVE ATTORNEYS NEGOTIATED IT WITH THEIR KNOWLEDGE AND CONSENT;

E. THEY HAVE CONSULTED WITH THEIR RESPECTIVE ATTORNEYS ABOUT IT; AND

F. THEY SIGN IT KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Agreement.

Michele Fekete Date

KENION.BENJAMIN.R USSELL.1246291213 Digitally signed by KENION.BENJAMIN.RUSSELL.1246291213 Date: 2022.06.23 18:32:29 -04'00'

Benjamin Kenion Date

Trenton School District Date

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Agreement.

Michele Fekete — 6/23/22

Michele Fekete — Date

Benjamin Kenion — Date

Trenton School District — Date

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Agreement.

Michele Fekete — Date

Benjamin Kenion — Date

Trenton School District — 06-28-2022 Date