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SCHOOL LAW DECISIONS

January 1, 1967, to December 31, 1967

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DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION, SUPERIOR COURT (APPELLATE DIVISION), AND SUPREME COURT ON CASES PREVIOUSLY REPORTED

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I

UNREASONABLE DELAY IN CHALLENGING SUPERINTENDENT'S APPOINTMENT MAY CONSTITUTE LACHES

BARBARA WITCHEL,

Petitioner,

v.

PETER CANNICI AND BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,

Respondents.

COMMISSIONER OF EDUCATION

DECISION ON MOTION FOR SUMMARY JUDGMENT

For the Petitioner, H. Ronald Levine, Esq.

For the Respondent Peter Cannici, Nicholas Martini, Esq.

For the Respondent Board of Education, Louis Marton, Jr., Esq.

Petitioner challenges the validity of the appointment of respondent Peter Cannici as Superintendent of the Passaic Schools, charging that the actions taken to appoint the Superintendent were in bad faith and contrary to law. Respondents have entered a general denial of petitioner's allegations.

Motions for summary judgment have been filed by both respondents on the ground that the petition fails to set forth a justifiable cause of action. Argument on respondent Board's motion was heard by the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education, Trenton, on October 10, 1966. Argument on respondent Cannici's motion was similarly heard on November 18, 1966. Briefs were filed by counsel.

In her pleadings petitioner alleged the following facts. On May 20, 1963, Dr. Clifford Jones resigned as Superintendent of Schools in Passaic and his successor met with an untimely death after serving only a six-month term. Thereafter, at a meeting of the Board on October 13, 1964, a resolution was introduced and passed by a vote of 5 to 3, appointing respondent Cannici as Superintendent for a term of two years. A subsequent resolution on December 14, 1964, amended the term of the contract so that it would terminate in less than two years and thereby avoid the automatic accrual of tenure. (Petitioner's affidavit October 21, 1966) On December 13, 1965, ten months prior to the expiration of the contract, respondents entered into a new two-year contract with a substantial salary increase.

Petitioner contends that both contracts between respondents were entered into illegally and they should, therefore, be declared null and void. She

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grounds her challenge on allegations that the two immediate predecessors of respondent Cannici had been selected and appointed in substantial compliance with a particular set of criteria formulated for the position of superintendent; that at no time was the policy establishing these criteria repealed and the Board had publicly stated it would adhere to the standards in the selection of a superintendent; that persons who did not meet the criteria either failed to apply or were not considered; that respondent Cannici met only two of the four criteria but was nevertheless appointed Superintendent; and that, therefore, the appointment was made in bad faith, was unfair to other candidates, and violated the Board's fiduciary responsibility. Petitioner challenges the validity of the second contract on the grounds that it was an appointment to a position which was not due to become vacant until some ten months later at a time beyond the official life of the Board purporting to take this action. She implies, further, that a change in the organization of the school district from an appointed to an elected board of education precipitated the Board's action.

Respondents enter a general denial of any illegal intent or action in the appointment of the incumbent Superintendent. They argue, in support of their motions for summary judgment, that the petition fails to allege any facts that would support a conclusion that the appointment of the Superintendent and the subsequent contracts constitute acts of bad faith or were improper or unlawful exercises of the Board's discretionary authority. Both respondents, moreover, contend that petitioner is estopped by her laches from bringing this action.

The petition herein was received by the Commissioner of Education on July 18, 1966, approximately 21 months after respondent Cannici's original appointment in October 1964, 19 months after the "corrective" appointment in December 1964, and 7 months after a new contract was executed in December 1965. Respondents point out that petitioner could have brought her petition before the Commissioner promptly after any of these actions, and that to allow her now to challenge an action taken by a board of education as long as 21 months ago is contrary to the public interest.

The Commissioner agrees. Strong considerations of public policy dictate that the continuity and stability of the superintendency of a public school system shall be preserved wherever possible. It is this consideration, the Commissioner held in *Cummings* v. *Board of Education of Pompton Lakes*, decided August 29, 1966, that explains the authority given to a board of education to appoint a superintendent for a term of up to 5 years, while it may appoint principals and teachers for only one year at a time. *Cf. R. S.* 18:7–70 and 18:13–6. The superintendent must have time to develop plans and programs for the welfare of the pupils and the schools, and neither he nor the board of education could function effectively if at any time, however late, the appointment of the superintendent could be upset on alleged procedural improprieties. "It is important that public duties be carried on without interruption or with as little interruption as possible." *Borough of Park Ridge* v. *Salimone*, 36 *N. J. Super.* 485, 495 (*App. Div.* 1955), affirmed 21 *N. J.* 28 (1956) There must come a time when both board and superintendent can be secure from the sort of attack that is presented herein.

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The Commissioner has consistently held that where the doctrine of laches as an equitable defense has been raised, he will consider all the circumstances to determine whether there has been unreasonable and inexcusable delay which would bar action. The Commissioner

> "* * * has established no specific period of time after which an appeal is barred. Thus in *Gleason* v. *Bayonne Board of Education*, 1938 *S. L. D.* 138, nine months' delay by a dismissed mechanic was laches; *Carpenter* v. *Hackensack Board of Education*, 1938 *S. L. D.* 593, six months' delay by dismissed teacher held laches; *Aeschbach* v. *Secaucus Board of Education*, 1938 *S. L. D.* 598, fourteen months between teacher's dismissal and appeal in this case did not constitute laches; *Wall* v. *Jersey City Board of Education*, 1938 *S. L. D.* 614 at 618, eleven months' delay of protest by teacher held laches; *Gilling* v. *Hillside Board of Education*, 1950-51 *S. L. D.* 61, nine months' delay by re-assigned janitor was laches. That the period of time constituting laches varies with the nature of the issue is also apparent. Thus, in *Jackson* v. *Ocean Township Board of Education*, 1939-49 *S. L. D.* 206, a delay of two months in protesting the award of a transportation contract was unreasonable; while in *Duncan, et al.—In re Annual School Election, East Rutherford*, 1939-49 *S. L. D.* 89, a delay of only three weeks constituted laches in contesting the results of an election." *Harenberg* v. *Board of Education of Newark, et al.*, 1960-61 *S. L. D.* 142, 144

In the instant matter the Commissioner finds that petitioner, as citizen and taxpayer and as a member of the Board of Education, had ample opportunity to challenge the alleged improprieties in respondent Board's actions "with reasonable promptitude." *Marjon* v. *Altman*, 120 *N. J. L.* 16, 18 (*Sup. Ct.* 1938) Her unexplained failure to do so, where the public interest is so deeply involved, constitutes such palpable delay that the doctrine of laches must be applied here. Having so found, there is no necessity to consider the other contentions raised by respondents in their motion for summary judgment. The petition of appeal is accordingly dismissed.

ACTING COMMISSIONER OF EDUCATION.

January 16, 1967.

Affirmed by State Board of Education without written opinion, January 3, 1968.

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RIGHT TO SALARY INCREASE NOT ESTABLISHED BY PROVISION OF FUNDS IN BUDGET

HAROLD A. VANDENBREE,

Petitioner,

v.

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF WANAQUE, PASSAIC COUNTY,

Respondent.

COMMISSIONER OF EDUCATION

DECISION

For the Petitioner, Slingland, Bernstein & Van Hartogh (George W. Slingland, Esq., of Counsel)

For the Respondent, Martin Verp, Esq.

Petitioner in this case asks the Commissioner to set aside a determination by respondent Board of Education fixing his salary for 1965-66, at the same figure as his salary in 1964-65, on the ground that such action violates his contractual rights. Respondent asserts that no such contractual rights exist, and that it acted in the proper exercise of its power.

This matter is submitted on the admitted facts set forth in the pleadings and on briefs of counsel.

Petitioner, having been employed by respondent as Superintendent of Schools since July 1, 1954, has acquired tenure in that position. During the 1964-65 school year he was paid at the annual rate of $13,800.

The dispute herein rises out of a series of actions beginning December 22, 1964. At its meeting that night, respondent Board, in the preparation of the budget for the ensuing school year, allocated $500 more in the Superintendent's salary account than the $13,800 he was currently receiving. On January 26, 1965, prior to the submission of the budget to the electorate in early February, the President and Secretary of the Board executed with petitioner what purported to be a contract fixing his salary at $14,300 for the 1965-66 school year. There is no record in the minutes that the Board ever acted to authorize or ratify such an agreement. However, petitioner was compensated at the $14,300 annual rate for the months of July, August, and September 1965. At its September 28, 1965, meeting, after a check of the minutes failed to disclose any specific action authorizing the $500 increase other than the budget discussions of the previous December, the Board adopted a resolution by a 5-2 vote establishing petitioner's salary at $13,800, the same amount he had been paid during the previous year.

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Petitioner's claims to the $14,300 salary rests first upon his contention that the purported contract executed on January 26, 1965, is complete, regular, and valid and gives him a vested right to the salary stated therein. The execution of this contract, says petitioner, was the result of respondent's intention to increase his salary, and such intention was made clear when respondent acted on December 22, 1964, to allocate $14,300 in the superintendent's salary account in the 1965-66 school budget. Petitioner contends further that the President and the Secretary of the Board acted with sufficient authority and power in executing the contract, that the action was consistent with respondent's policy and previous procedure for increasing the Superintendent's salary, and that even though authorization of the contract was not spelled out, the payments made to petitioner for the months of July, August, and September 1965, constituted a ratification upon which petitioner could rely. Therefore, petitioner asserts, respondent is estopped from claiming that it was never its intention to raise his salary and from fixing his compensation at $13,800 because such action would constitute a reduction of salary in violation of his tenure rights under *R. S.* 18:13–16.

Respondent contends that there was no valid action of the Board of Education fixing petitioner's salary at a new rate of $14,300, that there was no authorization for the execution of the purported contract, and that the salary payments in excess of his former rate during the first three months of the 1965-66 school year merely constituted an erroneous and unwarranted enrichment of petitioner. In adopting its resolution correcting this situation and establishing petitioner's salary at $13,800, respondent asserts it acted within the scope of its discretionary powers.

The statute relevant to this issue is *R. S.* 18:7–70, the pertinent portion of which reads:

> "A board may, under rules and regulations prescribed by the State Board, appoint a superintendent of schools *by a majority vote of all of the members of the board* * * * and fix his salary * * *." (Emphasis added.)

It is clear from the facts submitted that at no time was petitioner's salary fixed at $14,300 for 1965-66 by a majority vote of all the members of the Board. It was entirely proper and normal procedure for the Board of Education in office in December 1964, to estimate an amount for the Superintendent's salary in the 1965-66 school year in the preparation of the budget. But such an amount is no more than an estimate for budget purposes. In no sense is it a final determination or authorization from which vested rights flow. Once the funds called for by the total budget are approved by the electorate, the new board of education acts to expend specific amounts for specific purposes by appropriate resolutions. The right to fix petitioner's salary for the ensuing school year rested with the 1965-66 Board and not with its immediate predecessor which prepared the budget. *Skladzien* v. *Bayonne Board of Education*, 12 *N. J. Misc.* 603 (*Sup. Ct.* 1934), affirmed 115 *N. J. L.* 203 (E. & A. 1935); *Belli* v. *Clifton Board of Education*, 1963 *S. L. D.* 95, 97; *Evans* v. *Gloucester City Board of Education*, 13 *N. J. Misc.* 506 (*Sup. Ct.* 1935); *Cummings* v. *Pompton Lakes Board of Education et al.*, decided by the Commissioner of Education August 29, 1966 The mere allocation of an amount to a salary account in a budget by a board which

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prepares the budget cannot bind the next board and remove its power to fix salaries for the ensuing school year. *Cf. R. S.* 18:13–6.

As to the purported contract executed by the President and the Secretary of the Board with petitioner, the Commissioner finds that even if the 1964-65 Board could have made a contract with petitioner, there is no evidence of the requisite action as set forth in *R. S.* 18:7–70, *supra,* to authorize the execution of the contract. Action of the President and the Secretary of the Board in this case cannot be held to satisfy the statutory requirement of a majority vote of the whole number of members of the Board. Absent such an authorization the contract must be held to be void and of no effect. Having so found, it follows that compensation of petitioner at an increased rate during July, August, and September 1965, could not and did not constitute ratification of an alleged agreement. No rights can flow from an illegal contract. Petitioner not having acquired any rights to increased compensation, the correction of error in his rate of pay cannot be held to be a reduction of salary.

For the reasons stated the Commissioner finds and determines that petitioner has no valid claim by virtue of either tenure or contract to a salary of $14,300 for 1965-66, and that respondent's resolution fixing petitioner's salary at $13,800 was a proper exercise of its discretionary authority.

The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

January 19, 1967.

Affirmed by State Board of Education without written opinion, January 3, 1968.

III

LOCAL SCHOOL DISTRICT MAY NOT PAY TUITION FOR UNAPPROVED PRIVATE SCHOOL PLACEMENT

IN THE MATTER OF "G,"

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,

Respondent.

For the Petitioner, Jay J. Toplitt, Esq.

For the Respondent, Spingarn & Sachs (Samuel Spingarn, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner is the mother of a twelve-year-old son, hereinafter referred to as "G," who has need of a special educational program which petitioner alleges respondent has failed to provide. Respondent answers that it has always been and is willing and ready to provide for G such educational facilities as it is authorized by law to do.

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A hearing in this matter was held on November 17, 1966, at the office of the County Superintendent of Schools, Jersey City, by a hearing examiner appointed by the Commissioner for this purpose. The report of the hearing examiner is as follows:

G was first admitted to respondent's schools in September 1961. He demonstrated evidences of need for special educational services, and efforts were made to place him in special public school classes not available in respondent's schools. Offers of placement in the Neuropsychiatric Institute and the Arthur Brisbane School were rejected by petitioner in January 1962. G continued in respondent's schools throughout the 1961-62 school year, during which time he received individual and group speech therapy provided by the school district. In June 1962, petitioner voluntarily withdrew her son from respondent's schools, and placed him in Green Chimneys School, a residential school in New York State. She asserts that placement in a residential school was advised by the physicians who were caring for G. During the following school year petitioner was notified that respondent would be able to place G in a public school class in Bergen County, but this offer was also rejected.

Subsequent to the filing of the petition herein on February 9, 1966, and by agreement of counsel, respondent made application for approval of G's placement in Green Chimneys School pursuant to the statutory requirement set forth in *R. S.* 18:14–71.23 as follows:

> "The facilities and programs of education required under this act shall be approved by the Commissioner of Education and shall be provided by one or more of the following:
>
> * * * * * * *
>
> "(g) sending children capable of benefiting from a day school instructional program to privately operated nonprofit day classes in New Jersey or an adjoining State whose services are nonsectarian whenever in the judgment of the board of education with the consent of the commissioner it is impractical to provide services pursuant to subsections a, b, c, d, e, or f * * *."

The Commissioner's records show that on June 9, 1966, the Office of Special Education Services of the State Department of Education notified respondent that Green Chimneys School did not conform to standards established by the State Board of Education for the approval of a nonpublic school for special education purposes.

Petitioner contends that placement of her son in a residential school is essential to his proper care and education and such procedure was advised by physicians and others professionally acquainted with her son's problems and needs. She testified that she had rejected the offers of placement in two other residential institutions and in a public school class because this would involve "uprooting" her son from his present placement.

Respondent, through the testimony of its school social worker, established that it has endeavored through the means legally available to it to provide for G's educational needs, either in its own facilities, in other public school facilities, in institutional placement, or by application for approval of private schooling. Respondent also asserts that if G is enrolled in its schools it will

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re-evaluate the child's handicaps and educational needs, and, if it cannot provide facilities in its own system, it will arrange for an appropriate program elsewhere as provided by law.

It is clearly the desire of petitioner to have her son remain in Green Chimneys School (Tr. 21, 25, 29), with such costs to be paid by respondent as it may lawfully pay. The responsibility of respondent to provide a suitable educational program for G is set forth in *R. S.* 18:14–71.22, as follows:

> "It shall be the duty of each board of education to provide suitable facilities and programs of education for all the children who are classified as handicapped under any section of this act. The absence or unavailability of a special class facility in any district shall not be construed as relieving a board of education of the responsibility for providing education for any child who qualifies under this act."

The testimony in this case establishes that respondent district has been unable to fulfill its duty with respect to G because petitioner voluntarily withdrew him from respondent's schools and before and after such withdrawal rejected proposals to place him in public school facilities. Then, having applied for the Commissioner's approval of G's placement in Green Chimneys School, respondent learned that this school was not approved for such a placement. Lacking approval, respondent has no authority under the relevant statute, *R. S.* 18:14–71.23, *supra*, to pay any part of the cost of G's education at Green Chimneys School.

In a recent decision which raised a similar issue, *In the Matter of "R"* v. *Board of Education of West Orange*, decided December 15, 1966, the Commissioner said:

> "* * * In their natural anxiety over their daughter's progress they (the parents) chose to seek special schooling elsewhere with respect to their child's education. Parents have a right to elect to have their children educated in schools other than those provided at public expense but, in so choosing, they cannot, by unilateral action such as that herein, require the local school district to assume the costs of that choice."

Since, in the instant matter, petitioner voluntarily withdrew G from respondent's schools, and in the light of respondent's readiness to provide a suitable program for him when and if he is returned to its schools, the Commissioner's determination *In the Matter of "R," supra,* is applicable here.

* * * * * * *

The Commissioner has reviewed and considered the report of the hearing examiner set forth *supra.* He finds and determines that petitioner voluntarily withdrew G from respondent's schools and placed him in Green Chimneys School, a nonpublic school in New York State; that such placement was not and is not an approved placement in accordance with the applicable statutes and the State Board of Education rules; and that respondent is prepared to discharge its lawful obligations with respect to the provisions of a suitable educational program for G if he is once again enrolled in its schools.

The petition is therefore dismissed.

ACTING COMMISSIONER OF EDUCATION.

January 19, 1967.

Pending before State Board of Education.

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IV

EMPLOYMENT CONTRACT MAY BE TERMINATED IN ACCORDANCE WITH ITS TERMS

SUE S. BRANIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY, AND PAUL F. LEFEVER, SUPERINTENDENT,

Respondents.

For the Petitioner, Milton Diamond, Esq.

For the Respondent, Pillsbury, Carton, Barnacle & Russell (Lawrence A. Carton, Jr., Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO STRIKE

Petitioner alleges that she has been dismissed from her position as a teacher by the respondents without good cause before the normal expiration of her 1965-66 contract. Respondents deny that she was dismissed, and assert that her contract was lawfully terminated in accordance with the terms thereof. Respondents move to strike the petition on the ground that it fails to state a cause of action.

Oral argument on respondent's motion was heard on October 27, 1966, at the State Department of Education, Trenton, by a hearing examiner appointed for that purpose by the Commissioner of Education. The report of the hearing examiner is as follows:

The petition herein alleges that petitioner was employed in respondents' schools for most of the 1964-65 school year, and was re-employed under contract for the 1965-66 school year. On January 10, 1966, when she returned to her work several days late following the Christmas recess, she claims that she was upbraided by respondent Superintendent, who, she says, proposed that she resign immediately to avoid being dismissed. When she subsequently said that she would not resign, the Superintendent is alleged to have told her that she would be given 60 days' notice of termination of her contract. Thereafter on January 25, 1966, petitioner was given 60 days' written notice of the Board's intention to terminate her contract. It is this termination which petitioner challenges, contending that the action constitutes dismissal, and that under the statutes good cause therefor must be shown.

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Respondents' motion to strike the petition is grounded upon the position that the employment contract expressly provided

> "* * * that this contract may at any time be terminated by either party giving to the other sixty days' notice in writing of intention to terminate the same * * *."

The statutes relevant to the dispute herein are *R. S.* 18:13–11, as follows:

> "When the dismissal of any teacher before the expiration of a contract entered into between the teacher and a board of education shall, upon appeal, be decided to have been without good cause, the teacher shall be entitled to compensation for the full term for which the contract was made; but it shall be optional with the board of education whether or not the teacher shall teach for the unexpired term."

and *R. S.* 18:13–11.1 as follows:

> "If the employment of any teacher is terminated on notice pursuant to a contract entered into between the teacher and the board of education, it shall be optional with the board of education whether or not the teacher shall teach during the period between the time of the giving of the notice and the date of termination of employment fixed therein."

It is petitioner's contention that she was, in fact, "dismissed" within the meaning of *R. S.* 18:13–11 and that the "termination" referred to in *R. S.* 18:13–11.1 includes dismissal for cause. Such cause, she argues, has not been shown. Respondents agree that if petitioner had been dismissed, she would have all the rights afforded her by *R. S.* 18:13–11. However, they contend that there was, in fact, no dismissal; petitioner's contract was terminated in accordance with its terms and was, therefore, a "termination" and nothing more.

The Commissioner has previously held that a teacher under contract may not be summarily dismissed without notice and without good cause. In *Gager* v. *Board of Education of Lower Camden County Regional High School District No. 1*, 1964 *S. L. D.* 81, the Commissioner found that the Board of Education, dissatisfied with petitioner's work, attempted to dismiss him summarily. The Commissioner held that the evidence did not establish good cause for such dismissal, and that petitioner was entitled to compensation for the 60-day period of notice of termination provided in his contract. In *Amorosa* v. *Board of Education of Jersey City*, 1964 *S. L. D.* 126, the Commissioner distinguished even more sharply between the rights available in *R. S.* 18:13–11 and 18:13–11.1, *supra*. As in *Gager*, *supra*, the Board of Education had attempted to "dismiss" petitioner rather than terminate a contract which provided for a 60-day notice of intention to terminate. In finding that Amorosa was entitled to compensation for 60 days following his purported dismissal, the Commissioner said, at page 128:

> "* * * In *Gager* v. *Board of Education of Lower Camden County Regional High School District*, decided May 11, 1964, for example, the Commissioner held that when a board determines that a teacher's work is unsatisfactory to the degree that it does not wish to continue his employment, it may terminate such employment only under the conditions of the contract. Such a course was open to respondent in the instant matter; it could have, *for any reason or no reason*, given petitioner 60 days' notice

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in writing of its intention to terminate his contract, and, pursuant to *R. S.* 18:13–11.1, elected not to have him teach during the period of notice. The Commissioner recognizes the possibility of circumstances constituting good cause within the contemplation of *R. S.* 18:13–11, *supra*, under which the summary dismissal of a teacher could be upheld." (Emphasis added.)

Thus "dismissal" as used in *R. S.* 18:13–11 contemplates that "good cause" must exist therefor. Termination—which is equally available to both employee and employer—may be for any reason or no reason.

The hearing examiner concludes that petitioner's contract was validly terminated in accordance with its express terms, upon 60 days' written notice of intention to terminate, and that there is no cause for action in the petition herein.

* * * * * * *

The Commissioner, having considered the report and conclusion of the hearing examiner, finds and determines that on the basis of the facts as pleaded, petitioner has been accorded all the rights available to her under the terms of her contract of employment, and that no cause for action exists. The Motion to Strike the Petition is therefore granted.

ACTING COMMISSIONER OF EDUCATION.

January 25, 1967.

V

VOLUNTARY ABANDONMENT OF POSITION MAY VOID CLAIMS TO TENURE

THOMAS J. COMMINS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,

Respondent.

For the Petitioner, Thomas J. Commins, *Pro Se.*

For the Respondent, Francis C. Foley, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner seeks reinstatement in his position as a teacher in the Woodbridge school system. He contends that his employment was terminated and his tenure rights improperly voided by respondent at a time when he was unable to protect himself. Respondent denies that petitioner was deprived of any rights by any action taken by it and says that petitioner left the school

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system voluntarily. Respondent also asserts that petitioner is estopped from bringing this appeal because of laches.

The facts of the matter were made known at a hearing before the Assistant Commissioner in charge of Controversies and Disputes on January 5, 1967, at the Middlesex County Court House, New Brunswick.

Petitioner began his employment in respondent's schools in September 1957 and taught fourth and fifth grades there until February 1963 when he was hospitalized. He left the hospital and resumed his teaching duties on May 1, 1963. A few weeks thereafter, about June 13, 1963, his class was visited and observed by the elementary supervisor. According to petitioner, the supervisor criticized his classroom control and asked for his resignation. Petitioner also says that the principal produced another teacher to take over his class and, not knowing what else to do, he left. He attempted to reach the Superintendent by telephone but was unsuccessful and made no further effort.

The elementary supervisor testified that he observed petitioner from 11 o'clock until the noon dismissal, after which he discussed with petitioner some of his observations and offered suggestions of ways in which petitioner could strengthen his classroom procedures. According to the supervisor, petitioner then offered to resign, saying he would prefer to leave if his teaching performance was not acceptable. The supervisor testified further that he advised petitioner that a resignation should be put in writing, that the principal prepared a written resignation form, but petitioner declined to sign it. All agreed that after this discussion petitioner left the building and did not return. Petitioner admits that he made no protest then or at any subsequent time until the filing of the instant appeal on June 1, 1966. He admits also that he made no effort to communicate with respondent or its administrative staff. Petitioner disclosed further that shortly after leaving his employment with respondent, he moved from his last known address and lived for temporary periods of time at various motels and hotels. Admittedly, he made no effort to keep respondent informed of his location with the result that respondent was thwarted in attempting to communicate with him.

The testimony reveals that after leaving his teaching post on June 13, 1963, petitioner attempted unsuccessfully to find work. In the fall of 1963 he sought help from a member of the clergy who had been his teacher, and work was obtained for him at a church-maintained hospital. Petitioner remained there until January 1, 1954, when he began service in the Elizabeth public schools as a teacher of retarded children. He was relieved of these duties in March of 1964 and found employment as a *per diem* substitute in the Newark schools for the rest of that school year. During the summer of 1964, he held two part-time jobs and in September returned to teach in Newark as a "permanent substitute." On December 1, 1964, he returned again to the hospital where he remained until December 24. After his release he attempted to find work, without success. In February 1965, after a visit to his physician, he was committed to the hospital where he has remained until the present time except for one interval from mid-August 1966, to November 1, 1966, during which period he was again unable to find employment.

Petitioner seeks to be reinstated in his teaching position in respondent's schools on the grounds that he had tenure in that employment which he would

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not have surrendered except for the duress which was imposed on him by his superiors and which he was in no mental or emotional condition to resist so soon after his hospitalization. Respondent maintains that there was no duress, that petitioner left voluntarily, that no further word was heard from him for a period of three years, that petitioner has no rights of employment with respondent, and that, even if any rights could be considered to exist, petitioner's delay of three years in asserting his claim bars his coming forward now.

The Commissioner finds no element of improper duress herein. Petitioner's hasty and impulsive action to leave his job because of criticism of his performance by his supervisors resulted primarily from the state of his mental and emotional health, which he admits was impaired, rather than from any pressure from the school administration. Petitioner admits that he was not well at the time and the inference is strong that he should probably not have returned to teaching when he did. Unfortunate though the timing of his return may have been, it is clear from the evidence that petitioner was not forced to leave, that he did abandon his job voluntarily, and that he made no real effort of any kind to establish any claim to it until the institution of this action almost three years after the event complained of.

Petitioner ascribes his delay in asserting his claim to the poor condition of his health and says that his periods of extreme depression and hospitalization prevented his seeking reinstatement. Even if this contention is considered in its most favorable light, it is still insufficient to change the result. The clear intent of the law is to protect for a reasonable period the employment and tenure rights of teachers who, because of physical or mental illness, are unable to perform their duties. The Legislature has, for example, defined this reasonable period in one context to be a maximum of two years. See *R. S.* 18:5–50.5. The pertinent excerpts of this statute read as follows:

> "In addition to the routine examination of all employees as provided in this act, the board of education may require the individual examination of an employee whenever in its judgment such employee shows evidence of deviation from normal physical or mental health.
>
> * * * * * * *
>
> "If the result of the examination indicates mental abnormality or a communicable disease, the employee shall be ineligible for further service until satisfactory proof of recovery is furnished. If an employee is under contract or tenure protection, he may be granted any sick leave compensation provided by the board of education for other employees, and shall upon satisfactory recovery be permitted to complete the term of his contract, or, if under tenure, shall be re-employed with the same tenure status as he possessed at the time his services were discontinued; provided, the absence does not exceed a period of 2 years."

Admittedly there was no proceeding under this statute. Had there been, however, petitioner would have had to provide satisfactory proof of recovery within two years.

Petitioner's attack on respondent's defense of laches rests on his contention that he was in a state of mental ill health which made it impossible for him

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to assert his rights and that such a condition existed for almost three years. Even assuming that this were true, it is reasonable and logical to further assume that the two-year limitation set forth in *R. S.* 18:5–50.5 would apply in the same manner as if the procedure set forth in that statute had been followed and petitioner declared ineligible to serve because of deviation from normal mental health.

After consideration of all the facts in this case the Commissioner finds and determines that petitioner voluntarily quit his teaching job with respondent, and that such action and his subsequent lack of protest, claim, or communication with respondent for almost three years constituted abandonment of any rights he may have had to tenure or continued employment. Accordingly, the petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

January 25, 1967.

VI

STATE COLLEGE PRESIDENTS HAVE BROAD AUTHORITY TO CONTROL STUDENT BEHAVIOR

IN THE MATTER OF ROBERT McIVOR AND BASAN NEMBIRKOW, GLASSBORO STATE COLLEGE

For the Petitioner, Charles Camp Cotton, Esq.

For the Respondent, Stephen G. Weiss, Esq., Deputy Attorney General

COMMISSIONER OF EDUCATION

DECISION

Petitioners, members of the senior class at Glassboro State College, have petitioned the Commissioner for a hearing, alleging that they were forced by the President to withdraw from the College. The petition is brought pursuant to a rule of the State Board of Education which provides:

> "The Commissioner of Education may reinstate a dismissed student after a hearing at which the president who has dismissed the student may be present and be heard if he so desires. A student who has withdrawn voluntarily from a college may be reinstated at the discretion of the president with the approval of the Commissioner." *Rules and Regulations of the State Board of Education, January* 1964, *Page* 38, *Section* 9

The requested hearing was held before the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education, Trenton, on January 17 and 20, 1967. Petitioners and other student witnesses and members of the College administrative staff, including its President, testified. Counsel subsequently submitted briefs in behalf of petitioners and of the President of the College.

The following facts are disclosed by the testimony. During the fall of 1966, petitioners and five other male students arranged to sublet a house

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located off campus in the Glassboro community from its lessor, a young man regularly employed in Philadelphia, who also occupied the dwelling. The extent and amount of time which each of the seven students lived in the house varied. One of the group who was engaged in student teaching elsewhere contributed his share of the rent but did not spend any time at the house; others lived part of the time at their homes from which they commuted, and part of the time at the house; and for several it was their regular college residence. None of them registered this residence with the College nor did they seek administrative approval of their living there.

The students testified that in order to pay for the utilities and to meet the costs of maintaining this town residence, they decided to hold a "party" and to charge admission. Admission to the party entitled participants to beer which was provided by the hosts. Three such parties were held. The last occurred on Saturday, November 12, 1966, and was attended by approximately 150 men and women, not all of whom were students. At approximately 1 a. m. on this occasion the police arrived to investigate parking complaints lodged by nearby residents. News of the police call came to the attention of the College administration and gave rise to an investigation by them. As a result of these inquiries and after information had been received from several sources, including the lessor of the house, the realtor, neighbors, students, and an anonymous letter, various disciplinary measures were meted out to students involved. Of the six students who actually lived in the house, one (a senior) received no punishment, three others (a senior, a junior, and a freshman) were suspended for three weeks, and petitioners (both seniors) were permitted to withdraw from the College in lieu of being expelled.

Petitioners allege that they were pressed into signing a withdrawal from the College without opportunity to consider, to consult their parents, or to know the particulars of the charges against them. They allege further that the penalty imposed upon them for whatever infractions they committed was unfair, unequal, discriminatory and excessive.

The issue to be decided in this petition is whether the President of the College (hereinafter "President") erred to such an extent in the penalty he imposed upon petitioners because of their infractions of the College rules that the Commissioner is constrained to intervene and set it aside.

The authority of presidents of the State Colleges with respect to dismissal of students is stated in a rule of the State Board of Education, the relevant portion of which reads:

> "Presidents of State colleges may dismiss from their respective colleges those students whose conduct is detrimental to the college * * *." *Rules and Regulations of the State Board of Education, January* 1964, *Page* 38, *Section* 8

It is clear from the testimony and petitioners' own admissions that they were in violation of several rules of the College. While seniors are permitted to live off campus, such residence is restricted to "apartment-type dwellings." Other arrangements "must be approved and recorded in the Division of Administration before permission can be granted." Admittedly, petitioners did not live in an apartment-type dwelling nor did they seek permission and

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approval to reside where they did. Petitioners also admit disregarding College rules by permitting girls to visit the house and entertaining them there. Their admitted possession and consumption of alcoholic beverages while occupying this residence was also in defiance of College regulations.

It is clear that petitioners consented to, were involved in, and participated in the Saturday night parties. The testimony reveals also that large numbers of males and females attended these parties, that an admission fee was charged, that beer was served, that members of both sexes, whether authorized by the hosts to do so or not, were to be found in all parts of the house, and that the police dispersed the party on November 12, 1966, in response to a directive from the mayor of the municipality. Finally, it is evident that petitioners, once these activities had come to light, sought to impede the College officials in their inquiries instead of co-operating with them.

On December 5, 1966, petitioners were summoned by the President. He testified that his intention had been to expel them outright but in conference with his staff it was suggested that because petitioners were seniors, they be offered the alternative of withdrawing and completing the requirements for graduation through enrollment in part-time and extension classes. According to the President both petitioners were fully aware of the reasons underlying the action, they were offered the opportunity to make a statement but were silent, and they preferred to notify their parents in their own way and at their own time. Petitioners thereupon signed withdrawal forms.

In his testimony the President stated that the activities in which petitioners were involved have produced reactions in the community adverse to the College. The President said further that in the fifteen years he has been at the College he knew of no one whose conduct had been more detrimental to the College than that of petitioners.

The testimony fails to support petitioners' assertions (1) that they were never informed of the charges against them; (2) that they were not afforded an opportunity to be heard or to consult their parents; and (3) that they had no choice and signed withdrawal forms under duress. The Commissioner is satisfied that both petitioners were well aware of the counts against them and the reason for their summons by the President. He also concludes that petitioners were afforded a proper opportunity to speak in their own behalf and to consult their parents. The fact that they had no choice between dismissal and voluntary withdrawal does not constitute improper duress but represents a choice between penalties for conduct inappropriate for senior students and detrimental to the College.

Petitioners' charge that other students equally culpable received a lesser penalty and petitioners were, therefore, discriminated against and treated unfairly, is without merit. Petitioners do not come with clean hands. They are admittedly guilty of disregarding the rules of the College. That others also broke rules and were not disciplined in the same way is not relevent to petitioners' infractions and the action taken with respect to them. Moreover, the testimony indicates that the President determined the penalties to be imposed on each student involved in the light of the information available to him at that time. Actions which he may have taken subsequently with respect to students other than petitioners or as a result of information disclosed

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at the hearing and previously unknown to the College authorities, is not relevant to the question of the disciplinary action meted out to petitioners.

The issue herein is not whether the Commissioner would have imposed the same kind or degree of penalty upon petitioners or would have dealt with the problem in the way the President did. It is not the Commissioner's function to intervene in disagreements and disputes which arise in the State colleges. To do so would be to invade the function of the college president and would destroy his authority. As chief administrative officer of the college, it is the president, who in large measure, determines its standards of behavior and conduct and sets the tone of its disciplinary procedures. In his college he is the final arbiter and his judgment with respect to the proper operation of the institution is entitled to great weight and respect. His judgment and his authority must be sustained if the college is to function effectively. In the Commissioner's opinion, the president of a State college is entitled to wide latitude in the formulation of policies, the adoption of rules and regulations, and the control of student behavior. Only when the president violates the law or acts in a manner inconsistent with the rules and regulations of the State Board of Education is it appropriate for the Commissioner of Education to intervene in the management of the internal affairs of the college. The Commissioner finds no such violation or inconsistency in this instance. The Commissioner, therefore, declines to intervene or to substitute his judgment in the action of the President contested herein.

ACTING COMMISSIONER OF EDUCATION.

February 23, 1967.

VII

LAW REQUIRING PHYSICAL EXAMINATION OF PUPILS DOES NOT MANDATE EXAMINATION FOR DRUG ADDICTION

JOSEPH S. MANS,

Petitioner,

v.

JOSEPH SKRYPSKI, M.D., MEDICAL DIRECTOR, AND BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondents.

For the Petitioner, *Pro Se.*

For the Respondents, William A. Massa, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner is a private resident of Jersey City. He seeks an order from the Commissioner requiring that the respondent Board of Education direct the respondent Dr. Skrypski, as medical director in the Jersey City schools, to conduct examinations of pupils in the schools to determine whether they are addicted to drugs. In the original petition filed March 16, 1966, Dr. Skrypski

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was named sole respondent. By an order dated June 7, 1966, the Commissioner directed that the Board of Education be joined as a necessary party respondent.

A hearing in this matter was conducted by the Assistant Commissioner in charge of Controversies and Disputes on September 29, 1966, at the office of the Hudson County Superintendent of Schools, Jersey City.

It is agreed that the sole issue here turns upon the construction of *R. S.* 18:14–57 requiring physical examination of pupils. The relevant part of the statute reads as follows:

> "The medical inspector, or the nurse under the immediate direction of the medical inspector, shall examine every pupil to learn whether any physical defect exists, and keep a record from year to year of his growth and development, which record shall be the property of the board of education, and shall be delivered by the medical inspector or nurse to his successor in office. * * *"

It is petitioner's contention that the term "any physical defect" should be construed to include drug addiction within the scope of the examination of pupils. He alleged, but offered no acceptable proofs, that a drug problem exists in the Jersey City schools, and that medical examination in the schools could provide early detection of addiction.

Dr. Skrypski testified that a staff of physicians under his direction conducts a regular annual physical examination of all pupils, and in addition, examines pupils who are referred to them by the school nurses, especially for contagious or infectious disease. Dr. Skrypski further testified that unless the annual physical examination or a special examination happened to occur on a day when a pupil had used a drug, which might be medication, the physician would not ordinarily be able to detect drug use. He also testified that drug addiction is not an organic physical defect but would be evidenced by an altered behavioral pattern, which would best be observed, if at all, by the classroom teacher.

On the evidence presented, the Commissioner can find no basis for a finding that the statute, *supra*, is to be construed to include a mandatory physical examination for the specific purpose of determining drug addiction, and so holds. In making this determination the Commissioner does not impugn whatever public and worthy motives impelled petitioner to seek a means of dealing with any form of drug addiction or abuse or misuse of drugs that may exist. The continued study of the psycho-social problems of youth which may be found to underlie the drug problem may hopefully point to effective ways by which the schools may assist in its solution. The Commissioner expects and is confident that all school personnel will be alert toward the possibility of drug addiction or misuse among pupils, and that appropriate procedures will be established for referring such matters to the properly qualified school medical officials. However, there is no mandatory duty imposed by law for particular examinations on a regular basis for this purpose, and there has been insufficient evidence to establish that such a practice would be scientifically practicable. Accordingly, the petition must be dismissed.

ACTING COMMISSIONER OF EDUCATION.

February 23, 1967.

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VIII

WHEN CHARGES OF INEFFICIENCY ARE PROVED, JANITOR UNDER TENURE MAY BE DISMISSED

IN THE MATTER OF THE TENURE HEARING OF THOMAS MALMENDIER, BOROUGH OF EAST PATERSON, BERGEN COUNTY

For the Complainant, Robert D. Gruen, Esq. (Morton R. Covitz, Esq., of Counsel)

For the Respondent, Arthur Minuskin, Esq., and *Pro Se.*

COMMISSIONER OF EDUCATION

DECISION

General charges of inefficiency and unsatisfactory work habits and performance were certified to the Commissioner of Education against Thomas Malmendier, a school custodian, by the Board of Education of East Paterson on March 28, 1966, pursuant to the Tenure Employees Hearing Act. Mr. Malmendier was suspended without pay effective on the following day.

A hearing on the charges was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the County Administration Building, Hackensack, on June 16, August 25, and November 15, 1966. Respondent was represented by counsel on the first day of hearing. Thereafter, following counsel's withdrawal, respondent appeared on his own behalf. Memoranda were filed by both parties on conclusion of the hearing of testimony.

On November 22, 1965, the Superintendent of Schools sent to respondent the following letter (P-6):

"This letter is sent to you under the Tenure Employees Hearing Act R. S. 18:3–23 and constitutes notice to you of your inefficiency for the following reasons:

1. Constant lateness in reporting for duty.
2. Failure to wear the prescribed custodial uniform.
3. Poor performance in cleaning assignments.
4. Questioning directives given to you by your superiors.
5. Unsanitary working habits.
6. Lack of co-operation.

"The items indicated in our observations of inefficiency were brought to your attention in a letter dated December 21, 1964 and subsequently in a formal conference with your principal, the head custodian and myself on November 8, 1965.

"Unless your conduct is immediately corrected, charges will be brought against you under the Tenure Employees Hearing Act and you will be subject to suspension and dismissal."

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The testimony shows that dissatisfaction with respondent's work performance developed at the beginning of the 1964-65 school year. The principal consulted with respondent about his dissatisfaction, and reported the problem to the Superintendent, who also talked with the custodian. On December 21, 1964, the Superintendent wrote a letter (P-1) to respondent, advising him that certain deficiencies would no longer be tolerated, to wit: constant lateness in reporting to duty, failure to wear the prescribed custodial uniform, long coffee breaks, poor performance in the cleaning of assigned rooms and corridors, questioning directives given by the principal and directives given by the Superintendent through the principal, leaving the school unattended and open, and careless attitude about personal appearance. The principal was thereafter directed to report regularly to the Superintendent concerning respondent's performance. These reports (P-2A to D, F, G) and the principal's testimony show that while there was improvement from time to time, conditions did not improve to the principal's satisfaction, and he recommended that respondent be transferred to another school.

Such transfer to the High School was effected on September 7, 1966, and shortly thereafter a conference was held, involving the respondent, the head custodian of the school, and the principal, to outline what was expected of respondent in his new assignment. (Tr. 131) The principal testified that on the basis of his personal observations during the ensuing several weeks he found respondent's work performance unsatisfactory, particularly with respect to "punctuality, the wearing of a prescribed uniform, performance of cleaning assignments, following of directions, sanitariness of working conditions and habits, co-operation." (Tr. 132) Another meeting followed on October 14, 1965, with no apparent improvement resulting. (Tr. 134) A further conference on November 3, 1965, involved the Superintendent as well as those who had previously consulted with respondent. On November 8 thereafter the principal submitted to the Superintendent a report (P-5) evaluating respondent's performance since his transfer to the High School, and finding it unsatisfactory. The letter of November 22, quoted *supra*, followed, setting forth six areas of inefficiency which required immediate correction.

In a series of thirteen reports submitted by the principal to the Superintendent at his direction, covering the period from November 22, 1965, to March 24, 1966, respondent was evaluated on the six qualities set forth in the Superintendent's letter of November 22, *supra*. The evaluations were made by the head custodian. On the matter of punctuality, respondent was evaluated "satisfactory" in six of the 13 reports; "satisfactory" as to wearing of the prescribed uniform in three of the reports; "satisfactory" as to co-operation in one of the reports. All other evaluations in all six categories were "unsatisfactory." The head custodian testified as to deviations from punctuality in reporting to his job; to failure to wear the prescribed uniform, or appearing in an untidy condition; to carelessness, untidiness or incompleteness in the performance of his cleaning assignments; to questioning or failure to follow the directives of his superiors; to failure to clean lavatories, sinks, and his own work closets in such a way as to make them sanitary; to instances of outright refusal to co-operate in certain extraordinary custodial tasks not a part of his regular work assignment. The testimony of the head custodian was corroborated by the vice-principal, who was charged with

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supervision of custodial work. (P-18) The Commissioner finds and determines that the evaluations made by the head custodian and reported by him through the principal to the Superintendent represent reasonable conclusions based upon facts established by the testimony adduced at the hearing. *Kopera* v. *Board of Education of West Orange*, 60 *N. J. Super.* 288, 296 (*App. Div.* 1960)

Respondent's defense to the charge of tardiness was that when he reported late to his job, he worked an amount of time at the end of his shift equal to the degree of tardiness. He denied failing to wear his uniform, or that it was untidy. He asserted that he performed his cleaning as assigned, or that any failures to do so resulted from an unreasonable work load; and suggested that unsatisfactory conditions found in the morning could have been created subsequent to his finishing his work in the previous evening. He contended that he followed the directives of his superiors insofar as they were reasonable or possible, or had adequate reason for deviation therefrom. He attributed unsanitary conditions to the failure of the custodian on the daytime shift, or to unauthorized use of facilities by others, or to conditions created after he had finished his assignment. As to co-operation, he contended that conditions were designed to discriminate against him and put him in a bad light, and that he decided to do his assigned tasks and no more.

The weight of believable evidence overwhelmingly supports the charges of inefficiency and unsatisfactory job performance of which respondent was notified, pursuant to *R. S.* 18:3–26, on November 22, 1965, and which were filed with the Board of Education on March 7, 1966, more than 90 days thereafter. The Commissioner finds no evidence of bias, prejudice, or discrimination either in the supervision and direction of respondent's work, or in the evaluation thereof.

The Commissioner finds and determines that the charges against Thomas Malmendier, as certified by the Board of Education of East Paterson, have been sustained. He finds that the charges as proved are sufficient to warrant dismissal. He therefore directs the Board of Education of East Paterson to dismiss Thomas Malmendier from his employment, effective as of the date of his suspension on March 29, 1966. *In the Matter of the Tenure Hearing of David Fulcomer, Holland Township, Hunterdon County*, (*Superior Court, Appellate Division, January* 17, 1967, No. *A*-771-65)

ACTING COMMISSIONER OF EDUCATION.

February 27, 1967.

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IX

In the Matter of the Annual School Election Held in the Bordentown Regional High School District, Burlington County

Commissioner of Education

Decision

The announced results of the annual school election held February 21, 1967, in the school district of Bordentown Regional High School, Burlington County, on the question of the appropriations of $462,151.00 for current expenses for the 1967-68 school year were as follows:

	At Polls	*Absentee*	*Total*
Yes	175	2	177
No	178	0	178

Pursuant to a request made by the Secretary in the name of the Board of Education, the Assistant Commissioner in charge of Controversies and Disputes conducted a recount of the votes cast on this question. At the conclusion of the recount, which was held on February 24, 1967, at the office of the Burlington County Superintendent of Schools in Mount Holly, the correct tally was determined to be:

	At Polls	*Absentee*	*Total*
Yes	176	2	178
No	179	0	179

The Commissioner finds and determines that authorization for the appropriation of $462,151.00 for current expenses for the 1967-68 school year failed of approval by the voters at the annual school election held February 21, 1967.

Acting Commissioner of Education.

March 1, 1967.

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X

PUPIL MAY BE EXPELLED FOR THREATENING PHYSICAL HARM TO TEACHER

BART HYMANSON, AN INFANT, BY HIS PARENTS AND NATURAL GUARDIANS, PHILIP HYMANSON AND ROSE HYMANSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SADDLE BROOK, BERGEN COUNTY,

Respondent.

For the Petitioner, Parisi, Evers & Greenfield (Irving C. Evers, Esq., of Counsel)

For the Respondent, George Sokalski, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner in this case, hereinafter "B," is a member of the senior class in Saddle Brook High School. In a petition brought by his parents in his behalf, he protests respondent's action in expelling him from school, on the ground that such action was without just cause and without proper authority.

Pendente lite relief was denied petitioner by an order of the Commissioner on December 30, 1966. The matter proceeded to a hearing at the County Administration Building, Hackensack, on January 6, 1967, by a hearing examiner appointed for the purpose. The report of the hearing examiner is as follows:

On November 23, 1966, B was suspended from school by the principal for five days. The suspension was duly reported to the Board of Education, which met in caucus session on December 5, and after conference with B and his parents permanently excluded B from further attendance at school. (R-2) At the regular meeting of the Board on December 14, by unanimous vote, a motion was passed confirming the action of December 5. The petition herein was received by the Commissioner on December 19, 1966.

Petitioner initially challenges respondent's action on procedural grounds, wherein it is charged that B was not afforded a proper hearing before the Board. Testimony on this point establishes, however, that B's parents were notified by letter of the Board's meeting on December 5, were invited to attend the meeting with B (R-3), and were in fact present with B and given an opportunity to be heard. While the statute authorizing boards of education to "suspend or expel pupils" (*R. S.* 18:7–57f) contains no procedural limitations, the Commissioner has stated that:

"* * * a determination in such a case should be made only after a pupil has been given notice of the proceeding and reasonable opportunity to

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participate therein," *Gibbs* v. *Board of Education of the Township of Middle,* 1955-56 *S. L. D.* 95, 98

The facts in the instant matter therefore warrant a finding that neither B nor his parents were denied notice or a suitable opportunity to be heard prior to respondent's decision to expel B.

Petitioner further asks that the expulsion be set aside because the decision of the Board was made at a "caucus" meeting rather than at a regularly convened meeting. Respondent does not deny that a determination to expel B was made at such a "caucus" meeting on December 5, 1966. The record clearly shows that such was the case. (R-2) The minutes of the Board further show that at the regular meeting on December 14, the Board further ratified its prior action by a formal, unanimous vote. (Tr. 18) It is well established that a board of education cannot take final action except at a meeting convened in accordance with law, *R. S.* 18:5–47 See *Cullum* v. *Board of Education of North Bergen,* 15 *N. J.* 285, 294 (1954). On the other hand, there is no requirement that all deliberations of the board of education as a committee must be conducted at a public meeting. *Cullum* v. *Board of Education of North Bergen, supra* Counsel for respondent stated that it was a long-standing policy of respondent to keep matters pertaining to personnel, as well as students, out of public meetings. (Tr. 17) To have included in the minutes of the meeting at which the expulsion was ratified, a record of the findings of the "caucus" meeting, as petitioner suggests, would serve to destroy much of the purpose which respondent's salutary policy aimed to achieve in such matters. The fault here, if any, was in the "expulsion" in effect from December 5 to 14, when formal action was taken. It is the hearing examiner's conclusion that such fault was corrected by the action in the nature of confirmation or ratification at the regular meeting of the Board on December 14. *Cf. Mackler* v. *Board of Education of the City of Camden,* 16 *N. J.* 362, 371 (1954); 87 *C. J. S.* § 137. If it be found that the original suspension and subsequent expulsion were justified, then the continuance of B in school after December 5, pending formal action on December 14, would have been inimical to the best interests of the school.

The sequence of events leading to the High School principal's suspension of B on November 23, 1966, began on November 17, when he was found "loitering" in the home economics class. (R-1) On the following day he left a class purportedly to go to the nurse's office for an examination, but was found in the auditorium by the vice-principal. On November 22 he refused to obey a teacher's directive to place in a cafeteria waste can a piece of pie which the teacher alleges he had thrown. When this incident was reported to the vice-principal, she asked him to report to her office at the close of school for a conference. He failed to appear as directed, and when he was summoned to the office on the following morning, November 23, he explained that he had gone home to get a football jersey needed for a photograph to be taken of the team of which he was a member. Meanwhile, the vice-principal's investigation revealed that after the incident in the cafeteria, B had openly made remarks about the cafeteria teacher that, in any of the reported versions (R-1, Tr. 77, 158) must be considered vulgar and disrespectful. The vice-principal thereupon told B that she was recommending a five-day suspension, and arranged a conference with the principal for B. At that conference the

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principal told B he was suspended. B became very upset because this suspension would bar him from playing in the next day's football game, which was, he said, his "whole life." The principal testified that as B left her office he knocked over a chair and uttered another vulgar remark. B denies making the remark and asserts that in his emotional state he accidentally knocked over the chair. At any rate, he did not restore the chair to its proper position, but left the principal's office in a highly emotional state. He then went to the classroom where the teacher with whom he had been involved in the cafeteria incident was teaching a typing class. Again he was boisterous to the point of being physically violent, and admits saying to the teacher, "I have been accused of something I didn't do and I have been suspended because of you for something I didn't do and I intend to get even with you." (Tr. 155) B asserts that there was "no meaning" behind his threat at the time (Tr. 174), and he apologized to the teacher in open hearing for "any grief" he had caused her. (Tr. 156)

There then followed meetings of the school administrative staff and efforts on the part of B's parents to get him reinstated. The entire matter was referred to the Board for its consideration of:

"* * * the extreme seriousness of the situation:

"1. B—has displayed a loss of temper in a physical and mental way which makes us question the safety of having him in the building.

"2. B—has openly threatened a teacher." (R-1)

At the caucus meeting of the Board on December 5, a summary report of B's discipline record throughout his high school career (R-1) was before the Board. The report sets forth numerous instances of class disruption, insubordinate behavior, fighting, and class cutting. Many student and parent conferences had been held and a total of six suspensions from school, prior to that of November 23, were noted.

It should be noted that the record placed before the Board of Education by the school administration details the efforts of the administrators to document complaints made against B, to utilize conferences with B and his parents concerning his behavioral difficulties, and especially in the incidents in late November 1966 to avoid hasty action and to afford "cooling-off" periods before making critical determinations. It should be further noted that the Board devoted more than two hours to the consideration of B's case at the meeting of December 5. Finally, the administration has expressed its concern for B's continuing education and its willingness to help him find a means of completing his schooling elsewhere.

New Jersey law requires (*R. S.* 18:14–50) that:

"Pupils in the public schools shall comply with the regulations established in pursuance of law for the government of such schools, pursue the prescribed course of study, and submit to the authority of the teacher. Continued and willful disobedience, open defiance of the authority of the teacher, or the habitual use of profanity or obscene language shall be good cause for suspension or expulsion of any pupil from school."

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The hearing examiner concludes that evidence of "continued and willful disobedience and open defiance of the authority of the teacher" have been established to such a degree as to warrant a determination by respondent to expel petitioner B from school.

* * * * * * *

The Commissioner has carefully reviewed and considered the findings and conclusions of the hearing examiner in the report *supra.* Expulsion from school is a serious and drastic penalty, to be avoided unless it is clearly required by the circumstances. The Legislature, in providing "for the maintenance and support of a thorough and efficient system of free public schools," as required by the New Jersey *Constitution* (*Art.* VIII, *Sec.* IV, 1), has authorized boards of education "to suspend or expel pupils." *R. S.* 18:7–57f, *supra* Pupils may not, with impunity, defy the authority of the teacher and attempt to set their own authority above that of the school.

In the instant case, the Commissioner holds that the meeting of respondent on December 5, at which the petitioning parents were present and afforded an opportunity to be heard, constitutes sufficient hearing to satisfy the requirement that the pupil or the parents be afforded an opportunity to participate in the proceeding. *Gibbs* v. *Board of Education of the Township of Middle, supra*

The Commissioner further holds that the formal vote taken at the regular meeting of respondent Board on December 14, 1966, ratified and confirmed the action taken at a caucus meeting on December 5. In so holding, the Commissioner in no wise affirms a determination made at other than a regularly convened meeting, open to the public, as having any legal validity. Rather, in the particular circumstances set forth in the hearing examiner's report, he must regard B's exclusion from school as a continuation of the suspension originally imposed pending final formal action at a properly constituted meeting of the Board.

The findings set forth in the hearing examiner's report warrant his conclusion that respondent had before it sufficient evidence to decide to expel B. The Commissioner has previously stated that parents of school pupils have a right to be free of fear that their children will be safe from physical indignities by teachers. *In the Matter of the Tenure Hearing of Pauline Nickerson,* decided by the Commissioner September 2, 1965 In like manner, to the greatest possible degree, teachers have a right to be free of fear or threats to their physical safety by pupils. Even conceding that B was understandably upset by the forfeiture of his chance to play in a football game, his uncontrolled and violent behavior, involving what could under the circumstances only be interpreted as a physical threat to a teacher, justifies the conclusion that B's attendance in the Saddle Brook High School was no longer tolerable, and the Commissioner so holds.

The petition of appeal is dismissed.

ACTING COMMISSIONER OF EDUCATION.

March 3, 1967.

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XI

In the Matter of the Special School Election Held in the Township of Piscataway, Middlesex County

Commissioner of Education

Decision

The announced results of the balloting on a proposal to authorize the issuance of $3,438,000 of bonds of the School District of the Township of Piscataway for the expansion of school facilities at a special referendum held January 30, 1967, were as follows:

	At Polls	*Absentee*	*Total*
Yes	763	1	764
No	779	0	779

Pursuant to a request submitted by the Board of Education, the Assistant Commissioner in charge of Controversies and Disputes conducted a recount of the ballots at the office of the Middlesex County Superintendent of Schools, New Brunswick, on February 27, 1967. At the conclusion of the recount with 17 ballots referred for further consideration the tally stood:

	At Polls	*Absentee*	*Total*
Yes	760	1	761
No	767	0	767
Referred	17	0	17

Examination of the referred ballots indicated that, if counted, only 3 ballots at most could be considered to have been voted in favor of the proposal. Inasmuch as the addition of these to the tally of the "Yes" votes could not alter the results, there was no need to make any further determination.

The Commissioner finds and determines that the proposal submitted to the citizens of the School District of the Township of Piscataway at the special school election on January 30, 1967, failed to be approved by the voters.

Acting Commissioner of Education.

March 3, 1967.

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XII

In the Matter of the Annual School Election Held in the Town of Newton, Sussex County

Commissioner of Education

Decision

The announced results of the balloting for three seats on the Board of Education of the Town of Newton, Sussex County, for full terms of three years each at the annual school election held February 14, 1967, were as follows:

	At Polls	*Absentee*	*Total*
James A. Zamos	527	18	545
Lee Hardin	425	17	442
George W. Keefer	415	15	430
Kenneth Wooden	425	4	429

Pursuant to a request from candidate Wooden, the Assistant Commissioner in charge of Controversies and Disputes conducted a recount of the ballots cast for candidates Keefer and Wooden at the office of the Susex County Superintendent of Schools on February 28, 1967. At the conclusion of the recount with no ballots contested, the final tally of all the ballots cast was determined to be:

	At Polls	*Absentee*	*Total*
George W. Keefer	415	15	430
Kenneth Wooden	424	4	428

The Commissioner finds and determines that James A. Zamos, Lee Hardin, and George W. Keefer were elected on February 14, 1967, to seats on the Board of Education of the Town of Newton for full terms of three years each.

Following the recount an inquiry was held on two allegations made by candidate Wooden with respect to the conduct of the election.

The first charge is that "Paid election officals (sic) were instructed to keep, for the opposition, a record of the names of those who had already voted. This was done."

The election officials at one of the polling places admitted that they kept a list of voters as they appeared to cast their ballots. The keeping of such a list was requested by a member of the board of education. It was intended to be used as a check of voters who had not yet appeared with the apparent purpose of urging them to go to the polls to vote. Members of the election board stated that this had been a common practice in previous elections.

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It appears that the list in question was not used in this election. When the propriety of keeping such a list was questioned by one of the challengers, it was not collected by the person who had requested it and the list was evidently discarded. Petitioner makes no complaint that the list was used or that it prejudiced the results of the election. His asserted purpose in raising the issue is to determine the propriety of the compilation of such a list by the election officials in order to quiet the question in future elections.

The Commissioner knows of no statute or rule on this specific point. If the purpose of such a list is to encourage as large a turnout of the voters as possible, its motivation cannot be questioned. However, it appears to the Commissioner that the preparation of such a list is more properly the function of appointed challengers than of election officials. The election officials have specific statutory duties to perform which require their full attention and concern. Because of the need to perform their assignments with the utmost care and attention to all the niceties of proper election procedure, the election board should not concern itself with the preparation of voter lists or other ancillary activities but should leave such chores to properly designated challengers. It is also essential that persons appointed to conduct elections avoid even the appearance of partiality or prejudice with respect to any candidate or question to be voted on. For these reasons that Commissioner suggests that election officials would be well advised to refrain from involvement in any procedures other than those required for the proper conduct of an election, however meritorious their purpose may be.

The second question raised by petitioner concerned access to the polling place provided by the Board of Education. The discretion exercised by the Board in this respect was explained by its Secretary to petitioner's satisfaction. There is no need, therefore, for the Commissioner to deal with this question.

Petitioner's requests having been satisfied, the petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

March 3, 1967.

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XIII

PUPILS PROPERLY PLACED IN INSTITUTION ENTITLED TO EDUCATION IN LOCAL SCHOOLS

CHILD CARE CENTER OF FARMINGDALE,
Petitioner,

v.

BOARD OF EDUCATION OF HOWELL TOWNSHIP, MONMOUTH COUNTY,
Respondent.

For the Petitioner, Martin A. Spritzer, Esq.

For the Respondent, Krusen and Dawes (W. Lawrence Krusen, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, the Child Care Center of Farmingdale (hereafter "Center") is a nonprofit agency incorporated under Title 15 of the laws of New Jersey. In a petition of appeal to the Commissioner of Education filed September 6, 1966, it contests the refusal of the Howell Township Board of Education to admit to its schools, forty-two children resident in an institution maintained by petitioner, which is located within the municipal boundaries of Howell Township. Petitioner contends that respondent's refusal to accept the children is unreasonable, arbitrary and capricious and deprives them of their right to a free public school education. It prays that the Commissioner order respondent to admit the subject children to its public schools. Petitioner's further request for an order *pendente lite* was denied by the Commissioner in a written decision dated October 13, 1966.

The facts of this dispute were heard by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Monmouth County Superintendent of Schools in Freehold on December 6, 1966.

The testimony reveals that the Center is a nonprofit corporation organized pursuant to Title 15 of the laws of New Jersey. The Center's certificate of incorporation, dated September 9, 1966, sets forth its purposes as follows:

> "* * * to operate a child welfare facility for children who are dependent and neglected, to provide them with food, clothing, shelter, medical attention, religious training, schooling, and other services necessary to help ameliorate the problems of the child who needs to be separated from his own home * * *."

The institution comprises 11 buildings on 15 cleared acres of a 178 acre site in Howell Township, Monmouth County. At the time of the hearing there were 151 children resident in the Center ranging in age from 3 to 16 years. Most of the children are from New York City. The Center is supported pri-

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marily by tax monies from the City of New York supplemented by endowment income and voluntary contributions. A school program has been and is maintained at the Center under the direction of a school coordinator.

The Executive Director of the Center testified that beginning in 1964 efforts were made to have some of the children from the Center attend the public schools. That year the Howell Township Board of Education approved placement of two children in the eighth grade and received tuition for them from the Center. Two pupils of high school grade were placed in Southern Freehold Regional High School, of which Howell Township is a constituent district, in 1964-65; currently, nine children from the Center are enrolled there.

In 1965, the Center requested admission of 53 children to the Howell Township schools, offering to pay full tuition costs. The request was refused by respondent. Petitioner renewed its request for the enrollment of a selected group of its children for the 1966-67 school year. The basis of this application was set forth in a letter dated June 1, 1966, from its school coordinator to the Superintendent of respondent's schools, the pertinent portions of which read as follows:

"I was glad to be able to review with you my survey of the children we felt would benefit by public school education. * * * As I explained to you, we are only recommending youngsters who we feel would be able to function at or near grade level and who could make good use of the broader social experience available to them in the township. There are 42 children with the following grade breakdown:

Kindergarten	5	Fifth	4
First	3	Sixth	3
Second	3	Seventh	4
Third	10	Eighth	1
Fourth	9		

"In addition, we may possibly need places for two educable children who are not included in the count.

"We would provide tutoring for the children attending the Howell school to help them make up their deficiencies. We will continue our school with smaller classes geared toward a remedial type of instruction for those of our children who need this. Should you find that a child is unable to cope with the public school program we would be glad to take the child back into our school.

"I do not recall if I explained to you during our telephone conversation that each of our children is assigned to a caseworker who follows the progress of the child and is in contact with the child's family. The caseworker would be acting in lieu of the child's parent in relation to the teacher and would work with the teacher on the child's behalf.

"The New York City Welfare Board has agreed to pay public school tuition for the children. This, of course, has been the case with our high school children who are now attending Southern Freehold Regional High School."

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Respondent replied in a letter dated June 27, 1966, which stated in pertinent part as follows:

> "* * * we wish to inform you that it is impossible for the board of education to accept your children in our school system.
>
> "The board finds it necessary, because of lack of available classrooms, to go outside to rent space to accommodate the present number of Howell Township pupils; four classes in church halls and at least five in fire houses.
>
> "For these reasons the Howell Township schools will not be available to your pupils."

After receipt of this refusal, petitioner's executive director made formal application by letter dated August 25, 1966, for admission of 44 children to respondent's schools. As a part of this application petitioner agreed:

> "(1) We will guarantee payment of tuition for our children in Howell Township Schools.
>
> "(2) We will cooperate fully with the principals of the schools our children are attending, in following up with each child and accepting the return to our own school for any child who cannot be retained in a normal school experience."

Respondent, at its meeting on August 29, 1966, denied petitioner's request. Petitioner then filed this appeal to the Commissioner of Education.

Petitioner contends that its children have a statutory right to attend local public schools. This assertion rests upon *R. S.* 18:14–1e which reads as follows:

> "Public schools shall be free to the following persons over 5 and under 20 years of age:
>
> "e. Any person, nonresident of the district, who is placed in the home of a resident of the district by order of a court of competent jurisdiction in this State, or by any society, agency or institution incorporated and located in this State having for its object the care and welfare of indigent, neglected or abandoned children, or children in danger of becoming delinquent, or any person who is a resident in any institution operated, by any such society, agency or corporation, on a nonprofit basis, whether or not such resident, society, agency or institution is compensated for keeping such nonresident child; but no district shall be required to take an unreasonable number of nonresidents under this subsection except upon order of the Commissioner of Education issued in accordance with the rules established by the State Board of Education."

Petitioner points out that it could demand for its children the right to attend respondent's schools free of charge but it has not and does not press this entitlement and remains willing to pay the full costs of their tuition. In further support of its application petitioner says that those of its children who can profit by it, need the motivation and stimulation of interaction with their peers in a public school experience, need to become and feel themselves to be a part of the community, and need to overcome the feeling of rejection and isolation which is often a concomitant of life in an institution.

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Respondent's refusal to accept petitioner's children is grounded on the crowded condition of its schools. Through its witnesses it disclosed that it has six school buildings whose total capacity is about 3,500; that the current enrollment is approximately 4,000 children; that classes for about 500 children are being held in two firehouses, two churches, and in two makeshift classrooms formerly used as stockrooms; and that between 200 and 400 additional children may be expected to enroll during the year as a result of normal population growth. Two new school buildings are planned for occupancy by early 1968, but all estimates indicate that they will be completely filled as soon as they open. Respondent's witnesses testified further that admission of petitioner's 44 children could not be accomplished without disruption of attendance areas, school and class assignments, and bus routes. Respondent expresses the opinion that under such conditions petitioner's children would be more disadvantaged by attending the public schools than by remaining in small classes of 16 or 17 pupils, which the Center is able to afford in its school program. It is also argued by respondent that under the statute upon which petitioner relies, no district need accept an unreasonable number of non-resident children and that, in the present condition of its schools, the addition of 44 non-resident pupils would be such an unreasonable imposition.

It cannot be denied that respondent is faced with critical problems created by a rapid growth in population, that its schools are seriously overcrowded with consequent adverse effects on the educational program, and that it will have difficulty in providing sufficient school facilities to meet the expected continuing influx of new residents. Such conditions cannot serve, however, as a legally sufficient basis for the denial of a free public school education to children entitled thereto by law. In this case the applicable statute, *R. S.* 18:14–1e *supra*, is clear, and petitioner has met all of its obligations. It has shown that it is a duly incorporated society located in New Jersey, that it provides for the care and welfare of indigent, neglected, and abandoned children, that it operates on a nonprofit basis, that it has placed children of public school age in an institution located in Howell Township, New Jersey, and has applied for admission of 44 of those children to the public schools of the district. Indeed, it has gone beyond the requirements of the law by its offer to pay all costs. Under such circumstance, respondent has no legal basis on which it can refuse to accept petitioner's children in its schools despite their crowded condition.

Nor can respondent's contention that these 44 children constitute an unreasonable number of non-residents for it to accept under the statute be sustained. No provision is made in the rules of the State Board of Education adopted pursuant to *R. S.* 18:14–1e *supra*, for refusing to admit non-resident children who are otherwise qualified to the schools of a district. The applicable State Board of Education rule provides:

> "Whenever a board of education shall decide that the persons eligible for admission to its public schools under paragraphs (d) and (e) of section 18:14–1 of the Revised Statutes is, in its opinion, an unreasonable number, the board of education may make application to the Commissioner of Education for the approval and granting to the district of special State aid. * * * If the Commissioner shall determine that the number of such pupils constitutes an unreasonable number he shall grant special State aid * * *."

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Nowhere does this rule suggest that the children may be permanently excluded or denied the right to attend public school. It provides only that any added financial burden to the district resulting from the contemplated enrollment of an unreasonable number of non-resident children shall be met by additional funds from the State. "Unreasonable number" as used in this statute means unreasonable in terms of costs. To construe it to mean that each school district may set an arbitrary figure for the number of non-resident pupils it will admit to its schools and, once that point has been reached, to deny all others, is not credible. The Legislature certainly never intended that children in New Jersey would be without an opportunity for a public school education. Even transient children are eligible to attend school. It did, however, intend that no school district would have to assume an unreasonable financial burden for the education of non-resident children. This legislation and State Board rule were enacted therefore to assure a local school district that the State will assist with the costs whenever an unreasonable number of non-resident pupils are enrolled.

Even if this interpretation of the statute is in error, the Commissioner must find that petitioner's request does not constitute an unreasonable number of pupils for respondent to absorb in its schools. It is, of course, true that the addition of any number of pupils, no matter how few, will aggravate respondent's already crowded conditions. Nevertheless, the absorption of 44 pupils distributed through all of the elementary grades in a student body of some 4,000 children cannot be considered critical. Respondent is not without experience in providing places for additional pupils. For several years past it has absorbed a large influx of children during the school year as they moved into the township and it estimates that it will have to find room for 200 to 400 more children during the current term. Under such circumstances the Commissioner finds that the admission of petitioner's 44 children is not unreasonable and can be accomplished without serious dislocation of respondent's school program. The Commissioner finds, therefore, that respondent cannot refuse the petitioner's request on a claim of unreasonable numbers which will allegedly impose upon it additional financial burdens.

It appears to the Commissioner that the gravamen of respondent's defense is that it should not be required to accept non-resident children from an institution when the school district is already over-burdened in its attempt to provide proper facilities for its own resident pupils, and when provision is already made for the education of the non-resident children within the institution in which they are placed. Such a defense takes issue with the law and respondent's remedy in this respect lies with the Legislature, not with the Commissioner. The Commissioner's duty is to see that the school laws are effectuated. *Laba* v. *Newark Board of Education*, 23 *N. J.* 364 (1957) In this case he must and does find that respondent cannot lawfully refuse to admit the 44 children for whom application has been made by petitioner.

The Commissioner finds and determines, on the facts presented, that the 44 children for whom petitioner has made application to respondent are entitled to be admitted and enrolled in the Howell Township public schools. The Board of Education of Howell Township is directed, therefore, to admit and enroll the subject 44 children who are residents of the Child Care Center

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of Farmingdale in its schools as soon as the necessary administrative arrangements can be accomplished, but not later than September, 1967.

ACTING COMMISSIONER OF EDUCATION.

March 3, 1967.

THE HOWELL TOWNSHIP BOARD OF EDUCATION,
Respondent-Appellant,

v.

CHILD CARE CENTER OF FARMINGDALE,
Petitioner-Respondent.

SUPERIOR COURT, APPELLATE DIVISION: ORDER OF DISMISSAL

In accord with *R. R.* 1:8–6, the parties hereto, by their respective attorneys, having amicably adjusted the above-captioned matter, hereby request the approval of the Court to enter into a voluntary dismissal, and the Court having no objection hereto:

It is on this 11th day of September, 1967, ORDERED that the above-captioned matter be and is hereby dismissed, without prejudice, and without costs to either party.

XIV

BOARD OF EDUCATION MAY MAKE REASONABLE RULES TO CONTROL CONDITION THREATENING GOOD ORDER OF SCHOOLS

FRANCIS JOSEPH PELLETREAU,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NEW MILFORD, BERGEN COUNTY,
Respondent.

For the Petitioner, Gross and Gross (R. Michael Gross, Esq., of Counsel)

For the Respondent, Mario R. LaBarbera, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a fifteen-year-old male pupil, protests the action of the respondent New Milford Board of Education which, by resolution, ordered him expelled from New Milford High School on the ground that he refused to comply with regulations established by the Board governing the personal appearance of pupils, which regulations were designed to prohibit conduct detrimental to the orderly government of the school and to prevent disruptions in the educational process. In his petition of appeal, filed on December 6,

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1966, petitioner prayed for reinstatement. He also requested the Commissioner to order his reinstatement *pendente lite*. This latter request was denied by the Commissioner on December 9, 1966. The matter was heard thereafter by the Assistant Commissioner in charge of Controversies and Disputes on January 6, 1967, at the Bergen County Court House, Hackensack. Upon request of respondent the hearing was reopened for further testimony on January 13, 1967. Both counsel have waived the submission of briefs and choose to rest on the pleadings and testimony.

Petitioner completed the eighth grade in respondent's schools in June 1966 and was promoted to the high school. During the 1966 summer vacation he received a written notice from the principal of the high school setting forth "Guidelines" for dress at the school. These "Guidelines" contained a specific reference to hair style for boys as follows: "Hair should be neatly trimmed and be in keeping with the general style of the time. Extremes in hair length (covering the ears, the eyebrows, and the nape of the neck) are inappropriate for this school."

Petitioner reported to classes on the first day of school in September 1966, but was told by the vice-principal that unless he cut his hair shorter he could not return to school the following day. No testimony was offered with respect to the length or exact appearance of petitioner's hair at that time. Two school days later he returned to school but was again excluded because of his failure to comply with the directions of the vice-principal to cut his hair. Toward the end of the month, following receipt by his mother of a notice issued pursuant to the compulsory education statutes (*R. S.* 18:14–36), petitioner again sought to attend school but was again refused admission for the same reason. About a week later he was informed that he was suspended from school. However, at that juncture, an agreement was reached whereby petitioner was permitted to attend classes temporarily pending the outcome of a hearing on the matter before the Board of Education. Although no details of that hearing were educed, it is not disputed that petitioner and his parents appeared before the Board and that the matter of petitioner's hair style was discussed. Thereafter, on November 28, 1966, the Board adopted the following resolution: (P-R-2)

> "WHEREAS, the Board of Education of the Borough of New Milford has adopted guidelines for school dress and appearance in the New Milford public schools; and
>
> "WHEREAS, these guidelines were laid down for the purpose of preventing extremes in appearance and dress for the purpose of preventing disruption to the educational process in the school system in the judgment of the administration and the faculty; and
>
> "WHEREAS, Francis Pelletreau has appeared in the high school with extremely long hair in violation of the aforesaid guidelines for school dress and appearance; and
>
> "WHEREAS, Francis Pelletreau has refused to obey the recommendations of the administration of the high school by persisting in having extremely long hair; and

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"WHEREAS, the principal of the high school suspended Francis Pelletreau at least and until he complies with the rules and regulations of the high school; and

"WHEREAS, Francis Pelletreau has consistently refused to comply; and

"WHEREAS, the principal of the high school and the superintendent of schools have recommended expulsion of Francis Pelletreau for the refusals aforesaid; and

"WHEREAS, it is the determination of this board, upon the recommendation of the principal of the high school and the superintendent of schools that the disobedience of Francis Pelletreau is disruptive to the educational process and which the board determines is detrimental to the well-being of the orderly progress and government of the high school administration;

"NOW, THEREFORE, BE IT RESOLVED, by the Board of Education of the Borough of New Milford that Francis Pelletreau be expelled as a student from the New Milford High School for the following reasons:

"1. That he has refused to comply with the rules and regulations of the high school in that he has refused to comply with the guidelines for school dress and appearance."

Petitioner thereupon appealed to the Commissioner of Education.

As part of his pleadings petitioner attached three photographs which counsel represents to show the status of petitioner's hair at the time of his expulsion. Petitioner's hair, in these photographs, covers the nape of his neck in back to a short distance above his shirt collar. His hair is parted on his left and is combed to the right. It extends across his forehead and covers it almost entirely, and reaches his eyebrows. His hair is combed around his ears, which are fully exposed. The pictures indicate that petitioner's hair was long enough to cover his eyebrows and his ears, were it not combed otherwise.

Counsel have agreed to the following statement of the issues in this matter:

"a. Does the local board of education have the power to regulate the length of a student's hair?

"b. If the board has such power, is the specific code provision adopted by respondent Board a reasonable exercise of that power?

"c. Assuming that the specific code provision is valid, has the petitioner so far violated it as to warrant his expulsion from school?"

A

The question of acceptable dress and appearance of pupils has risen from time to time in various schools in New Jersey. This is the first instance, however, in which the power of a local board of education to regulate pupil appearance has been formally raised before the Commissioner of Education. Neither has this question been considered by a New Jersey Court, although it has been litigated in a relatively few cases in other jurisdictions, some of which are cited *post*.

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The first issue raised in this appeal is the power of a local board of education to regulate the appearance and dress of its pupils and specifically the length of a boy's hair.

Boards of education in New Jersey are vested by law with broad authority in the operation and management of schools in their jurisdiction. *R. S.* 18:7–56 provides:

> "The board may make, amend and repeal rules, regulations and by-laws, not inconsistent with this Title or with the rules and regulations of the State Board of Education, for its own government, the transaction of business, the government and management of the public schools and the public school property in the district * * *."

R. S. 18:7–57 gives the board of education express authority to suspend or expel pupils. Concomitantly, pupils are required to submit to the authority of the school. *R. S.* 18:14–50 provides:

> "Pupils in the public schools shall comply with the regulations established in pursuance of law for the government of such schools, pursue the prescribed course of study, and submit to the authority of the teacher. Continued and willful disobedience, open defiance of the authority of the teacher, or the habitual use of profanity or obscene language shall be good cause for suspension or expulsion of any pupil from school."

Petitioner argues that the style in which he chooses to wear his hair is a matter of fashion and personal taste, and that it has nothing to do with morality or behavior. He maintains that the Board, by depriving him of the right to wear his hair in the style he prefers, is denying him his personal liberty. Even if it is conceded that his appearance would attract some attention by reason of its being different from that of other students, he contends that such distraction is slight and in no wise sufficient to interfere with the good order of the school.

Respondent maintains that the enactment of its "Guidelines" for appropriate pupil appearance was a necessary and proper exercise of its discretionary authority for the purpose of preserving the good order of the school and the maintenance of a proper climate for learning. It claims that the presence of boys who wear their hair in the long style affected by petitioner has been shown to create disorder and produces a disruptive influence in the classroom, which interferes with learning.

A study of the cases involving control of pupil appearance reveals that although customs and styles may have changed over the years, the courts have consistently upheld the decisions and regulations of school authorities regulating pupil attire. More than 40 years ago, a school board in Arkansas excluded an eighteen-year-old girl for wearing talcum powder on her face in violation of its rule which provided that "The wearing of transparent hosiery, low-necked dress or any style of clothing tending toward immodesty in dress, or the use of face paint or cosmetics, is prohibited." The Supreme Court of Arkansas held that absent a clear showing of abuse of discretion or unreason-

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ableness, the rule of the board would be upheld regardless of the court's personal predilections as to its wisdom:

> "The question, therefore, is not whether we approve this rule as one we would have made as directors of the district, nor are we required to find whether it was essential to the maintenance of discipline. On the contrary, we must uphold the rule unless we find that the directors have clearly abused their discretion, and that the rule is not one reasonably calculated to effect the purpose intended, that is, of promoting discipline in the school; and we do not so find.
>
> "Courts have other and more important functions to perform than that of hearing the complaints of disaffected pupils of the public schools against rules and regulations promulgated by the school boards for the government of the schools. The courts have this right of review, for the reasonableness of such rule is a judicial question, and the courts will not refuse to perform their functions in determining the reasonableness of such rules, when the question is presented. But, in doing so, it will be kept in mind that the directors are elected by the patrons of the schools over which they preside, and the election occurs annually. These directors are in close and intimate touch with the affairs of their respective districts, and know the conditions with which they have to deal. It will be remembered also that respect for constituted authority and obedience thereto is an essential lesson to qualify one for the duties of citizenship, and that the schoolroom is an appropriate place to teach that lesson; so, that the courts hesitate to substitute their will and judgment for that of the school boards which are delegated by law as the agencies to prescribe rules for the government of the public schools of the state, which are supported at the public expense." *Pugsley* v. *Sellmeyer*, 158 *Ark.* 247, 250 *S. W.* 538, 539 (*Sup. Ct., Ark.* 1923)

In 1931 a rule of a North Dakota board of education forbidding the wearing of metal heel plates to school, on the ground that they caused more than normal damage to floors and extra noise and confusion affecting the conduct and discipline of the school, was judicially upheld. See *Stromberg* v. *French*, 60 *N. D.* 750, 236 *N. W.* 477 (*Sup. Ct., N. D.* 1931). The school committee in Haverhill, Massachusetts, was also upheld when its rule banning "the wearing of jerseys, sweaters, caps and other conspicuous evidence of membership in an unapproved secret organization" was sustained in court. See *Antell* v. *Stokes*, 287 *Mass.* 103, 191 *N. E.* 407 (*Sup. Jud. Ct., Mass.* 1934). The same conclusion was reached by the Commissioner of Education in *Milligan* v. *Manchester Regional Board of Education*, 1961-62 *S. L. D.* 197. See also *Wood* v. *Manchester Regional Board of Education*, 1964 *S. L. D.* 79.

More recently, courts in Massachusetts and Texas have ruled on the power of a board of education to expel male pupils because of the appearance of their hair. *Leonard* v. *School Committee of Attleboro*, 212 *N. E.* 2*d* 468 (*Sup. Ct., Mass.* 1965) involved a situation similar to the instant case. Leonard's suspension by the school principal because he refused to get "an acceptable haircut" was sustained by the school committee and led to a

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challenge by his parents in the courts. In upholding the school authorities the Court quoted from *Antell, supra,* as follows at page 472:

> " 'Rules adopted by the constituted authorities for the governance of the public schools must be presumed to be based upon mature deliberation and for the welfare of the community.' "
>
> * * * * * * *
>
> "Here, accordingly, we need only perceive some rational basis for the rule requiring acceptable haircuts in order to sustain its validity. Conversely, only if convinced that the regulation of pupils' hair styles and length could have no reasonable connection with the successful operation of a public school could we hold otherwise."

Similarily in Dallas, Texas, a federal court was called upon to consider the case of three boys who were denied admission to the high school "solely because of the length and style of (their) hair." *Ferrell* v. *Dallas Independent School District,* 261 *F. Supp.* 545 (*D. Ct. N. D. Texas* 1966) In its decision upholding the school authorities, the Court said:

> "This court is concerned for the welfare of the individual plaintiffs in this case, but feels that the rights of other students, and the interest of teachers, administrators and the community at large are paramount. * * * Plaintiffs contend naturally that their primary interest is to get an education, but it appears that they want this education on their own terms. It is inconceivable that a school administrator could operate his school successfully if required by the courts to follow the dictates of the students as to what their appearance shall be, what they shall wear, what hours they will attend, etc.
>
> "One of the most important aims of the school should be to educate the individual to live successfully with other people in our democracy. Since the school authorities, by legislative grant, control the public educational system, their regulations play a part in the educational process. This is but another way of stating that society expects public education to concern itself with building young citizens as well as teaching the '3 R's'. It does not appear from the facts of this particular case that there has been any abuse of discretion on the part of the school authorities. On the contrary, it appears that they acted reasonably under the circumstances, taking into consideration these individual students *and* the need for an academic atmosphere. The school principal felt that his authority was being challenged when the boys did not follow the usual registration procedure, but came instead to his office with the proposition that they were under contract to keep their hair 'Beatle Length' and did not intend to cut it. It is, therefore, the opinion of this Court that there has been no violation of minor plaintiffs' rights, either state or federal, by the school authorities."

Analysis of these cases reveals that although there have been relatively few instances in which the subject has been adjudicated, the courts have consistently agreed that local boards of education are cloaked with the authority to regulate the dress and appearance of their pupils.

It can hardly be disputed that school authorities are vested with the power to regulate pupil appearance in instances where it is, or threatens to become

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so extreme as to be the obvious cause of indiscipline and disruption of the school program. Boards of education and their staffs have a responsibility by statutory mandate to provide and maintain conditions under which learning can take place most effectively. The power to adopt rules and regulations having as their purpose the creation of an optimum climate for learning and the elimination of distracting or disruptive elements is an entirely proper and necessary adjunct of that responsibility. To hold otherwise would be to render the school officials powerless to prevent flagrant individual abuses, under the guise of personal freedom, which could adversely affect the welfare of the group and invade the rights of those who want an education. It is inconceivable that a pupil must be allowed to dress or appear in some such bizarre, grotesque, or outlandish fashion, including the condition of his hair, that his presence would be demonstrably prejudicial to the good order of the school. Under such circumstance it is a proper and valid exercise of its statutory discretionary authority for the board of education to adopt rules to regulate appearance, and the Commissioner so holds. As the Court noted in *Leonard* v. *School Committee of Attleboro, supra,* at 472:

> "We are of opinion that the unusual hair style of the plaintiff *could* disrupt and impede the maintenance of a proper classroom atmosphere or decorum. This is an aspect of personal appearance and hence akin to matters of dress. Thus as with any unusual, immodest or exaggerated mode of dress, conspicuous departures from accepted customs in the matter of haircuts *could* result in the distraction of other pupils." *Leonard* v. *School Committee of Attleboro, supra,* at 472 (Emphasis added.)

B

The power of a board of education to make rules and regulations is not unlimited, however. Every rule must be reasonably calculated to achieve a desired and valid educational objective. Thus:

> "A rule, in order to be valid, must be reasonable. Boards of education cannot exercise the authority given to them in ways that are arbitrary, capricious, or unreasonable, overworked and difficult of precise definition as these words may be. *N. J. Good Humor, Inc.* v. *Bradley Beach,* 124 *N. J. L.* 162 at 164 Reasonable is defined as 'conformable to reason; such as is rational, fitting or proper, sensible'. It imports that which is appropriate or necessary under the circumstances. A reasonable rule implies that there is a rational and substantial relationship to some legitimate purpose." *Angell et al.* v. *Board of Education of Newark,* 1959-60 *S. L. D.* 141, 143

Accordingly, while respondent has the inherent power to enact rules to regulate pupil appearance, it may not act capriciously or unreasonably in doing so. Such rules must have as their purpose the realization of an educationally valid and desirable end and they must be reasonably designed to achieve that purpose. If respondent adopted its "Guidelines," for instance, in order to produce conformity of appearance of its pupils, or because members of the faculty or of the Board do not personally approve of particular styles affected by some young people, or in order to develop a sense of "good taste," or for similar reason, the validity of its action could be seriously questioned. Indeed, insistence upon conformity of appearance is repugnant to principles of

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good citizenship which our schools must seek to instill in the future generation. It is also pertinent to question, in any attempt to legislate particular standards of dress or "good taste," whose standards are to serve as the norm. "Good taste" is a matter of education, not legislation. Attempts by school authorities to impose arbitrarily determined standards of appearance upon pupils for the sole purpose of teaching "proper" dress or producing greater uniformity in the student body, is a highly questionable excursion into the realm of parental responsibility, the purpose of which it would be difficult to sustain. Respondent's rule, challenged herein, must be examined, therefore, in the light of these criteria.

Respondent says that it adopted its regulation proscribing extreme hair length for male pupils upon the recommendation of its administrative staff. The administrators who testified said that the reports which they received from teachers revealed that the presence of boys with unusually long hair produced a definite disruptive influence and introduced an element of indiscipline in classes. They denied that their own personal taste or preferences influenced their recommendations in any way. Their sole concern, they testified, was to provide the best possible conditions for learning in order that the mission of the school might best be fulfilled. Two teachers testified and corroborated the assertion of the administrators that the presence of one or more boys with unusually long hair in their classes in the 1965-66 school year had an adverse effect upon the learning situation. The witnesses cited instances of interruptions in classroom routines by jeers, derogatory remarks and general indiscipline when one of the long-haired boys was called upon to recite or to go to the chalkboard. Evidence of these pupils' withdrawal from and isolation by their peers, and the expressed unwillingness of other pupils to sit near them because of the distracting effect of their appearance was also presented. As a direct result of this experience during the 1965-66 school year and in order to control what appeared to be a growing fad having negative effects upon the school's operation, the administration appointed a committee to study the problem and to make recommendations. The committee, headed by the vice-principal and comprising teachers, parents, and pupils, met several times after the close of school in June 1966, and eventually presented a draft for a "dress code" to the administration. Except for some minor editing, the committee's suggestions became the "Guidelines" subsequently adopted by the Board of Education in August 1966, upon the recommendation of the school administration.

After a careful consideration of all of the testimony the Commissioner concludes that there is substantial evidence to support respondent's contention that it acted reasonably to control a condition which threatened the good order of the school, and not from any purpose to deprive pupils of personal liberty or arbitrarily to impose upon them matters of taste in appearance. While any of the incidents cited by the witnesses, standing alone, might be considered relatively minor in its effect upon the good order of the school, the cumulative effect of the conditions created by the appearance of these boys with unusually long hair could, in the Commissioner's judgment, constitute a serious deterrent to effective learning in a group situation. The Commissioner finds, therefore, that respondent has sufficiently established the fact that its regulation has a rational relationship to a valid educational purpose and is a reasonable exercise of its discretionary authority. In this connection the Commissioner notes

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the recent case of *Tinker* v. *Des Moines Independent Community School District,* 258 *F. Supp.* 971 (*D. Ct. S. D. Iowa* 1966) in which the Court was asked to enjoin a school district regulation prohibiting the wearing of black arm bands by pupils on school facilities as a protest against the continuing of hostilities in Viet Nam. In upholding the authority of the school district to impose such a restriction on appearance the Court said, at pages 972, 973:

> "Officials of the defendant school district have the responsibility for maintaining a scholarly, disciplined atmosphere within the classroom. These officials not only have a right, they have an obligation to prevent anything which might be disruptive of such an atmosphere. Unless the actions of school officials in this connection are unreasonable, the Courts should not interfere.
>
> * * * * * * *
>
> "While the arm bands themselves may not be disruptive, the reactions and comments from other students as a result of the arm bands would be likely to disturb the disciplined atmosphere required for any classroom. It was not unreasonable in this instance for school officials to anticipate that the wearing of arm bands would create some type of classroom disturbance. The school officials involved had a reasonable basis for adopting the arm band regulation.
>
> * * * * * * *
>
> "On the other hand, the plaintiff's freedom of speech is infringed upon only to a limited extent. * * * In this instance, however, it is the disciplined atmosphere of the classroom, not the plaintiff's right to wear arm bands on school premises, which is entitled to the protection of the law.
>
> * * * * * * *
>
> "After due consideration, it is the view of the Court that actions of school officials in this realm should not be limited to those instances where there is a material or substantial interference with school discipline. School officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court. In the case now before the Court, the regulation of the defendant school district was, under the circumstances, reasonable and did not deprive the plaintiffs of their constitutional right to freedom of speech."

The rule involved in this case is similarly reasonable and the Commissioner so holds. See also *Leonard* v. *School Committee of Attleboro, supra.*

C

Having found that respondent's rule is reasonable, the question remains whether the Board properly concluded that petitioner's long-haired appearance violated it.

Counsel for petitioner emphasized that petitioner wore his hair much longer at the hearing than at the time he was barred from school. He asks that the Commissioner's judgment on this question be based not on petitioner's ap-

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pearance at the hearing but on three photographs of petitioner taken at the time of his expulsion and attached to his pleadings. These photographs indicate that petitioner's hair then was combed in a different style, described *supra,* and was not as long as at the time of the hearing.

This particular question raises problems of definition which it may not be feasible, practical, or even necessary to answer precisely.

The evidence presented sufficiently establishes that at the time of his exclusion from school petitioner wore his hair much longer than is the usual custom for most males and in a style currently affected by a relatively small number of adolescents and young men. Whether his hair length could be classified as a mere fad or as exhibitionism, or whether it was just within or beyond respondent's rule for acceptability cannot be determined with preciseness from the photographic evidence. Certainly, its length at the time of the hearing before the Assistant Commissioner is irrelevant. The Commissioner knows of no practical way to define the point at which a schoolboy's hair becomes too long to be acceptable for school attendance, nor does he find any necessity to do so in this case. Conceivably the standards for pupil appearance may vary from school to school and from time to time. The determination of acceptable dress must lie necessarily with local school authorities who, in the exercise of their discretion, may bar bizarre styles and fashions when it can reasonably be shown that they are directly related in a negative way to the proper purposes of the school. In this case the Commissioner has been presented no evidence which would cause him to consider aribtrary the judgment of the school officials who determined that petitioner's appearance was not acceptable under respondent's rules for school attendance.

Although not raised by counsel, there remains, in the Commissioner's opinion, the question of the severity of the penalty which petitioner is to suffer for his noncompliance. The Commissioner deplores the necessity for expulsion from school of any boy or girl and believes that every alternative remedy should first be explored before resort is had to such drastic action. In this case, however, there appears to be no appropriate alternative. Petitioner, like other New Jersey boys and girls, has a constitutional right to a free public school education. But that right does not extend to dictation by a pupil of the terms and conditions of his attendance and the school's operations. See *Ferrell et al.* v. *Dallas Independent School District et al., supra.* In exercising his right to get an education by going to school, petitioner has a concomitant obligation to submit to the authority of the school and to refrain from conduct or behavior which is demonstrably deleterious to the best interests of other pupils. If he refuses to comply and adamantly insists that he will attend only on his own terms, which those in charge have reasonably determined to be prejudicial to the good order of the school, then his individual right must give way to the paramount rights of the group. Although the Commissioner wishes it could be otherwise, he can see no other course open to respondent than removal of petitioner's right to school attendance in the face of his persistent refusal to comply with respondent's regulations therefor.

Finally, the Commissioner urges all school officials and personnel to use good judgment, patience, and a deep understanding of the developmental needs of children and youth in the regulation, not only of this particularly sensitive

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and difficult aspect of pupil behavior, but of all kinds of student conduct and the determination of appropriate sanctions when violations occur. Problems such as the one presented herein call for the exercise of much forbearance, patience, understanding, and wisdom on the part of school staffs and parents alike. In this case the Commissioner hopes that petitioner will be helped to see the necessity to comply with respondent's rules for acceptable appearance and will do so expeditiously in order that he may resume and complete his public school education successfully.

The Commissioner finds and determines (1) that respondent Board of Education has the authority to adopt reasonable rules and regulations for acceptable pupil behavior with respect to dress and appearance; (2) that the rule adopted by respondent Board of Education with respect to acceptable appearance of the hair of male pupils is not capricious or unreasonable under the circumstances shown; (3) that the determination of the school administrators that petitioner's hair appearance violated respondent's regulations was proper; and (4) that the penalty of expulsion was justified.

The petition is therefore dismissed.

ACTING COMMISSIONER OF EDUCATION.

March 8, 1967.

DECISION OF STATE BOARD OF EDUCATION

Petitioner, a fifteen year old male ninth grade pupil, was expelled as a student from the New Milford High School by resolution adopted on November 28, 1966, by the Board of Education of the Borough of New Milford. He appealed to the Commissioner of Education. After hearings held on January 6 and 13, 1967, the Commissioner, by Decision dated March 8, 1967, dismissed the petition of appeal. An appeal from the Commissioner's decision was timely taken to this Board. Each member of this Board has reviewed the record of the transcript of the hearings below and studied the briefs submitted by the parties. Oral argument was heard on June 7, 1967.

The departure of the petitioner from school was occasioned by the length of his hair and his concededly stubborn refusal to comply with the orders of the school authorities to have his hair trimmed in an "appropriate" manner. The orders were based on regulations adopted by the Board of Education of New Milford during the summer of 1966 at the request of the high school authorities. Copies of the regulations, called "Guidelines for school dress and appearance", were sent to all high school pupils and their parents. The "Guidelines" contain the following provision:

> "Hair should be trimmed neatly and be in keeping with the general style of the time. Extremes in hair length (covering the ears, the eyebrows, and the nape of the neck) are inappropriate for this school."

When petitioner came to class on the first day of the term beginning in September 1966, he was told by a Vice-Principal that unless his hair was trimmed, he could not attend class. He has been out of school since, except for a short period after a hearing held by the Board of Education and before

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its decisions, during which period a stipulation allowing class attendance was in effect.

The resolution of November 28, 1966 is set forth in full:

"WHEREAS, the Board of Education of the Borough of New Milford has adopted guidelines for school dress and appearance in the New Milford public schools; and

"WHEREAS, these guidelines were laid down for the purpose of preventing extremes in appearance and dress for the purpose of preventing disruption to the educational process in the school system in the judgment of the administration and the faculty; and

"WHEREAS, Francis Pelletreau has appeared in the high school with extremely long hair in violation of the aforesaid guidelines for school dress and appearance; and

"WHEREAS, Francis Pelletreau has refused to obey the recommendations of the administration of the high school by persisting in having extremely long hair; and

"WHEREAS, the principal of the high school suspended Francis Pelletreau at least and until he complies with the rules and regulations of the high school; and

"WHEREAS, Francis Pelletreau has consistently refused to comply; and

"WHEREAS, the principal of the high school and the superintendent of schools have recommended expulsion of Francis Pelletreau for the refusals aforesaid; and

"WHEREAS, it is the determination of this board, upon the recommendation of the principal of the high school and superintendent of schools that the disobedience of Francis Pelletreau is disruptive to the educational process and which the board determines is detrimental to the well-being of the orderly process and government of the high school administration;

"NOW, THEREFORE, BE IT RESOLVED, by the Board of Education of the Borough of New Milford that Francis Pelletreau be expelled as a student from the New Milford High School for the following reasons:

"1. That he has refused to comply with the rules and regulations of the high school in that he has refused to comply with the guidelines for school dress and appearance."

At the hearing before the Commissioner a set of photographs were introduced in evidence which, it is stipulated, are images of petitioner's appearance at the time of his expulsion. His hair is apparently neat, yet considerably longer than customary for males "in general style of the time." It covers his forehead to his eyebrows and is combed around his ears, which are not covered. The nape of his neck is covered.

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The case was submitted to the Commissioner on the following stipulated statement of issues:

"a. Does the local board of education have the power to regulate the length of a student's hair?

"b. If the board has such power, is the specific code provision adopted by respondent Board a reasonable exercise of that power?

"c. Assuming that the specific code provision is valid, has the petitioner so far violated it as to warrant his expulsion from school?"

The Commissioner ruled against the petitioner on each issue and further determined that the penalty of expulsion was justified.

The laws of our State give broad authority to boards of education to operate and manage the schools in their jurisdiction (*R. S.* 18:7–56) and the power to suspend or expel pupils (*R. S.* 18:7–57). Pupils are required to "comply with the regulations established in pursuance of law for the government of * * * schools * * *." (*R. S.* 18:14–50) The fact that the present case is one of first impression in this State is testimony to the wisdom of boards of education and school administrators in adopting and administering, and respect of pupils for convention and authority in complying with, rules relating to pupil conduct and appearance.

Certainly it is the right of local school boards and school administrators to adopt and enforce rules concerning student conduct. Such rules must be reasonable. See *N. J. Good Humor, Inc.* v. *Bradley Be*ach, 124 *N. J. L.* 162 (E. & A. 1939) 124 N. J. L. 162. Reasonable rules have "* * * a rational and substantial relationship to some legitimate purpose." *Angell et al.* v. *Board of Education of Newark,* 1959-60 S. L. D. 141, 143

It is the contention of the respondent that the rule in question was necessary to prevent disruption and indiscipline in classrooms and during other school activities. There was testimony that there was some jeering and occasional derogatory remarks when long-haired boys were called upon to recite. Some indication is given that there was a tendency on the part of other students to isolate themselves from the boys who wore their hair longer than was customary.

Petitioner claims that the rule must fall as violative of the protection of freedom of expression guaranteed by the First Amendment of the United States Constitution. He claims that any pupil has the right to be a "speckled bird" so long as he does not violate reasonable regulations relating to health and morality.

It is essential to the orderly process of education that local boards concern themselves with the conduct of the students in their schools where such conduct constitutes a threat to the educational process. We are not satisfied that the record demonstrates that long-haired males present a significant threat to orderly discipline in the schools. The evidence does not indicate that the reaction of the other students was so grave as to be beyond control by the exercise of ordinary simply disciplinary measures.

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Nor do we believe that this case presents issues of sufficient importance to the management of the public schools to cause us to embark upon an examination of the constitutional limits of the authority of boards of education to regulate the conduct of pupils.

We recognize that students live most of their lives outside the walls of their schools. During their out-of-school hours, they are subject to the discipline of their parents and must abide by the laws of the community. A school regulation forbidding long hair in effect regulates outside of school conduct. It is not possible to have short hair in school and revert to longer hair at home. A regulation relating to dress does not have this effect. A student may well comply with regulations as to what may or may not be worn during school hours and dress as he or his parents sees fit during his non-school hours.

Historically, students have been innovators. So long as it does not interfere with the process of education, it is healthy and heartening that they now and again test the mores of their elders. While most of the rule promulgators and decision writers of 1967 wear their hair cropped comparatively close to the scalp, history has seen the day when the legislators and judges habitually adorned themselves with natural or artificial locks of near shoulder length. Who is to say that this day is not to return?

We come to the conclusion that the portion of the "Guidelines" resolution quoted above should be set aside. We are not convinced that the rule has a substantial relationship to a legitimate purpose. We cannot conceive that the threat to school discipline is sufficiently great to justify interference with the relatively harmless experimentation of students in the field of hair styling.

It is noted that both the Supreme Court of Massachusetts and a Federal District Court in Texas have ruled, in cases similar to this one, contrary to our decision here. *Leonard* v. *School Committee of Attleboro*, 212 *N. E. 2d* 468 (*Sup. Ct., Mass.* 1965); *Ferrell* v. *Dallas Independent School District*, 261 *F. Supp.* 545 (*D. Ct. N. D. Texas* 1966) However, a judge of the Superior Court of California has set aside a rule similar to the one here in question as being too vague and uncerain "to permit an enforcement without the interjection of conjecture and opinion * * *." *Meyers et al.* v. *Ascata Union High School District, Super. Ct. Calif., Humboldt County*, Nov. 1966, No. 45522

Of course, the reasonable rules and regulations of local boards of education shall be enforced. We stress the limits of this decision and caution any ingenious and provocative New Jersey public school students that our concern for freedom of expression is tempered by our determination that the proper course of the educational process not be impeded and that the high standards of our schools be maintained.

The decision of the Commissioner is reversed. Petitioner is to be admitted to the New Milford High School for the fall term.

September 6, 1967.

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XV

In the Matter of the Annual School Election Held in the Borough of Fort Lee, Bergen County

Commissioner of Education

Decision

The announced results of the balloting for candidates for membership on the Board of Education for 3 full terms of 3 years and for 1 unexpired term of 1 year at the annual school election held February 14, 1967, in the School District of the Borough of Fort Lee, Bergen County, were as follows:

For Terms of Three Years

	At Polls	*Absentee*	*Total*
Louis R. Masci	790	1	791
Irving Goodman	671	1	672
Stephen Colenda	613	1	614
Vahan Zarifian	602	0	602
George Beck	572	0	572
Frank J. Belizzi	561	0	561
Jordan M. Cole	217	0	217

For Unexpired Term of One Year

Richard B. Thompson	738	1	739
Nancy Siracusa	566	0	566

Pursuant to a request from Vahan Zarifian and at the direction of the Acting Commissioner of Education, a recount of the votes cast for Vahan Zarifian, George Beck and Stephen Colenda was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes on March 9, 1967, at the warehouse of the Bergen County Board of Elections. The rechecking of the voting machine totals and the poll lists confirmed the announced results above.

The Commissioner finds and determines that Louis R. Masci, Irving Goodman and Stephen Colenda were elected to membership on the Board of Education of the Borough of Fort Lee for full terms of 3 years each and that Richard B. Thompson was elected for an unexpired term of 1 year.

Acting Commissioner of Education.

March 16, 1967.

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XVI

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

Commissioner of Education

Decision

The announced results of the balloting for candidates for membership on the Board of Education for 3 full terms of 3 years at the annual school election held February 14, 1967, in the School District of the Township of Medford, Burlington County, were as fellows:

Richard L. O'Neal	378
Irving R. Norton	284
William Bisignano	239
Donald R. Johnson	226

Pursuant to a request from Mr. Johnson and at the direction of the Acting Commissioner of Education, a recount of the ballots cast for William Bisignano and Donald R. Johnson was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes on March 10, 1967, at the office of the Burlington County Superintendent of Schools. The recount was limited to a determination of the ballots cast for Candidates Bisignano and Johnson. The results of the election were determined to be:

William Bisignano	239
Donald R. Johnson	225

The Commissioner finds and determines that Richard L. O'Neal, Irving R. Norton, and William Bisignano were elected to membership on the Board of Education of the Township of Medford for full terms of 3 years each.

Acting Commissioner of Education.

March 16, 1967.

XVII

In the Matter of the Annual School Election Held in the Township of Tabernacle, Burlington County

Commissioner of Education

Decision

The announced results of the voting at the annual election held in the School District of the Township of Tabernacle, Burlington County, on Feb-

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ruary 14, 1967, for three members of the Board of Education for full three-year terms were as follows:

Helene M. Emlen	116
Roberta Hagerty	111
Paul Fitzpatrick	109
Edward Dawes	107
Edward S. Dorn	107
Abner J. Nixon	100
Elizabeth Emlen	1
Arthur Gerber	1

Pursuant to a request from the Tabernacle Township Board of Education, the Acting Commissioner of Education directed the Assistant Commissioner of Education in charge of Controversies and Disputes to conduct a recount of the votes cast. The recount was held on March 10, 1967, at the office of the Burlington County Superintendent of Schools in Mount Holly.

During the recount 30 ballots were referred for determination. Further consideration of these ballots disclosed eight ballots with no marks in the square before the name of any candidate, and therefore no vote could be counted. *R. S.* 19:16–3c; *In re Election for Mayor, Borough of Lavalette,* 9 *N. J. Misc.* 25; *In re Annual School Election in the Township of Lawrence, Mercer County,* 1956-57 *S. L. D.* 68 It was further determined that all or at least part of the remaining 22 ballots were marked properly and that the appropriate number of votes were to be added to the totals of the candidates properly voted for. *Stanton* v. *Englewood Cliffs Annual School Election,* 1938 *S. L. D.* 166

The recount disclosed that many voters had cast votes by the use of pasters to indicate personal choice of candidates whose names were not imprinted on the ballots. The use of such pasters has been held to be valid. *Shearn* v. *Middlesex Borough Annual School Election,* 1938 *S. L. D.* 161 Some of the pasters were placed over the names of nominated candidates printed on the ballots. In such cases where proper marks had been made in the appropriate squares, the votes were counted. *William Pepper, In re Annual School Election in Tabernacle Township, Burlington County,* 1938 *S. L. D.* 188, 190

In some instances in which voters had written in the names of personal choice candidates in the spaces provided for that purpose, the names were spelled, written, or printed incorrectly. In each such case it was determined that the intention of the voter was clear and the vote was therefore counted. *Joseph Flach, In re Madison Borough Annual School Election,* 1938 *S. L. D.* 176

At the conclusion of the recount with all ballots determined the tally stood:

Helene M. Emlen	123
Roberta Hagerty	119
Edward S. Dorn	113
Paul Fitzpatrick	113
Edward Dawes	108
Abner J. Nixon	102
Arthur Gerber	2
Howard Grovatt	1

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The Commissioner finds and determines that Helene M. Emlen and Roberta Hagerty were elected to membership on the Tabernacle Township Board of Education for full terms of three years each. The Commissioner further determines that, by reason of the fact that Paul Fitzpatrick and Edward S. Dorn each received 113 votes, there was a failure to elect a third member to the vacant seat on the Tabernacle Township Board of Education. The Burlington County Superintendent of Schools is therefore directed to appoint a qualified person to fill the vacancy until the organization meeting following the next annual election in accordance with the provisions of *R. S.* 18:4–7d.

ACTING COMMISSIONER OF EDUCATION.

March 21, 1967.

XVIII

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF DOVER, A CONSTITUENT DISTRICT OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY

COMMISSIONER OF EDUCATION

DECISION

Pursuant to a petition and affidavits filed by Lester R. Glenn and Carlos E. Wilton, alleging irregularities in the conduct of the annual school election held on February 7, 1967, in Dover Township, a constituent district of the Toms River Regional School District, an inquiry was conducted by a hearing examiner designated by the Commissioner of Education at the office of the County Superintendent of Schools on March 7 and 8, 1967. The report of the hearing examiner is as follows:

The announced results of the balloting for the election of two members on the Regional Board of Education from Dover Township for terms of three years were as follows:

	At Polls	*Absentee*	*Total*
Edward Gatsch	617	24	641
Carlos E. Wilton	614	9	623
Lester R. Glenn	584	10	594
Arthur W. Lesbirel, Jr.	456	21	477
Stephen J. Wenzler, III	101	1	102
Michael T. Ottmer	63	0	63
Joseph Carracino	60	0	60
Bruno Agnoli	30	0	30
John W. Vasarkovy	24	0	24

In the affidavits filed in support of their request for an inquiry, petitioners make these allegations:

1. At the polling place for School Election District #4, the wife of the chairman of the election officers was permitted to be present in the polling place and to make a list of those who voted, said list being for the use of

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certain persons actively supporting the election of particular candidates. The making of the list was continued until a police officer was called, who impounded the list, later returning it to the chairman. Further, an incumbent Board member was interested in receiving said list of voters.

2. Certain voters at School Election District #3 were permitted to vote although their names were not found in the signature copy registers and said persons did not file affidavits attesting their eligibility to vote. Three telephone calls were made, supposedly to the County Board of Elections, to clear the voting rights of certain persons whose names were not found in the signature copy registers.

3. An official challenger took several persons into a separate room adjoining the polling place prior to their voting. It is the belief of the affiant that the said challenger was electioneering at the polling place.

Further complaints were made at the inquiry herein:

4. There were complaints of difficulty in operating the voting machine lever to cast a vote for a second candidate, and a mechanic was called to correct the difficulty. No claim was made that any voter had been unable to cast his vote.

5. The petitioners were not afforded an opportunity to examine the voting machines as provided by *R. S.* 18:7–47.9.

Testimony was heard from the petitioners, their challengers, the chairmen of election officers at both polling places, several Board members, the wife of the chairman at District #4, and a fire commissioner from the Fire House at which the polling place for District # 3 was located. With respect to each of the allegations respectively, the hearing examiner finds:

1. The wife of the chairman of District #4 did make a list of voters as they received their voting authority, at the request of a person not a challenger or candidate for election, in the knowledge that the list was to be used to get voters to the polls. The chairman's wife was not an election officer, a candidate, or a challenger. There was no evidence that her presence or activity interfered with or impeded the orderly progress of the election.

2. No person voted at District #3 whose name does not appear in the signature copy registers used in that District. The poll lists made at the election were compared name-by-name, and each name was found in one of the registers. The chairman of the election officers testified that he made telephone inquiries to the County Board of Elections concerning three persons whose names did not appear in the signature copy registers but who presented permanent registration cards. These three persons were not permitted to vote.

3. There is no evidence to support a charge of improper electioneering by a challenger at District #3. The testimony shows that the persons who passed through or near the area of the Fire House used as the polling place were firemen, that the challenger was himself a fireman, and that no electioneering as alleged was either seen or heard.

4. With respect to the difficulty in operation of voting machines, it is established that a mechanic did in fact service the voting machines in at

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least two polling places. One witness testified that the mechanic "put a little oil" in the machine. However, no testimony was offered to show that any person was unable to operate the machine to cast his vote.

5. There was no testimony *contra* petitioners' assertions that they had not been given opportunity to examine the voting machines prior to the election as provided by *R. S.* 18:7–47.9, which reads as follows:

> "After preparing a voting machine for a school election when candidates are to be elected written notice shall be mailed by the superintendent of elections of the county or the county board of elections, as the case may be, to all candidates, stating the time and place where the machines may be examined, at which time and place all the candidates shall be afforded an opportunity to see that the machines are in proper condition for use in the election."

From the findings as set forth *supra,* the hearing examiner concludes that there is no showing of any irregularity or misconduct to warrant setting the election aside. It is well established that elections will be given effect if possible, and will not be held void unless clearly illegal. *State, ex re. Love et al.* v. *Freeholders of Hudson Co.,* 35 *N. J. L.* 269, 277 (*Sup. Ct.* 1871); *In re Wene,* 26 *N. J. Super.* 363, 376 (*Law Div.* 1953), affirmed 13 *N. J.* 185 (1953)

The petition herein does not in itself seek the voiding of the election. It complains of the aura of partisan activity surrounding the conduct of the election, and by the clear implication of the supporting affidavits associates the alleged irregularities with such partisan activity. The effect of such implication, unsupported by fact as it has been shown to be, is that of reflecting no more than petitioners' suspicions of impropriety. But suspicions are not enough. There must be facts established to show that the acts complained of constituted such misconduct or omission of duty on the part of the election officials that the result of the election would be changed. See *In re Clee,* 119 *N. J. L.* 310, 327 (*Sup. Ct.* 1938).

Petitioners complain of the "intrusion of partisan politics into school board affairs" and allege "that certain prominent political figures in Ocean County were apparently using the political apparatus" of a party to bring about the election of two of the candidates. The Commissioner has previously expressed his belief that partisan politics have no place in school district elections. *In the Matter of the Annual School Election Held in the Southern Regional High District, Ocean County,* 1964 *S. L. D.* 47, 48 The courts as well have spoken on this subject. In *Botkin* v. *Westwood,* 52 *N. J. Super.* 416, 431 (*App. Div.* 1958), the Court noted the legislative separation between municipal governing bodies and boards of education, and said:

> "* * * The aim is clear that the local school system shall be run by the citizens through their elected representatives on the board of education and not by political parties and that the elections of board members shall be on the basis of educational issues and not partisan considerations."

However, in the *Southern Regional High School* election matter, *supra,* the Commissioner found no basis for setting aside an election on the grounds of endorsement of a candidate by a political party, saying:

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> "* * * If the mere assertion that a political organization had supported a particular nominee were enough to void an election, it would be a simple matter * * * to eliminate an opponent by arranging to have a political group endorse him and thereby give him 'the kiss of death.' "

Finally, petitioners in their testimony allege a failure in duty of the election officials to require to leave the polling place "all persons other than challengers, candidates and persons in the process of voting." *R. S.* 18:7–35 It is plainly the duty of election officials to see to it that the election is conducted in an orderly manner, that there is no interference with the voting or canvassing of the votes, and that there is no electioneering in the building in which the election is being conducted. *R. S.* 18:7–35, 18:7–40 Such activities fall within the discretion of the election officials who *may* require unauthorized persons to leave the polling place. *R. S.* 18:7–35 In any event, any presence of unauthorized persons in or near the polling place was not shown to have had any effect on the result of the election.

> "* * * Irregularities on the part of election boards having no effect upon the voting, & c., will never vitiate an election." *In re Clee, supra,* at page 329

The hearing examiner observes that some of the misunderstandings attendant upon this election derive from the fact that challengers did not present credentials to the election officials, or did not possess such credentials, or were not supplied with a mark of identification as a challenger. It is recommended that the Commissioner caution all persons having responsibility for the conduct of a school election to follow the procedures set forth in the statutes for the appointment, certification, identification, and conduct of challengers. *R. S.* 18:7–35, 35.1, 35.2, 35.3, 35.4

* * * * * * *

The Commissioner has carefully studied the findings, conclusions, and recommendations of the hearing examiner set forth *supra,* and concurs therein. The Commissioner holds that the election for two members from Dover Township to serve on the Toms River Regional Board of Education is a valid election. In so holding, he does not condone any informality of procedure or any departure from strict and meticulous observance of the laws governing school elections, and he cautions and directs all persons having responsibility for school district elections to give scrupulous attention and conformance to the statutes.

The Commissioner finds and determines that Edward Gatsch and Carlos E. Wilton were elected in Dover Township to three-year terms on the Toms River Regional Board of Education.

ACTING COMMISSIONER OF EDUCATION.

March 27, 1967.

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XIX

In the Matter of the Annual School Election Held in the Borough of Seaside Park, Ocean County

Commissioner of Education

Decision

At the annual school election held February 14, 1967, in the school district of Seaside Park, Ocean County, the ballot provided for the election of a member of the Board of Education for an unexpired term of one year. The name of only one candidate, Eleanor B. Graff, appeared on the printed ballot. A number of voters cast irregular ballots by writing in a name as their personal choice in the space provided for such purpose. At the conclusion of the voting, when the votes were being counted, some confusion arose over the tallying of the irregular ballots because of the variations in the names written in. As a result only two members of the election board signed the report certifying the proceedings, the other two members declining to do so. The Commissioner of Education was called upon, therefore, to recount the votes and determine the result of the election for the seat on the Board for the unexpired term of one year.

At the conclusion of the recount it was determined that the tally for Eleanor B. Graff was 89 votes cast at the polls and one vote by absentee ballot, for a total of 90 votes. In addition there were 124 ballots on which "write-in" votes were cast as follows:

Charles J. Miller	60
Charles Miller	43
Charles Miller, Jr.	7
Charles J. Miller, Jr.	3
Other names or spellings	11

Members of the election board were unable to agree whether the votes on which the name Miller appeared should be counted separately or combined in one total.

It appears that there are two residents of Seaside Park named Charles Miller who are father and son. The father's full name is Charles John Miller and the son's is Charles Joseph Miller. The younger Mr. Miller asserted his belief that all of the votes were intended for him and not for his father. In support of this claim he testified that his father had never taken any interest in school matters and had not sought a seat in the Board and had, in fact, been ill for some time prior to the election. The son testified further that he is a teacher in another school system and very much interested in school problems in his home district; that he neglected to file a nominating petition in time because of the illness and subsequent death of his mother; that he did thereafter seek election to the Board and had, in fact, solicited the vote of at least 150 residents by personal contact.

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On the other hand, Mrs. Graff and two members of the election board expressed their belief that the voters were confused between father and son and that there was no way in which it could be fairly determined for which one the votes had been cast.

The case law pertinent to the problem presented herein is summarized in 29 *C. J. S.* § 180, 516 as follows:

> "A name must be written on the ballot in such a manner as to make it possible to determine the voter's choice for the office. Thus a ballot cannot be counted where the voter has failed to identify sufficiently the candidate for whom he attempted to vote, as where the name written in bears no resemblance to the name of the candidate for whom the vote is claimed and there is a person bearing such name resident in the district, or where the voter has failed to give a substantial rendering of the candidate's name, giving merely a similar sounding surname, and there is another individual within the district or other political unit to which the name as written might appropriately apply, or where the voter has written in only the candidate's initials or either his given name alone or his given name and initials.
>
> "Likewise, ballots or attempted write-in votes have been held invalid and not to be counted because of the elector's failure to identify sufficiently the candidate for whom he attempted to vote, where the elector has written in only the candidate's surname, at least where there are other persons bearing the same surname within the political unit who are eligible to hold the office, or where the voter has written in the candidate's surname with a wrong given name, and there is nothing to show that the candidate is known by such given name, or where the voter has omitted the candidate's initials, or has used wrong initials.
>
> "Generally, however, if the voter's intention can be determined, that intention will not be defeated because of an irreguarity in the writing of the candidate's name. Thus ballots have been held not invalidated because the voter misspelled the candidate's name or address, as where the error was so slight and of such a nature as to render the name as written within the scope of the doctrine of idem sonans; or because the voter wrote some other or slightly different name of like or similar pronunciation, as where there is a clear relation between the appearance or sound of the name written in and that of the candidate, and only one man of a particular name is a candidate for the office or resides within the political unit.
>
> "Likewise, where the voter's intention can be ascertained, a ballot or write-in vote is not invalidated because the voter omitted the candidate's initial, or employed a wrong initial or a wrong first or middle name.
>
> "Provided the voter's intention can be determined, a ballot or write-in vote is not invalidated because the voter wrote the candidate's initials in place of his given name, or not only wrote the candidate's initial instead of his given name but also misspelled the candidate's surname, or because the voter abbreviated the candidate's first or middle name, or wrote only the candidate's last name, there being no other candidate of the same

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name to be voted for, or no persons within the district or political unit, other than the candidate and his wife, bearing the same name.

"Even where there are others within the district or political unit bearing the same surname, it has been held that a ballot on which the voter has written only a candidate's surname should be counted for such candidate, where the circumstances are such that the voter's intention to vote for the particular candidate is clear."

See also *In re Steinberg*, 197 *C. A.* 2*d* 264, 17 *Cal. Rptr.* 431 (1961), in which it was held that the trial court has a right to consider, in ascertaining a voter's intent, the fact that the write-in candidate is an avowed candidate for the office.

In this case 60 votes were cast for Charles J. Miller and 43 votes for Charles Miller. It is as reasonable to assume that all of these votes were cast for the same man as it is to argue that they were intended for different persons. The use of the middle initial in this instance does not distinguish between father and son. That the voters were not aware of the full names of the two men is shown by the fact that no ballot spelled out the middle name of either man. Nor is the use of the appellation "Jr." correct in this instance. Under the circumstances herein and in accordance with the case law cited *ante*, the Commissioner finds that it is necessary and proper to look to parol evidence in this case to determine the will of the voters.

Young Mr. Miller claims that he has been actively interested in local school matters and was an avowed candidate for membership in the Board of Education and that neither of these assertions is true with respect to his father. His explanation for his failure to file a nominating petition and his subsequent decision to seek election by means of a "write-in" vote is entirely credible. These claims were not refuted. Under such circumstances the Commissioner finds that it may reasonably be inferred that the voters who cast a ballot for "Charles J. Miller" or "Charles Miller" intended to elect the son and not the father. The Commissioner finds, therefore, that the ballots cast for Charles J. Miller and Charles Miller are to be counted for the same person and that that person is Charles Joseph Miller, the son of Charles John Miller.

The Commissioner finds and determines that Charles Joseph Miller was elected to a seat in the Seaside Park Board of Education for an unexpired term of one year.

ACTING COMMISSIONER OF EDUCATION.

April 7, 1967.

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XX

In the Matter of the Annual School Election Held in the Morris Hills Regional High School District, Morris County

Commissioner of Education

Decision

The announced results of the balloting for one seat on the Morris Hills Regional High School District Board of Education from the constituent district of the Borough of Wharton at the annual school election held February 7, 1967, were as follows:

Frank J. Porter	29
Augustine Magistro	43

Pursuant to letter requests from candidate Porter and another resident of the district, the Assistant Commissioner in charge of Controversies and Disputes held an inquiry into the conduct of this election at the office of the Morris County Superintendent of Schools on March 28, 1967. Testimony was offered by the two petitioners.

The petitioners make the following allegations:

1. Voting authority slips were not offered to or used by many voters.
2. There were no challengers at the polls.
3. Electioneering was permitted at the polls.
4. Approximately 9 irregular ballots were written on a line other than the proper one.
5. Blizzard weather conditions kept many voters from the polls.
6. There was a secret, clandestine campaign to elect Mr. Magistro.

The petitioners contend that under the circumstances of this election the results did not reflect the will of the people. They ask that the election be set aside and a new election held.

1. One of the petitioners testified that voters did not receive authorization slips to cast their ballots on the voting machines. He presented an unverified "affidavit" on which appears the following statement followed by the signatures of 10 persons and their addresses:

> "We, the undersigned hereby affirm that we are residents and duly registered voters of the Borough of Wharton."
>
> "The undersigned further affirm that on February 7, 1967, in the course of voting in the Morris Hills Regional School District election, we did not receive a voting authorization slip from the election officials of the Borough of Wharton. We, hereby certify that we cast our votes without being offered or touching any voting authorization slips."

No election official was present to affirm or refute this testimony.

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Whether or not voting authorization slips were used, there is here no charge or evidence that such an omission had any bearing on the results of the election. There is nothing to show that more ballots were cast than there were voters, or that unqualified persons were permitted to vote, or that any illegal votes were cast thereby. Absent such a showing there is no sufficient basis for challenging the results of the election. That being so and in the absence of more complete testimony with respect to this allegation, the Commissioner recognizes no necessity to make a more specific finding on this charge.

2. The absence of challengers at the polls does not establish grounds for contesting an election. As a nominated candidate, petitioner could have served as a challenger or he could have appointed a challenger to act in his interest. *R. S.* 18:7–35 That he failed to do so and that there was thereby no challenger at the polls does not in itself raise a question with respect to the integrity of the election or the manner in which it was conducted.

3. The only evidence offered on the charge of electioneering at the polls was a newspaper article which told of a telephone call from an unidentified person charging that the wife of the successful candidate had remained in the polling place distributing pencils, and which contained also a denial by the secretary of the election board that any such conduct had been permitted or had occurred. The only other evidence on this charge was admittedly hearsay by one of the petitioners.

None of this evidence is competent. Petitioner was unable to support this charge with substantial evidence and the allegation must, therefore, be dismissed.

4. Examination of the paper roll from the voting machine on which irregular ballots were recorded revealed that votes were written in on lines 1, 2, 3, 13, and 14.

Petitioners contend that valid irregular ballots could be cast only on line 2 opposite the name and lever of candidate Porter. It is evident, however, that the voting machine was not prepared by the county election board with all the slides for irregular ballots locked out except slide No. 2. The machine was arranged so that any one of a number of slides could be opened and for that reason irregular ballots appeared on several different lines. There is no showing or allegation that more than one slide could be opened, or that more than one vote could be cast. Under these circumstances the Commissioner finds that the action of the election board to count the irregular ballots no matter on what line they appeared was proper.

5. There can be no question that blizzard conditions existed on February 7, 1967, which made it difficult or hazardous or, in some cases, impossible for voters to get to the polls. It cannot be assumed, however, that either candidate was particularly favored or disadvantaged by the weather conditions. The election was held on the date established by law (*R. S.* 18:8–16) and must be held to have been valid in this respect.

6. No proof, other than petitioners' unsupported statement, was offered to establish the allegation of a secret campaign aimed at the election of an

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un-nominated candidate. Even were such a charge substantiated, the Commissioner knows of no statute or rule which would be offended thereby or which would render such activity illegal, reprehensible as it may appear to the regularly nominated aspirant.

One of the petitioners also testified that at the conclusion of the election after the polls were closed, he was asked to break the seal on the rear of the voting machine, permitting access to the counters in order that the tellers could announce and record the tally. He expressed the conviction that no person other than a member of the election board was authorized to touch the voting machine and contended that his being permitted to do so was evidence of the slipshod manner in which the election was conducted.

The Commissioner finds this testimony lacking in merit. No effort was made to show that by his breaking of the seal petitioner would have been able to affect the results in any way. Irregularities of election boards having no effect upon the voting will not vitiate an election. *In re Clee*, 119 *N. J. L.* 310 (*Sup. Ct.* 1938); *Lehlbach* v. *Haynes*, 54 *N. J. L.* 77 (*Sup. Ct.* 1891)

The allegations and the proofs offered in support of the charges in this case are lacking both in substantiality and sufficiency to contest the subject election, considered either singly or collectively. Elections are to be given effect whenever possible. *Love* v. *Board of Chosen Freeholders of Hudson County*, 35 *N. J. L.* 269 (*Sup. Ct.* 1871); *In re Wene*, 26 *N. J. Super.* 363 (*Law Div.* 1953), affirmed 13 N. J. 185 (1953) There is no proof of any irregularity or deviation which could be considered to have been the producing cause of illegal votes which would not have been cast, or of defeating legal votes which would have been counted had the irregularity not occurred. Nor has it been shown that the will of the people was illegally suppressed and not fairly determined. *In re Wene supra* Absent such proofs the election must be held to be valid and its results conclusive.

The Commissioner finds and determines that Augustine Magistro was elected to a seat on the Morris Hills Regional High School District Board of Education as a representative of the constituent district of the Borough of Wharton for a full term of three years.

ACTING COMMISSIONER OF EDUCATION.

April 7, 1967.

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XXI

WHERE BUDGET CUT IS NOT ARBITRARY AND APPROPRIATION IS ADEQUATE, COMMISSIONER WILL NOT INTERVENE

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD,
Petitioner,

v.

THE TOWNSHIP OF DEPTFORD, AND THE GLOUCESTER COUNTY BOARD OF TAXATION, GLOUCESTER COUNTY,
Respondents.

For the Petitioner, Ware, Caulfield, Zamal & Cunard (Martin F. Caulfield, Esq., of Counsel)

For the Respondent Township, Fred A. Gravino, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriation for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on March 29, 1967, at the State Department of Education, Trenton.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $1,414,059 for current expenses and $87,000 for capital outlay. The items were submitted again on February 28, 1967, at a second referendum pursuant to *R. S.* 18:7–81 and again failed of approval. The budget was then sent to the Committee pursuant to *R. S.* 18:7–82 for its determination of the amount of funds required to maintain a thorough and efficient local school program.

On March 7, 1967, the Board met in consultation with the Committee to discuss the school budget. The Committee met thereafter on March 9 and adopted a resolution certifying the amount of the tax levy for current expenses at $1,299,059, a reduction of $115,000. No decrease was made in the capital outlay item which was certified in the original amount of $87,000. The Board contends that the Committee's action was arbitrary and capricious and the amount certified is insufficient to provide an adequate system of education for the pupils of the school district. The Board appeals to the Commissioner to restore the funds deleted by the Committee.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles

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for the review of twice-rejected school budgets by the municipal governing body as follows:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

> "* * * The Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

In this case the Commissioner finds insufficient evidence to support a charge of arbitrary or capricious conduct by the Committee. While it is true that the Committee did not immediately disclose the underlying reasons for its reduced certification or specify the items where it believed economies could be effected as the Court suggested, the evidence reveals that the Committee consulted with the Board, requested and used the data supplied to it and did study and review the budget in terms of the information it had from the Board. Whether or not the Committee was influenced by inaccurate or insufficient data, the fact is clear that it did consider and review the proposed budget and certified the amount in terms of the judgments it made in the limited time available. Under such circumstances, the Committee's action, correct or incorrect, cannot be found to be arbitrary or capricious.

Next to be considered is the Board's contention that it cannot operate an adequate school program under such curtailed appropriations. The Committee testified that it believed that amounts in excess of needs had been

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budgeted in the following four line items and recommended that they be reduced as indicated:

Item	*Budgeted*	*Reduction*	*Revised Amount*
Instruction—salaries	$2,103,625	$94,000	$2,009,625
Textbooks	50,000	5,000	45,000
Transportation	64,300	8,000	56,300
Utilities	68,900	8,000	60,900
		$115,000	

The major curtailment recommended is in the instruction salaries account which includes the salaries of regular teachers, substitute teachers, librarians, guidance personnel, principals, certain clerks, a psychologist, plus some miscellaneous amounts, which in total affect more than 285 employees. The testimony reveals that the Board adopted a salary schedule in December 1966. Under the provisions of *R. S.* 18:13–5.1, the salaries called for by the schedule are fixed and the funds required for its implementation are mandatory. This account cannot be reduced, therefore, below the amount needed to meet the demands of the adopted salary schedule.

A school budget is, of course, a gross estimate of funds anticipated to be needed for the next year, which is prepared more than six months before becoming operative. Under such circumstances it cannot be a precise instrument, and allowances must be made for factors and conditions which are subject to change. It is particularly difficult to be exact in an item such as instruction salaries which is conditioned upon such unknowns as teacher retirements, resignations, replacements, and additional staff requirements. With a teaching staff as large as that herein, approximately 250 employees, the estimate is necessarily even less precise. With so many variables to consider, it is difficult to determine with exactness the effect that the Committee's recommended reduction of $94,000 will have on the salaries account. It appears that the Board based its estimate on the assumption that all present employees will return and receive the scheduled salary increase. No factor of turnover and replacement was included. Provision has also been made for an additional fourteen teachers because of anticipated increased enrollment.

In this case the Commissioner finds it unnecessary to determine whether or not the salary account can absorb a $94,000 reduction. Examination of the budget reveals an amount of $69,500 marked "Reserve for Future Appropriations." According to the testimony this item represents funds reserved from additional State Aid received from sales tax distribution which the Board hoped to apply to the installation of required fire detection systems. The Board unsuccessfully sought voter approval of the transfer of these funds to the capital outlay account at both school elections. This amount remains uncommitted, therefore, in the current expense account. Although not recommended or mentioned by the Committee, the Commissioner finds no reason why this uncommitted amount of $69,500 should not be applied to the reduction made in the salary account. The effect of the Committee's suggested reduction then would be only $24,500 instead of $94,000. In the Commissioner's judgment such an amount can be absorbed in the $2,103,625

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instruction salary account without affecting the salaries already guaranteed by the Board.

The Commissioner also finds it unnecessary to consider the remaining three specific recommendations of the Committee. In this case the Board has not carried successfully the burden of showing clearly that an adequate program cannot be maintained under the curtailment of $115,000 made by the Committee. In addition to the uncommitted $69,500, the evidence discloses that the Board can reasonably expect a surplus of approximately $100,000 at the close of this school year. Such a surplus can absorb the $45,500 difference between the $69,500 available and the $115,000 reduction made by the Committee without curtailing the school program to an extent permitting the Commissioner's intervention.

The Commissioner wishes to emphasize that he finds no excess funds in the Board's budget which he would curtail in the exercise of his own independent judgment. The Deptford Township school system has been forced to cope with extremely difficult problems in the form of sudden and enormous growth, low ratables, high tax levies, and minimum appropriations for school purposes. Although, in the Commissioner's judgment, it has done well in the face of prodigious problems, there is still much to be done to provide an ideal school program. Were the Commissioner determining the school appropriations independently under *R. S.* 18:7–83, he would certify the entire amount requested by the Board. He is limited herein, however, to a review of the Committee's action. In that context he is constrained to find that the Board can maintain an adequate education program under the certification made by the Committee. The proofs offered by the Board fail to support the contrary conclusion which they have urged in this case.

From his review of the testimony and evidence offered, the Commissioner concludes (1) that there has been no clear showing of arbitrary or capricious action by the Deptford Township Committee with respect to its certification of the amount necessary for school purposes in the school year 1967-68; and (2) that the Committee's reduction of $115,000 from the amount requested by the Board for current expenses, although significant, will still produce an amount which, with anticipated surpluses, will be sufficient to maintain the minimum required education program in the school district.

The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

April 10, 1967.

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XXII

ARBITRARY BUDGET CUTS WILL BE SET ASIDE

BOARD OF EDUCATION OF THE BOROUGH OF NATIONAL PARK,
Petitioner,

v.

BOROUGH OF NATIONAL PARK AND GLOUCESTER COUNTY BOARD OF TAXATION, GLOUCESTER COUNTY,
Respondents.

For the Petitioner, Alvin G. Shpeen, Esq.

For the Respondent Borough, Samuel G. DeSimone, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was twice rejected by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on March 29, 1967, at the State Department of Education, Trenton. The Gloucester County Board of Taxation, as a nominal party respondent only, did not appear and was not represented at the hearing.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $72,076 for current expenses and $906 for capital outlay. The voters also rejected the same items submitted pursuant to *R. S.* 18:7–81 at a second referendum. After receipt of the budget from the Board, the Council met on March 6, 1967, and determined by resolution to set the amount to be raised for current expense at $48,076, a reduction of $24,000. The capital outlay amount was not changed. The Board contends that the action of the Council was arbitrary and capricious and the amount certified is insufficient to provide an adequate system of education for the pupils of the school district and appeals to the Commissioner to restore the funds deleted by the Council.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

"* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be

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independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

"* * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

In this case, the Commissioner finds that the reduction made by Council was arbitrary. The testimony shows that the Board presented its budget at a meeting of Council on March 6. Questions were asked and explanations offered of various items. Council then declared a recess. Upon reconvening a short time later, Council announced that it had decided to cut the budget by $24,000 and adopted a resolution to that effect. In explanation of how it arrived at that figure, Council said it had based it on the expenditure of $375 per pupil.

It is the Commissioner's judgment that such a method of arriving at the amount required to maintain a thorough and efficient local school program is arbitrary and capricious. It is clear from the testimony that Council made no proper study of the Board's needs. It acted to reduce the local tax levy by an aggregate figure, without reference to specific items in the school budget, and it arrived at that figure by use of an arbitrarily selected unit of pupil expense. In the Commissioner's judgment, this is not the kind of responsible action based on thoughtful study and consideration of the school district's needs, which the Legislature contemplated when it authorized municipal governing bodies to determine the amount to be raised for school purposes following voter rejection. Nor does this kind of action comport with the guidelines laid down by the Supreme Court in the East Brunswick case. In

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the Commissioner's opinion, the possibility of such inadequately considered and unrelated lump-sum reductions was one of the reasons for the Court's finding that a review by the Commissioner is proper and necessary in order that the interests of the children of the district might be protected and not lost sight of in a tax dispute between two governmental agencies.

The Commissioner finds further that the amount certified by the Council is not sufficient to maintain the minimum school program mandated by the New Jersey Constitution and the school laws. The Legislature has set $400 per pupil as the minimum expenditure on which State Aid to local school districts shall be based. *R. S.* 18:10–29.39 Certainly no reduction should be made below this figure. It is estimated that the local schools will enroll 475 pupils next year. That figure multiplied by $400 yields $190,000 and when reduced by anticipated State Aid of $125,434 results in a local tax levy of $64,566. This amount is $16,490 more than that certified by Council and $7,510 less than asked by the Board.

The Commissioner is aware, from his continuing knowledge of this school district, that it has operated for many years on a minimum financial basis which has provided only the bare necessities of a modern education program. He notes that it closed last year with a surplus of only $745.03. The Commissioner emphasizes in making his determination herein, that his use of $400 as the minimum per pupil cost is related to the circumstances in this case, and may not be deemed an appropriate yardstick for measuring the financial needs of other school districts under other circumstances. The Commissioner notes also from the testimony that if the Council's reduced appropriations are permitted to stand, the Board will be unable to correct certain unhealthful conditions already existing in its school plant. Correction of hazards to the health of children should not be postponed. The Commissioner finds therefore that an additional $6,000 for contemplated repairs is also essential to the maintenance of a minimum education program in the subject district.

Finally, the Commissioner would observe that he finds no excess in the Board's budget requests and agrees that the purposes for which they were intended are important and highly desirable. Were the Commissioner making his own independent determination under *R. S.* 18:7–83 he would restore the full amount. However, within the limits placed on his review of the action of Council under the directive of the Court quoted *supra,* the Commissioner finds no ground for further increasing the amount of the certification made by the Council.

The Commissioner finds that the certification of the amount of appropriations for school purposes made by the National Park Borough Council was arbitrary and is insufficient to support a thorough and efficient system of public schools in the district. He directs that there be added to the certification previously made by the Council to the Gloucester County Board of Taxation the sum of $22,490 so that the total amount of the local tax levy for current expense of the school district for the 1967-68 school year shall be $70,566, and for capital outlay $906.

ACTING COMMISSIONER OF EDUCATION.

April 10, 1967.

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XXIII

BOARD MAY NOT SPEND PUBLIC FUNDS FOR SOCIAL AFFAIR NOT CLOSELY RELATED TO SCHOOL PURPOSES

MARIE S. HOWARD,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

Respondent.

For the Petitioner, *Pro Se*

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

For the New Jersey State Federation of District Boards of Education, *Amicus Curiae,* Thomas P. Cook, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner is a member of the Board of Education of Jefferson Township. She contends that the use of Board funds to pay for a staff dinner constitutes an improper use of public funds. Respondent denies that such a use of funds is improper, but asserts that in any case the staff dinner of June 24, 1966, which petitioner protests, was paid for individually by those who participated in it, without expenditure of public funds. However, respondent seeks adjudication of this matter not only for its future guidance but also because it proposes to reimburse individual staff members for the cost of their dinners if the Commissioner sustains its action.

A hearing in this matter was held by the Assistant Commissioner in charge of Controversies and Disputes on August 23, 1966, at the Office of the County Superintendent of Schools, Morris Plains. Briefs and memoranda were filed by the parties hereto, and counsel for the New Jersey State Federation of District Boards of Education filed a brief *amicus curiae.*

The testimony establishes that in accordance with a custom of several years' standing, respondent on April 11, 1966, adopted a motion "to authorize the annual staff dinner at an expenditure not to exceed $1600 * * *." (Tr. 21) All Board members except petitioner voted in favor of the motion. On May 9 thereafter, petitioner proposed a motion "that the Board seriously consider rescinding the motion authorizing the staff dinner and putting the money in education." (Tr. 22) Petitioner and one other Board member voted in favor of the motion; all other members voted against it. An invitation to attend the dinner on June 24, 1966, was issued to staff members on May 23. The invitation stipulated that the charge for guests of staff members would be $6.00 per person.

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The petition herein was filed on June 3, 1966. At a conference of the Board shortly thereafter, it was decided to make the dinner "Dutch Treat," and a notice to that effect was sent to staff members on June 14. (P-2) The notice mentioned the appeal to the Commissioner, and added:

> "If the Commissioner finds that it is permissable [sic] to expend Board of Education funds for this dinner, the employees' portion of the cost will be refunded at a later date."

The testimony of the Board Secretary, through whose office all monies for the dinner were handled, establishes that no part of the total invoiced cost of the dinner, which amounted to $1,221.55, was paid with Board funds. (P-3, 4) Petitioner asserted, however, that there were administrative and operating costs involved, such as clerical time and supplies for invitations and notices; telephone calls; and time and services in collection, depositing, and payment of money. (Tr. 12) However, she offered neither proofs nor estimates of such costs.

It is petitioner's contention that there is no statutory authority for the expenditure of public funds for such a dinner, that such funds might better be spent to meet educational needs of the district, and that such a dinner serves no clear purpose in providing for the education of the public school children.

Respondent, on the other hand, argues that power to expend public money for such a purpose as a staff dinner is implied from the broad rule-making authority granted to boards of education by *R. S.* 18:7–56, and that such an affair constitutes a kind of "fringe" compensation. The respondent further asserts that long custom and usage, which finds parallels in the practices of other areas of both public and private business, provide justification for a staff dinner of the type here in question. Respondent's position was, in general, that of the State Federation of District Boards of Education, as set forth in its brief *amicus curiae*. Respondent introduced the testimony of the Superintendent of Schools and two Board members, all of whom expressed their conviction that such dinners served to improve staff morale, improve board-staff relations and ease the tensions generated by negotiations for salary improvement. Such benefits, the Superintendent believes, would result generally in better teaching. (Tr. 73) It was testified that the program for the dinner was arranged by a staff committee and was on an informal level, without specific reference to the educational program as such. (Tr. 81)

The Commissioner finds and determines that the staff dinner conducted by respondent in June 1966 involved no expenditure of public funds other than incidental administrative and operational costs, the value of which was not established, and that no adverse effect upon the educational program was shown by competent testimony. Accordingly, the petition herein states no meritorious cause for action and must be dismissed. However, respondent seeks full adjudication for its own guidance and, if sustained in its original intent to provide the dinner at public expense, asks for approval of its plan to refund to staff members the cost of the dinner which they, as individuals, had paid.

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While the question *sub judice* has not been raised in the precise form presented herein, the Commissioner had occasion to consider the question of social affairs at public expense in the case of *Evans* v. *Board of Education of Manville*, 1959-60 *S. L. D.* 79. Petitioner in that case challenged the expenditure of $190 of public funds to provide a party in connection with ground-breaking ceremonies for a new school building, to which selected guests from the Board of Education and the public were invited. In ruling on this question, the Commissioner said:

> "The authority of the board of education to expend $190 of public funds for a party in connection with the ground-breaking ceremonies of the new school is questioned. The board defends the propriety of this expenditure as a means of showing its appreciation to the officials of a corporation which had made a generous contribution to the building program. There is no specific authority in the statutes for such an expenditure. A board must draw upon its implied powers to find authority. Such implied authority should not be stretched too far. Without impugning the motives of the board or questioning its good faith in this particular instance, the Commissioner would say that a board of education would have to stretch its implied powers to the breaking point to find authority to expend public funds for parties in connection with such ceremonies. When expending funds for dinners is incidental to some important school business or facilitates some worthy school purpose, such expenditures may be justified under implied powers. While not intending the following list to exclude other proper purposes, the Commissioner would mention as proper the payment for meals in connection with Federated Boards of Education meetings, School Board Institutes, and meetings of receiving and sending boards, etc., where the dinners are incidental to a school purpose.
>
> "Experience has shown that dinners held to advance public relations at ceremonies or elsewhere where a limited number of guests are entertained are likely to have an adverse rather than a favorable effect upon good public relations. In these times, when funds are desperately needed for school facilities to keep pace with an expanding population, a board of education cannot afford to risk an adverse public reaction to expenditures for public relations dinners. It is the opinion of the Commissioner that boards of education should scrutinize very carefully their expenditures for dinners and entertainment."

The criteria established in *Evans*, *supra*, are applicable to the instant matter. The authority of boards of education to expend public funds must be derived from the Legislature, which is charged by the *New Jersey Constitution, Article* VIII, *Section* IV, *paragraph* 1 to "provide for the maintenance and support of a thorough and efficient system of free public schools * * *." Absent explicit authority, a board may look to implied authority to accomplish that which may be incident to powers expressly conferred or essential to its declared objects and purposes. *City Affairs Committee of Jersey City* v. *Board of Commissioners*, 134 *N. J. L.* 180, 189 (*E. & A.* 1945) See also *Edwards* v. *Mayor and Council of Moonachie*, 3 *N. J.* 17, 22 (1949); *Belfer* v. *Borella*, 6 *N. J. Super.* 557, 560 (*Law. Div.* 1949); *Houston* v. *Board of Education of North Haledon*, 1959-60 *S. L. D.* 73, 76, affirmed State Board

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of Education 1960-61 *S. L. D.* 232, 233. In the instant matter, respondent asserts that such implied authority arises out of and is incident to its general rule-making authority as expressed in *R. S.* 18:7–56, and to its power to fix compensation of its employees as expressed in *R. S.* 18:7–71. However, to warrant such an exercise of implied authority, a staff dinner such as that conducted by respondent in June 1966 must demonstrate a purpose clearly related to the operation of a thorough and efficient system of public schools in Jefferson Township. The purpose attributed to the dinner by respondent's witnesses was the establishment and maintenance of good "morale." But the dinner was held at the close of the school year, and was open to and possibly attended by employees who would not be returning to the school system in the following school year. The program was plainly social, with "no serious speakers of any sort," no speeches, even brief ones, on education, and with the Board president restricting his remarks to the employees to "welcoming them and assuring them that the Board appreciates them." (Tr. 81) As in *Evans, supra,* the Commissioner does not impugn the motives of respondent or question its good faith. However, he finds the relationship of the purposes of this dinner to the expressed purposes of the public schools so nebulous as to hold that respondent would have to stretch its implied powers to the breaking point to find authority to expend public funds for this purpose. The Commissioner therefor determines that no statutory authority, either express or implied, would authorize respondent to expend up to $1,600 for the annual staff dinner on June 24, 1966. It follows, and the Commissioner so holds, that respondent is not authorized to reimburse its employees individually for the $6.00 cost of their dinners.

In so holding the Commissioner emphasizes that his decision herein is confined to the facts and circumstances of this particular case. It should not be construed as restricting the many kinds of educationally worthwhile school staff affairs which might be and are conducted in a social setting at Board expense. The Commissioner is well aware of and finds no legal infirmity in long-standing practices of many boards of education throughout the State in holding staff luncheons and dinners in connection with workshops, teacher orientation programs, instructive or inspirational speeches, and the like. Dinner meetings between school staffs and visiting committees of school accrediting committees are common occurrences. Other types of meetings at which meals are served, where the social aspects are incidental to a school purpose, have been called "proper" in *Evans, supra.* In deciding whether to expend public funds for such purposes, as in many determinations which lie within their discretion, "boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions." *Boult and Harris* v. *Board of Education of Passaic,* 1939-49 *S. L. D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N. J. L.* 329 (*Sup. Ct.* 1947), 136 *N. J. L.* 521 (*E. & A.* 1947)

The Commissioner finds and determines in the instant matter that respondent has made no improper expenditure of public funds for the staff dinner held on June 24, 1966, but that it has no authority to reimburse participants under the circumstances herein established. The petition is therefore dismissed.

ACTING COMMISSIONER OF EDUCATION.

April 11, 1967.

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XXIV

TEACHER MAY BE DECLARED INELIGIBLE FOR EMPLOYMENT WHEN INCAPACITY IS PROVED

IN THE MATTER OF THE TENURE HEARING OF DAVID BERNSTEIN, MATAWAN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY

For the Complainant, Vincent C. DeMaio, Esq.

For the Respondent, *Pro Se*

COMMISSIONER OF EDUCATION

DECISION

Charges of incapacity, insubordination and conduct unbecoming a teacher were certified to the Commissioner on June 23, 1966, by the Board of Education of the Matawan Regional School District against David Bernstein, a teacher under tenure in the Matawan schools.

A hearing in this matter was originally set down for August 15, 1966, but was continued from that date at respondent's request. A hearing was conducted on February 16, 1967, at the office of the County Superintendent of Schools, Freehold, by a hearing examiner appointed by the Commissioner for that purpose. The report of the hearing examiner is as follows:

Respondent was suspended from his teaching duties by the Superintendent of Schools on April 28, 1966. The suspension was reported to the Board of Education, which by resolution on May 2 continued the suspension and directed its attorney to prepare charges against respondent pursuant to the Tenure Employees Hearing Act. At a special meeting on May 23, the Board adopted a resolution finding that respondent had shown evidence of departure from normal mental and physical health and directing him to submit to examination by a physician on June 8, 1966, pursuant to *R. S.* 18:5–50.5. The resolution named the physician who would examine respondent at Board expense, but in accordance with the statute afforded respondent the option of an examination at his own expense by a physician of his own choice, approved by the Board in advance of the examination. Respondent did not submit to such examination as scheduled. Thereafter, the Superintendent prefered written charges against the respondent as follows:

"1. That you did fail to comply with Rule 3.24 of the Rules and Regulations of the Board of Education which Rule provides the following:

'REPORT CARDS

3.24 Report to parents

It shall be the duty of each teacher in all classes at the end of each marking period to make and record a careful estimate of the progress of each pupil under his charge. A copy of this report of progress shall be

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sent to parents at the end of each marking period. This report shall include a record of attendance.'

"2. Notwithstanding that you knew that you were required to have a report card for each child under your charge for the marking period ending April 28, 1966, you prepared and marked each report card with the notation,

'There is, in truth, not one mark.'

There is attached hereto and made a part hereof as Exhibit A a copy of one such report card.

"3. Not only did you not have a report card appropriately marked, but an examination of your report books shows that during the fourth marking period you kept no written records from which a report card could be prepared.

"4. During the school year you distributed to your fourth (4th) grade class an assignment which was inappropriate and in poor taste. A copy of said assignment is attached hereto and made a part hereof as Exhibit B.

"5. By your behavior and by your own admission you have demonstrated that you are presently incapable of carrying out your duties as a teacher. There are attached hereto copies of your letters dated January 11, 1965 and April 29, 1966 as Exhibits C and D.

"6. As a result of your failure to keep and maintain your record books for the fourth (4th) marking period and as a result of your failure to comply with Rule 3.24 you were suspended by the Superintendent of Schools with the consent of the President of the Board of Education, which suspension is still in effect.

"7. On May 23, 1966 the Board of Education adopted the Resolution annexed hereto and made a part hereof as Exhibit E. You did call Dr. Hodas to advise him that you would not keep the appointment. Said refusal did constitute insubordination and conduct unbecoming a teacher.

"WHEREFORE, the Petitioner prays that the Commissioner of Education sustain the suspension and permit continuance thereof until such time as you demonstrate that you are physically and mentally able to continue your duties; further that in the event you do not comply with the request for an examination within a reasonable time that you be discharged; for such other relief as is equitable and just."

The Board by its resolution of June 21, 1966, found that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary, and so certified them to the Commissioner.

The hearing examiner finds upon the facts presented that the first charge, pertaining to respondent's failure to properly prepare report cards is true in fact. At the end of the marking period on April 28, 1966, respondent turned over to the assistant principal of his school a set of report cards for his

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pupils, on each of which was printed, in the spaces for marks for that marking period:

"There is, in truth, not one mark."

Attendance figures were marked in the appropriate spaces, and the grade "F" (Failure) in "Behavior" was given to every pupil in the class. (P-1)

The report cards were referred to the school principal, who in turn referred the matter to the Superintendent. Respondent was summoned to a conference with the Superintendent on the afternoon of April 28. The Superintendent testified that when he asked respondent why marks had not been put on the cards as required, respondent's answer was that "he just wasn't up to it." (Tr. 46) Respondent does not deny giving this answer, but enters the general defense that he viewed this procedure with respect to report cards as:

> "* * * a way of getting word past the school administration's hostility or its quiescence, that in our school and in our classroom particularly liberty was being violated, that the teacher's feelings were lacerated by an administrator, that the teacher's livelihood was being destroyed and that the public's investment in the teacher's classroom was being transgressed." (Tr. 136, 137)

He further testified that after the principal of the school had, for two successive weeks, approved his lesson plan book which had no significant plans, he regarded this as justification for his failure to put marks on the report cards. Respondent also testified, in answer to a question by the hearing examiner, that prior to April 28 he had expressed no concerns about the administration of the school to anyone superior in authority over the principal. (Tr. 158)

The hearing examiner finds that respondent's defense does not constitute a mitigation of the admitted truth of the charge pertaining to report cards, except as will be set forth hereinafter.

The hearing examiner further finds that the charge pertaining to the failure to keep written records is true in fact. Respondent's class record book (P-2) shows no entries of marks for the fourth marking period. The Superintendent testified that respondent told him that although tests had been given during the marking period, he had not "been up to" marking the tests. (Tr. 46) Respondent does not deny the charge, but enters the same defense as to the report card charge, *supra*. The hearing examiner finds that respondent's defense does not constitute a mitigation of the admitted truth of the charge except as will be hereinafter set forth.

The hearing examiner finds the next charge to be true in fact. Respondent had asked his fourth grade pupils to react in writing to questions about a jingle dealing with Nazi persecution of Jews (P-6), which jingle respondent said he had read in a lavatory of a college library. The use of this assignment was not contained in the course of study for the fourth grade class, nor did respondent show its relationship to the social studies program into which it was introduced. While it is true that courses of study should not be so rigid as to prohibit the introduction of original material, and assignments that

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stimulate critical thinking are to be encouraged, the hearing examiner can find no appropriate justification for such an assignment for fourth grade children.

The next charge asserts that by his behavior and his own admission, respondent has demonstrated that he is incapable of carrying out his duties as a teacher. In a letter to the Superintendent on April 29, 1966, the day following his suspension, respondent wrote in part (P-5):

> "The undersigned finds that he must recognize that Mr. Foster had no alternative but to suspend him. Mr. Bernstein's value as an educator had become so diminished and Mr. Bernstein had become so impaired, his 'failure and neglect to perform (his) duties' could not be tolerated by the people of Matawan as of the '28th day of April, 1966.'"

The hearing examiner finds that the respondent's behavior established in support of the previously discussed charges, and the admission contained in the letter quoted *supra,* establish this charge as true.

The last charge alleges that respondent did not keep the appointment made for him to be examined by a physician on June 8, 1966. Respondent admits that he called the physician to advise him that he would not keep the appointment. (Tr. 140) He further admits that prior to the date when the charges were filed against him and certified by the Board on June 21, 1966, he did not notify the Board of any intention to avail himself of the option to be examined by another physician approved by the Board, but at his own expense. The statute authorizing a board of education to direct such an examination is *R. S.* 18:5–50.5 which reads in part as follows:

> "In addition to the routine examination of all employees as provided in this act, the board of education may require the individual examination of an employee whenever in its judgment such employee shows evidence of deviation from normal physical or mental health.
>
> "The cost of examinations, laboratory tests, or X-ray procedures may be borne by the board of education when made by a physician or institution designated by the board. In lieu of the examination by such authority with payment by the board, an employee may be examined at his own expense by a physician or institution of his own choosing; provided, that such physician or institution shall be approved by the board of education.
>
> "If the result of the examination indicates mental abnormality or a communicable disease, the employee shall be ineligible for further service until satisfactory proof of recovery is furnished. If an employee is under contract or tenure protection, he may be granted any sick leave compensation provided by the board of education for other employees, and shall upon satisfactory recovery be permitted to complete the term of his contract, or, if under tenure, shall be reemployed with the same tenure status as he possessed at the time his services were discontinued; provided, the absence does not exceed a period of 2 years."

To the extent, therefore, that respondent did not submit to examination as directed, nor did he prior to the certification of the charges herein submit to other examination, the hearing examiner finds that respondent failed and

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refused to obey a directive of the Board which it had authority to issue. Such conduct constitutes insubordination as charged.

It remains to be determined whether the charges, all of which have been found to be true, warrant a conclusion that the charges are sufficient to sustain a recommendation for dismissal or reduction in salary.

The Board of Education offered the testimony of a competent psychiatrist who had examined respondent at his request for the benefit of both the Board and respondent on September 19 and 26, 1966. The psychiatrist testified that as a result of his examination he had concluded that respondent "was of a paranoid personality and * * * that there were probably periodic episodes of borderline and psychotic process." (Tr. 89) In explanation of his diagnosis, the witness said that such a personality would be anxious in conditions of authority, having a "belief that there are others who are doing things to them or tormenting them or causing them the particular difficulty," (Tr. 90) tending to be suspicious, verbally combative and verbally aggressive in challenging another in the anxiety situation. Such a person in a teaching situation, the witness testified, would tend to have difficulty in establishing good relationships with fellow teachers, considerable difficulty in relationships to superiors, and difficulty in forming a close relationship with pupils, and at times would be subject to considerable anxiety in relation to the problems presented by pupils. (Tr. 92) Respondent had discussed the report card episode, *supra*, with the physician, who characterized it as respondent's "way of rebelling against the administration." (Tr. 92)

Had this report of the psychiatric examination been available to the Board of Education before it certified the charges on June 21, 1966, the Board would have had authority to make a determination pursuant to *R. S.* 18:5–50.5, *supra*, whether respondent should be declared ineligible for further service until satisfactory proof of recovery is furnished. Having offered the physician's testimony, the Board has placed it before the Commissioner for his consideration in determining whether the charges as proved warrant dismissal or reduction in salary. The hearing examiner concludes that under the conditions of personality difficulty diagnosed by a competent psychiatrist, the conduct of respondent established in this hearing was the product of a personality disturbance from which respondent suffered at the time of his suspension and continued to suffer at the time of the psychiatric examination five months later. Under such circumstances, respondent should not be dismissed or suffer a reduction in salary, but should be declared ineligible to teach until he furnishes satisfactory proof of recovery, subject to the conditions set forth in *R. S.* 18:5–50.5, *supra*. The hearing examiner so recommends.

* * * * * * *

The Commissioner has read and carefully considered the report, conclusion and recommendation of the hearing examiner. He concurs in the finding that the charges as framed are true in fact. He further concurs in the hearing examiner's conclusion as to the effect of the psychiatrist's testimony in evaluating the impact of the established conduct in light of conditions imposed upon the Commissioner by the Tenure Employees Hearing Act. Incapacity and insubordination are the gravamen of the charges herein. When such conditions arise, as here, from a condition of mental abnormality, the appropriate course of action for the Board is to be found in *R. S.* 18:5–50.5. The

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Board was unable to invoke this remedy because of respondent's recalcitrance and was left no suitable alternative except to institute charges under the Tenure Employees Hearing Act. The Commissioner, however, is charged with the responsibility to consider all of the circumstances in determining the penalty when charges are established as true in fact. See *In re Fulcomer*, 93 *N. J. Super.* 404, 422 (*App. Div.* 1967). He therefore finds that the charges as proved do not warrant dismissal or reduction in the salary of respondent. He finds, rather, that respondent suffers from a mental disturbance to a degree sufficient to warrant a determination that he is ineligible for further service until satisfactory proof of recovery is furnished. The Commissioner therefore directs the Board of Education of Matawan to declare respondent ineligible for further service, subject to all the conditions set forth in *R. S.* 18:5–50.5.

ACTING COMMISSIONER OF EDUCATION.

April 14, 1967.

Pending before State Board of Education.

XXV

PETITION TO REGAIN RIGHT TO POSITION BARRED BY UNREASONABLE DELAY IN ASSERTING CLAIM

DOROTHY L. ELOWITCH,

Petitioner,

v.

BAYONNE BOARD OF EDUCATION, HUDSON COUNTY,

Respondent.

For the Petitioner, Frohling & Gaulkin (Geoffrey Gaulkin, Esq., of Counsel)

For the Respondent, John J. Pagano, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner claims tenure in the position of school psychologist and contests an action taken by respondent which relieved her of such duties and assigned her to a teaching position. Respondent denies that petitioner acquired tenure as a school psychologist and maintains that her reassignment to classroom duties was a proper exercise of its discretionary authority.

Respondent moved earlier to dismiss this appeal, contending that on the admitted facts of the case, petitioner did not acquire tenure, that she has no cause for action, and that her appeal is barred by laches. Argument on the motion was heard on January 13, 1966, and counsel submitted briefs thereafter. The motion was denied. In his decision the Commissioner of Education found on the basis of the stipulated facts that petitioner had ac-

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quired tenure as a school psychologist in respondent's employ. He found further that there were insufficient proofs at that posture of the record to determine the issue of laches. Decision on that question was reserved and jurisdiction was retained by the Commissioner pending further hearing and proofs. Accordingly a hearing on the issue of laches was held on December 16, 1966, before the Assistant Commissioner in charge of Controversies and Disputes at the office of the Hudson County Superintendent of Schools in Jersey City.

For the purpose of clarity and completeness, the Commissioner will repeat herein the facts, contentions, and conclusions set forth in his prior decision on respondent's motion to dismiss, in which the issue of tenure was determined in petitioner's favor:

"The record shows that petitioner was first employed in respondent's school system in September 1937 as a teacher and continued in that position until the close of school in June 1957. After a three-year hiatus her employment with respondent was resumed in September 1960, and has continued thereafter without interruption for each succeeding academic year.

"Petitioner's assignment for the 1960-61 school year was as a teacher, at a salary of $5,730. On July 13, 1961, she was appointed school psychologist at a salary of $7,200 and performed duties appropriate to that position during the 1961-62 year. Although her reappointment for the 1962-63 year was as a teacher, petitioner continued to function as a school psychologist that year and also in 1963-64, for which years she was paid $7,450 and $7,750, respectively.

"On July 9, 1964, respondent adopted a resolution terminating petitioner's services as school psychologist and assigning her to a teaching position for the 1964-65 school year at an increase in salary to $8,200. Petitioner was notified of this action by letter dated July 10, 1964, and reported to the Superintendent for a teaching assignment at the opening of school in September 1964. She apparently made no protest to the Commissioner of Education with regard to her reassignment until after June 10, 1965, when respondent appointed another person to the position of school psychologist. Petitioner then filed the within appeal on June 15, 1966.

"Petitioner claims tenure in the position of school psychologist on the basis of her assignment and the duties she performed. But, she asserts, even if she did not have tenure in that assignment, she has a right to a statement of the grounds upon which the Board determined not to place her under such tenure and a hearing thereon, with a further review by the Commissioner as to whether the Board acted arbitrarily and without factual support.

"Respondent concedes that petitioner has acquired tenure in the district but denies her claim to tenure protection in the position of school psychologist. It cites the fact that she served only three academic years in that title and contends that she needed to be employed for a fourth year (more than three academic years) in order to have tenure as school psychologist. Even assuming that it is in error in this respect, respondent further asserts the defense of laches, saying that petitioner's acceptance

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of her reassignment and her failure to take timely measures to protest respondent's action represents such inexcusable delay that she is now estopped from challenging it.

"The question to be answered is whether petitioner acquired tenure in the position of school psychologist.

"Prior to the enactment of *Chapter* 231, *Laws* of 1962, tenure attached to only four categories of position: teacher, principal, assistant superintendent, and superintendent. *Lascari* v. *Lodi Board of Education*, 36 *N. J. Super.* 426 (*App. Div.* 1955) Members of school staffs such as librarians, supervisors, guidance counselors, and other certificated personnel who performed no classroom teaching duties, and who were not principals, assistant superintendents, or superintendents acquired tenure in the general category of teacher only. *Lange* v. *Audubon Board of Education*, 26 *N. J. Super.* 83 (*App. Div.* 1953) The amendment of *R. S.* 18:13–16 by the enactment of *Chapter* 231, *Laws* of 1962, extended the protection to all positions which require the holding of an appropriate certificate. Thus, the Teachers' Tenure Statute now provides not only tenure of employment in the district but protection also in an extensive variety of positions within the scope of that employment. One of the positions so protected is that of school psychologist by reason of the necessity for such persons to hold an appropriate certificate issued by the State Board of Examiners.

"As part of this 1962 amendment to *R. S.* 18:13–16, the Legislature inserted the following:

> "* * * provided, that the time any such employee had taught in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district, except that no employee shall obtain tenure in a position other than as a teacher, principal, assistant superintendent or superintendent prior to July 1, 1964."

"The purpose of this provision was to afford employing boards of education a substantial period of time in which to determine whether particular employees should have permanent status in positions in which they had formerly been subject to transfer. Thus boards of education had opportunity from February 1, 1963, the effective date of the act, to July 1, 1964, to evaluate the services of personnel in their various assignments. If a board did not want to have an employee acquire permanent status in a particular position other than the original four cited, it had the right during this 17-month transition period to transfer the employee to another assignment. See *David* v. *Cliffside Park Board of Education* and *Reinish* v. *Cliffside Park Board of Education*, decided by the Commissioner of Education April 22, 1965, affirmed State Board of Education March 2, 1966, affirmed Superior Court, Appellate Division, September 28, 1966.

"Applying the law to the facts of this case, the Commissioner finds that although petitioner's yearly assignments were variously designated 'teacher' and 'school psychologist,' it is conceded that for the three school years beginning September 1961, she performed the duties of a

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school psychologist and not those of a classroom teacher. Her employment record may be stated as follows:

Academic year 1960-61	teacher
Academic year 1961-62	school psychologist
Academic year 1962-63	school psychologist
Academic year 1963-64	school psychologist

It is clear, therefore, that petitioner acquired tenure in respondent's employ in September 1963, after completion of more than three consecutive academic years of employment. The question at issue is in what position did her tenure accrue?

"Respondent argues that petitioner did not acquire tenure as a school psychologist because she can point to only three consecutive academic years *in that assignment* and *more than* three such years is needed for the protection she claims. But if respondent is correct, how can petitioner have tenure in any position? Having had only one year as a teacher and three as a school psychologist, she failed to achieve more than three years in either assignment. And yet, she undoubtedly has tenure with respondent and that tenure must be in some assignment.

"The Commissioner holds, therefore, that petitioner's tenure in the district became fixed on July 1, 1964, in the position of school psychologist. That was the position in which she was serving on February 1, 1963, when the Legislature saw fit to extend tenure protection to all certificated positions. But petitioner's right to continue in that position did not become permanently fixed on that date. The Legislature held the coming into being of that protection until July 1, 1964. In almost a year and a half, from February 1, 1963, to July 1, 1964, respondent was given opportunity to evaluate petitioner's services as school psychologist and to decide if it wanted her to continue permanently in that work. At any time in that interval it could have relieved her of her duties and transferred her to a classroom teaching position. But, on July 1, 1964, the statute extended tenure to the classification of school psychologist and petitioner, who possessed the appropriate certificate and was actually serving in that capacity, became vested with protection in that position. Respondent's subsequent action on July 9, 1964, purporting to reassign her came too late. Having acquired tenure as school psychologist, petitioner became entitled to a statement of charges and a hearing thereon before she could be removed from that position. *R. S.* 18:13-17, 18:3-23 *et seq.*

"One other provision of the 1962 amendment to *R. S.* 18:13–16 lends support to the Commissioner's finding in this matter. The third unnumbered paragraph thereof carves out another exception which, while not directly applicable to petitioner's status, does reveal a legislative intent favorable to her cause. That provision states in part that any person under tenure or eligible to obtain tenure who is transferred or promoted, with his consent, to another covered position on or after July 1, 1962, would obtain tenure in the new position

> 'after employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding year.'

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Thus, had petitioner been assigned as a school psychologist at the beginning of the 1962-63 school year she could have achieved tenure in that position after the expiration of only two years' service in that assignment at the start of the 1964-65 term. Petitioner had already served three academic years as school psychologist. Accordingly, although her assignment to school psychologist preceded July 1, 1962, neither reason nor logic compels a finding that her rights should be less secure than if she had not been so assigned until some time later. Indeed, her extra time in that position afforded respondent even greater opportunity to evaluate her. In sum, there is strong inference that the Commissioner's finding herein accords with the legislative intent."

There remains then the issue of whether petitioner is barred from asserting her rights because of laches. Testimony offered at the hearing reveals that at a conference in May 1964 attended by the President of the Board and two assistant superintendents (the position of superintendent being then vacant), petitioner was apprised of the fact that her services as school psychologist might be terminated. Thereafter petitioner's brother, Dr. Elwood, since deceased, interceded for her at a conference meeting of the Board in June, at which time he was shown a draft of a resolution reassigning petitioner to classroom teaching. According to the President of the Board, it was intended to adopt the resolution at the June meeting "but out of respect for Dr. Elwood, who we had a great deal of respect for as an individual and in the manner in which he came before the Board, we decided to hold off the action until the following meeting in July." (Tr. 50) At its meeting on July 9, 1964, the Board adopted the following resolution (RL-16):

"BE IT RESOLVED, that the services of Miss Dorothy Elowitch, a teacher, as School Psychologist, be and the same are hereby terminated, and be it further

"RESOLVED, that, Miss Dorothy Elowitch, a teacher, be and she is hereby assigned and transferred to teach in the public schools of this district, at the salary of $8200.00 per annum, and be it further

"RESOLVED, that Miss Elowitch report to the Superintendent of Schools for teaching assignments on September 9, 1964, and be it further

"RESOLVED, that this resolution take effect immediately."

Petitioner reported to school in September 1964 and was assigned to perform various classroom duties during the 1964-65 school year. On June 10, 1965, the Board appointed Helena Bibko as school psychologist at a salary of $7,500. Petitioner then filed the subject petition of appeal to the Commissioner of Education on June 15, 1965.

Respondent contends that during the 11-month period from July 10, 1964, when petitioner received official notice of her termination as school psychologist, to June 15, 1965, when she filed her appeal, petitioner failed to protest her reassignment or take effective action to set it aside. Because of her failure to assert promptly any claim to rights allegedly denied her, and respondent's consequent reliance on her acceptance of the change of duties, respondent contends petitioner is now barred by laches from bringing this action.

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Petitioner denies that she slept on her rights and contends that she protested the Board's action in a variety of ways. She maintains further that there was no inaction on her part but that the 11 months which elapsed before the filing of her appeal was spent in seeking legal advice and opinion and in exploring possible courses of action. She argues that when the actions she did take are considered, any delay which occurred cannot be considered unreasonable, that any inference that she had waived her rights is groundless, and that the lapse of time produced no change of position prejudicial to respondent's interests.

From the testimony and documentary evidence offered with respect to this issue the following facts are clear. After the conference in May 1964, at which petitioner learned that respondent contemplated a change in her duties, she conferred by telephone with two staff members of the State Department of Education. On June 2 she wrote to the New Jersey Education Association and was visited twice during that month by its field representatives. On June 24 she and her brother sought and obtained a conference with the Deputy Commissioner of Education. After respondent adopted its resolution on July 9, petitioner wrote to the Deputy Commissioner. He advised her that she could contest respondent's action by filing a petition of appeal to the Commissioner of Education and referred her for procedural information to the Division of Controversies and Disputes. Petitioner followed this suggestion, wrote to that office on August 5, 1964, and obtained a suggested form of petition of appeal and information pertaining to the initiation and processing of a cause under *R. S.* 18:3–14. Following this correspondence, petitioner consulted an attorney in Newark but did not follow through with him.

Early in September, petitioner testified, she received a letter from the New Jersey Education Association enclosing an opinion from its attorney which concluded that petitioner had no claim to tenure as a school psychologist. In October, petitioner wrote to the Association to inquire whether it could assist her in an appeal to the State Department of Education and was advised in effect that she had no cause for action.

In December 1964, petitioner sustained an injury at school and was absent from her employment until early in April. During this time she wrote again on March 22, 1965, to the State Department of Education for information on the appeal procedure and received a second copy of the suggested form for an appeal and information on how to proceed. Shortly after her return to school, the Superintendent received a notice from an attorney stating that he had been retained by petitioner and asking for copies of her employment and personnel records. These were sent to him on April 23, 1965. There is no evidence of further communication or action from this attorney. On May 10, petitioner wrote to the Commissioner of Education describing the situation from her point of view and asking what guidance he could give her. There then followed respondent's appointment of one of its staff members as school psychologist on June 10 and petitioner's action to file the instant petition of appeal *pro se* before the Commissioner on June 15, 1965.

Petitioner contends that in the light of her attempts, as shown by the testimony, to ascertain the reasons for her reassignment, to effect a resolution of the controversy informally and through the mediation of her professional association, and to obtain guidance with resepect to her legal rights,

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she was under no compulsion to file a formal complaint, and any delay in so doing which may have occurred was reasonable and proper. Contributing to the lapse of time, she avers, was her inability to arrange conferences with the Superintendent, misleading advice she purportedly received, and her enforced absence because of injury.

In support of its defense of laches, respondent calls attention to the fact that at no time did petitioner communicate with or protest to the Board of Education or its administrator with respect to her reassignment. Respondent points out and petitioner concedes that it did not receive copies of any of the correspondence recited *supra,* nor was it apprised in any way of petitioner's activities relative to this dispute. Respondent avers that at the several conferences between petitioner and the Superintendent during the year, the subject was not petitioner's removal as psychologist, but involved her classroom assignment, salary, or application for sabbatical leave. It contends, therefore, that petitioner's silence and delay in instituting action which could effectively join the issue, constituted unreasonable delay and gave rise to a reasonable inference that petitioner had abandoned her claim, on which respondent could rely and move to fill the vacancy.

Prior appeals in which the issue of laches was raised demonstrate clearly that the Commissioner has established no rigid period of time after which an appeal is barred but he has, instead, considered all of the circumstances in each case. *Cf. Harenberg* v. *Newark Board of Education et al.,* 1960-61 *S. L. D.* 144, affirmed Superior Court, Appellate Division, July 7, 1961, and cases cited therein. It is also clear that when the issue is one of termination of public employment and assertion of a right to reinstatement, the courts have emphasized the need for prompt action. In his decision in *Harenberg, supra,* at pages 145-146, the Commissioner considered at length the opinions of the courts, as follows:

> "In *Park Ridge* v. *Salimone,* 36 *N. J. Super.* 485, affirmed, 21 *N. J.* 28, the Court said:
>
> 'The courts have long ago recognized the need for prompt action by public employees in seeking judicial review of their discharge. The reason is obvious. It is important that public duties be carried on without interruption or with as little interruption as possible. A governing body must be allowed to fill the employment in the public service with all necessary dispatch free from unnecessary risk of double payment of wages.'
>
> "The Supreme Court in its affirmation made this further statement at page 46:
>
> 'But the time must come when the appointing authority can rely upon the conclusion of the issue and proceed to make arrangements in the interest of the public to replace the dismissed employee without fear that its action will be undone. * * * Although the statutes there involved'—in *Marjon, supra*—'concerned tenure, the principle is the same.'
>
> "In *Atlantic City* v. *Civil Service Commission,* 3 *N. J. Super.* 57 at 61, it was said:
>
> 'The law of this State is well settled that in the case *sub judice,* a public employee's rights to reinstatement even assuming, but not deciding, that

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his removal or other interference with his rights may be unjust and unwarranted, may be lost by his unreasonable delay in asserting his rights. This recognized principle of law is founded upon considerations of public policy and its application is warranted here.'

"Justice Heher said in the case of *Marjon* v. *Altman*, 120 *N. J. L.* 16 at page 18:

'While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action. *Taylor* v. *Bayonne*, 57 *N. J. L.* 376; *Glori* v. *Board of Police Commissioners*, 72 *Id.* 131; *Drill* v. *Bowden*, 4 *N. J. Misc.* 326; *Oliver* v. *New Jersey State Highway Commission*, 9 *Id.* 186; *McMichael* v. *South Amboy*, 14 *Id.* 183.'

"The Commissioner finds some similarity also between the instant case and *Jordan* v. *Newark*, 128 *N. J. L.* 469. In both cases, the petitioners carried on discussions and consulted counsel about the matter, but neglected to bring action. * * *"

The Commissioner cannot agree with petitioner that there was no obligation to institute action immediately and that such action could wait while she explored other means of resolving the matter. Prompt action would have at least put respondent on notice that its action was unacceptable to petitioner. As it was, respondent had no way of knowing that petitioner had not acquiesced and accepted the change of duties. It is clear that she made no protest to the Board. The testimony indicates further that even in her conversations with the Superintendent, while she apparently expressed some unhappiness over the change of status, she made no real protest and confined herself mostly to discusssion of matters of salary, teaching assignment, and sabbatical leave. In the face of such silence and inaction, respondent had every reason to infer that petitioner had accepted her altered status, particularly in view of the fact that her salary as a teacher was higher than she had earned as school psychologist. Moreover, an examination of petitioner's actions for a period of almost a year after respondent's resolution was adopted, leads to the conclusion that they were more in the nature of temporizing than of effective resolution of the problem. Petitioner was informed early and more than once that her most effective course would be to appeal to the Commissioner, but she delayed almost a year before doing so. Although she consulted counsel twice, she failed on both occasions to follow through and initiate action through them. It is also a reasonable assumption that the filing of the appeal herein was triggered by respondent's action to appoint a person to petitioner's former position, coming as it did immediately thereafter. From a careful consideration of all the evidence the Commissioner concludes that petitioner's actions and failure to act constituted inexcusable temporizing which entitled respondent to infer that she had waived whatever rights she may have had and to change its position.

The Commissioner concludes that petitioner's delay in making an effective protest and respondent's reasonable inference therefrom has caused sufficient detriment to respondent to warrant a finding of laches. Irreparable harm

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to the educational program, and hence to the welfare of pupils, results when professional staff members and the appointing board cannot feel reasonably secure against interruption by a long-delayed challenge such as appears herein. The Superintendent testified that he searched for a suitable replacement for the position of school psychologist during the 1964-65 school year without success. Finally, at the end of the year, a qualified candidate from within the staff was appointed and not until thereafter did petitioner take action to protest and claim rights to the position. By that time respondent had spent almost a year, while petitioner was silent, looking for a suitable replacement and had entered into an agreement with a new psychologist. Petitioner's replacement accepted the appointment with no indication that petitioner claimed prior rights to it and has performed her duties during the pendency of these proceedings. The Commissioner holds that petitioner's temporizing has permitted changes to take place which cannot now be undone without harm to the particular persons involved and the school system generally. It would be highly prejudicial to compel respondent to reinstate petitioner to the school psychologist position after having hired another person at a lower salary. Timely action by petitioner could have avoided such a situation. Under such circumstances the Commissioner finds that petitioner's appeal herein is barred by her laches.

The Commissioner finds and determines that (1) respondent Board of Education failed, through inadvertence, to act in time to prevent petitioner's acquiring tenure as school psychologist, but that (2) petitioner's failure to make timely protest or to inaugurate effective action to protect her rights was inexcusable and it would be detrimental to respondent to reassign her. Thus, petitioner's laches bars any further contest of respondent's termination of petitioner's employment as school psychologist and reassignment to classroom teaching duties.

The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

April 18, 1967.

DECISION OF THE STATE BOARD OF EDUCATION

The Commissioner of Education, in a decision rendered April 18, 1967, held (1) that petitioner acquired tenure as a school psychologist on July 1, 1964, by virtue of *R. S.* 18:13–16 (*Ch.* 231, *L.* 1962, *p.* 1124), but (2) that her claim for relief is barred by laches. Petitioner appeals from the determination that her claim is so barred, and respondent Board cross-appeals from the determination that petitioner acquired tenure.

Both parties agree that petitioner, a properly certified school psychologist, served in respondent's employ as a teacher in the academic year 1960-61, and as school psychologist for the three consecutive academic years following (1961-62, 1962-63, and 1963-64), as defined by *R. S.* 18:13–16, and that she was a member of one of the classes of persons covered thereby. The applicable section of the statute (effective date, February 1, 1963) grants tenure to school psychologists

> "* * * after employment for 3 consecutive academic years together with employment at the beginning of the next succeeding academic year . . .

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provided, that the time any such employee had taught in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district, except that no employee shall obtain tenure in a position other than as a teacher, principal, assistant superintendent or superintendent prior to July 1, 1964."

Respondent contends that petitioner acquired no tenure as school psychologist since she did not meet the requirement of "employment at the beginning of the next succeeding academic year." Petitioner claims that the statutory proviso allowing tacking on of her prior teaching service gave her the required time, subject only to the exception prohibiting the acquisition of tenure prior to July 1, 1964.

On May 27, 1964, prior to petitioner's completion of her third consecutive academic year as psychologist, she met with the President of respondent Board and the acting Superintendent of Schools who advised her that she would not be reappointed as school psychologist. At the June, 1964 meeting of the full Board, petitioner appeared with her brother who requested that action on the proposed terminating resolution be deferred, in which request the Board acquiesced "out of respect for Dr. Elwood" (her brother). A draft of the resolution of termination was shown to Dr. Elwood and petitioner at that meeting. At the July 9, 1964 meeting, the resolution was passed:

"*Be It Resolved*, that the services of Miss Dorothy Elowitch, a teacher, as School Psychologist, be and the same are hereby terminated * * *."

The balance of the resolution assigned and transferred her to teach in the district.

The search for legislative intent with respect to the tenure statute as it applies to this case is not an easy one. Tenure is a status, not a contractual right; it is subject to legislative change at any time, and may be contractually negotiated between teacher and local board, subject to law. *Phelps* v. *Board of Education of the Township of West New York*, 57 *S. Ct.* 483, 300 *U. S.* 310, 81 *L. Ed.* 674 (1957); *Laba* v. *Board of Education of Newark*, 23 *N. J.* 364 (*Sup. Ct.*, 1957); *Kopera* v. *Board of Education of the Town of West Orange*, 60 *N. J. Super.* 288 (*Essex Co.*, 1960); *Offhouse* v. *State Board of Education*, 131 *N. J. L.* 391 (*Sup. Ct.*, 1944), app. dism. 65 *S. Ct.* 68, 323 *U. S.* 667, 89 *L. Ed.* 542, reh. den. 65 *S. Ct.* 114, 323 *U. S.* 814, 89 *L. Ed.* 648; *Redcay* v. *State Board of Education*, 130 *N. J. L.* 369, aff'd 131 *N. J. L.* 326 (*Sup. Ct.*, 1943); *R. S.* 18:13–5 By reason of such changes, tenure in particular assignments may be lost. *Lascari* v. *Board of Education, Borough of Lodi*, 36 *N. J. Super.* 426 (*App. Div.* 1955) It may be delayed and, conceivably, never acquired through periodic assignment changes.

The local Board notified petitioner of its intention to terminate in May, 1964, and intended to pass an apppropriate resolution at its June, 1964 meeting. Had it done so, petitioner's claim would be untenable. However, the formality of its presentation and passage were postponed, at petitioner's request, until the meeting following the critical date of July 1, 1964. Question might well arise, in view of her request, whether she in fact acquired tenure on July 1, 1964.

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However, we do not find it necessary to determine that question. Between July 9, 1964, the date of the terminating resolution, and June 15, 1965, when petitioner appealed, the following occurred:

On a date prior to June 2, on June 24, July 31, August 5, 12, 15, 17, 1964, and March 15 and 22, 1965, petitioner was in communication with members of the State Department of Education with respect to her termination, and was advised by them to use all organizational and other resources available to her, including the filing of an appeal, to have the local Board's action reviewed. To this end, on August 17, 1964, and again on March 22, 1965, petitioner was furnished by the State Department of Education with appropriate forms and written instructions as to the filing and processing of such an appeal. Additionally, on or about June 2, July 9, September 9, 10, 1964, April 7, 14, and May 10, 1965, petitioner was in communication with several persons, including private attorneys and the New Jersey Education Association, with respect to remedial avenues available to her. It appears that most of these communications were for the purpose of obtaining a legal opinion favorable to the claim which she now presses.

On June 10, 1965, respondent Board, after attempts for almost a year to fill the vacancy created, contracted for the employment of another person to fill the school psychologist post. Five days later, petitioner filed her appeal *pro se*. During the 1964-65 academic year, petitioner accepted employment as teacher with respondent Board.

Nothing in the applicable statutory or regulatory procedures prescribes the time within which an appeal of this type must be prosecuted. Respondent claims the 11-month delay was unreasonable and that it has been prejudiced by having filled the vacancy. Petitioner, in her brief, contends that reasonable excuse exists in these circumstances because (1) her efforts had not produced favorable legal advice, from non-departmental sources, to justify action, (2) the incapacitating effect of an injury had disabled her from teaching between December 5, 1964, and April 5, 1965, and (3) there was uncertainty as to whether the school psychologist position had been abolished. The first argument must be discounted in view of the clear evidence showing that personnel of the State Department of Education encouraged her to appeal the action taken, and the fact that when she did file her appeal, *pro se*, she had not even then obtained a favorable legal opinion. As to the second argument, there has been no showing that the disability she suffered was such as to render her incapable of preparing and filing the required appeal forms. During her incapacity, she requested and received appeal forms and written instructions as to the perfection of any appeal. As to the third argument, petitioner's first awareness of intended termination (Spring, 1964) and the Board's subsequent resolution of July 9, 1964, clearly related to termination of her services and reassignment, not abolition of the post; and the many attempts by petitioner to find out what was wrong with her performance indicate that she entertained very few, if any, thoughts about abolition of the post. No claim is made that the local Board made any misrepresentations to her or that it acted fraudulently.

Implicit in the doctrine of laches is the inaction of a party with respect to a known right for an unreasonable period of time coupled with detriment to the opposing party. *Pomeroy, Equity Jurisprudence, V.* II, *Sec.* 419, p. 171-2;

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27 *Am. Jur. 2nd, Sec.* 162, *p.* 701; *Atlantic City* v. *Civil Service Commission,* 3 *N. J. Super.* 57 (*App. Div.*, 1949); *Park Ridge* v. *Salimone,* 36 *N. J. Super.* 485 (*App. Div.*, 1955), aff'd 21 *N. J.* 28 (*Sup. Ct.*, 1956) Respondent, on June 10, 1965, 11 months after terminating petitioner, contracted to fill the vacancy created, prior to receiving any notice that petitioner contested the propriety of its action. Under all the circumstances, respondent's action constituted a sufficient detriment, in the face of petitioner's implied acquiescence, to invoke the bar of laches.

One further consideration remains. During the pendency of these proceedings, petitioner's successor as school psychologist resigned (October 1, 1967). Petitioner claims that this occurrence renders moot the question of laches. We do not agree. We are concerned with an act of a local Board and petitioner's implied acquiescence therein to the extent that legal justification existed for the Board to change materially its position in reliance thereon. We do not conceive that as against a public body which has acted to its detriment, a right to relief, once extinguished, may be reincarnated through the subsequent acts of a stranger to the controversy. To hold otherwise would place before the local board the specter of never-ending claims.

The decision of the Commissioner is affirmed.

December 6, 1967.

XXVI

SCHOOL DISTRICT NOT OBLIGATED TO PROVIDE SPECIAL EDUCATION FACILITIES EQUAL TO THOSE OF PRIVATE SCHOOL

In the Matter of "M",

Petitioner,

v.

Board of Education of the Township of Springfield, Union County,

Respondent.

For the Petitioner, Jay J. Toplitt, Esq.

For the Respondent, Riker, Danzig, Scherer & Brown (Howard F. Casselman, Esq., of Counsel)

Commissioner of Education

Decision on Motion to Dismiss

This is an action brought by the father of an eight-year-old girl, hereinafter referred to as "M", alleging that respondent has failed to provide adequate special educational facilities for his daughter. Respondent denies that it has failed in its duty to provide for M in accordance with the laws of the State, and has moved to dismiss the petition on the grounds that it fails to

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state a proper cause for determination by the Commissioner, that it seeks relief which respondent is not required by law to give, and that petitioner refused the special education services which respondent provided in accordance with law.

A brief and affidavits in support of its Motion have been filed by respondent. Petitioner has filed a letter stating that there is a question of fact which requires that the matter be heard in a plenary fashion.

M was originally enrolled in the kindergarten class of respondent's schools in 1963. In the following year she was classified and placed in a public school class for the educable mentally retarded. Petitioner, regarding the classification and placement as improper, voluntarily withdrew M from the facilities provided by respondent and placed her in a private school for brain-damaged children at his own expense. Subsequently, respondent offered petitioner a placement for M in a public school class for neurologically impaired children. Petitioner withdrew M from the private school and placed her in the public school class. Again petitioner deemed the public school facilities inadequate to meet M's needs and not equal to those available at the private school. As a result he withdrew her from public school and re-enrolled her in the private school at his own expense. In his petition he seeks either that respondent be required to provide an educational program for M equal to that which she now receives in the private school, or else provide for payment of tuition and transportation expense for the enrollment and attendance of M at the private school.

Respondent contends that it has in all respects complied with the statutes in fulfillment of its obligation to provide for the educational needs of M. It has submitted the affidavits of its Superintendent of Schools and its school psychologist setting forth the procedures it has undertaken, as outlined *supra*, to evaluate and classify M, and to provide educational facilities and programs consonant with such evaluation and classification. Respondent contends, therefore, that there is no material issue of fact to be determined by a hearing and urges that petitioner's claims that the evaluation and placement of M were improper and inadequate are mere conclusions of law. Moreover, respondent contends that the statutes place no obligation upon the school district to provide programs and facilities "equal" to those available in a private school.

The obligation imposed by statute (*R. S.* 18:14–71.22) is to provide "suitable facilities and programs" for handicapped children. Only when it is found impractical to provide facilities and programs offered by and in connection with public school facilities, may the board of education, with the consent of the Commissioner, send a child to privately operated, nonprofit, nonsectarian day classes. *R. S.* 18:14–71.23

The Commissioner was recently called upon to consider the obligations of a local board of education in similar circumstances. *In the Matter of "R"*, decided by the Commissioner December 15, 1966 In that case, as here, the parents of the handicapped child elected to withdraw her from the educational program provided by the local board of education. In holding that the respondent board of education fulfilled its statutory obligations in its efforts to evaluate R and thereafter to accomplish a proper educational placement for her, the Commissioner said:

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"No demands were made upon respondent by R's parents. In their natural anxiety over their daughter's progress they chose to seek special schooling elsewhere and in so doing they relieved respondent of any obligation with respect to their child's education. Parents have a right to elect to have their children educated in schools other than those provided at public expense but, in so choosing, they cannot, by unilateral action such as that herein, require the local school district to assume the costs of that choice. *Lange* v. *Hi-Nella Board of Education*, 1959-60 *S. L. D.* 65; *Cf. Boorstein* v. *Fort Lee Board of Education*, 1957-58 *S. L. D.* 50. Even were there no suitable facilities for R in respondent's schools, placement in an appropriate program in a nonpublic school at public expense could be accomplished only after concurrence and approval by respondent and the Commissioner of Education. *R. S.* 18:14–71.23 (g) There is no showing that any such approval was ever sought or granted. It is clear that R was removed from public school and placed in private school on her parents' volition and with no involvement on the part of respondent. Under such circumstances the financial obligations incurred by that action devolve solely upon the parents and not upon the Board of Education."

The Commissioner finds and determines that the petition herein raises no question of material fact with respect to respondent's performance of its obligations under the appropriate statutes. The bare allegations, standing alone, that the classifications of M made by respondent were improper, and that the facilities and programs provided by respondent are inadequate are not sufficient to require a hearing. Whether the facilities and programs are or are not "equal" to those provided in a private school is not a justiciable question under the statutes. Absent a clearly defined allegation that such facilities as have been provided by respondent are not *suitable*, there is no question of fact to be determined by a hearing. Respondent's Motion is therefore granted and the petition is accordingly dismissed.

ACTING COMMISSIONER OF EDUCATION.

April 18, 1967.

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XXVII

LOCAL TAX LEVY CERTIFIED

BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK,
Petitioner,

v.

MAYOR AND COUNCIL OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,
Respondents.

For the Petitioner, Joseph D. Donato, Esq.

For the Respondent, Slingland, Bernstein & van Hartogh (George van Hartogh, Esq., of Counsel)

COMMISSIONER OF EDUCATION

ORDER

It appearing that the voters of the school district for the Township of Pequannock, Morris County, rejected the appropriations proposed by the Board of Education to be raised for school purposes for the 1967-68 school year at the annual school election and as resubmitted at a second referendum; and it appearing that subsequently the Pequannock Township Council, pursuant to *R. S.* 18:7–82, by resolution, fixed the levies to be raised for school purposes in the following amounts:

For current expenses	$1,669,061
For capital outlay	26,140

and it appearing that thereupon the Board of Education filed a petition of appeal to the Commissioner of Education protesting the insufficiency of the amounts fixed by Council to maintain an adequate school program; and it appearing that subsequently the Board of Education and the Township Council entered into further discussions which resulted in agreement on a revised amount of appropriations considered to be necessary; and it further appearing that both parties have concurred on a revised certification of the amounts to be raised as follows:

For current expenses	$1,711,983
For capital outlay	34,440

and have stipulated in writing their consent to an Order of the Commissioner of Education finding and determining that said amounts are to be fixed as necessary for the school purposes of the district for the school year 1967-68; now, therefore,

IT IS, on this eighteenth day of April, 1967, ORDERED that the certification of the local tax levy for school purposes in the Township of Pequannock for the school year 1967-68, heretofore made by the Pequannock Township

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Council to the Morris County Board of Taxation shall be revised and amended so that the certification shall be:

For current expenses	$1,711,983
For capital outlay	34,440

ACTING COMMISSIONER OF EDUCATION.

XXVIII

PLURALITY OF VOTES ELECTS MEMBER TO FILL VACANCY ON BOARD

IVAN POLONSKY, DONALD D. DEVINE, AND CURTIS Q. MURPHY,
Petitioners,

v.

RED BANK BOARD OF EDUCATION, EDMUND J. CANZONA, PRESIDENT, RICHARD J. LYON, SECRETARY, SAMUEL CAROTENUTO, HERMAN O. WILEY, HENRY STEVENSON, WILLIAM MACEE,
Respondents.

For the Petitioners, Joseph N. Dempsey, Esq.

For the Respondents, Theodore D. Parsons, Esq.

COMMISSIONER OF EDUCATION

DECISION

In this petition of appeal the Commissioner of Education is asked to rule on questions relating to the filling of a vacant seat on a board of education. It is brought by three members of the Red Bank Board of Education who contest the election of a person to fill the vacancy by four other members of the Board. The factual issues were heard by the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education, Trenton, on November 29, 1966, and January 17, 1967. A memorandum of law was submitted also by counsel for respondents.

Since the annual school election occurred on February 14, 1967, and the seat in question has now been filled by a vote of the electorate, the issue herein may be considered moot. Although the Commissioner does not generally adjudicate moot issues, the questions raised herein are ones that are asked of him frequently. The Commissioner will depart from his usual practice, therefore, and rule on this matter for the future guidance of boards of education.

The school district of Red Bank is organized under the provisions of Chapter 7 and has an elected board of education consisting of nine members. Prior to its regular meeting on July 12, 1966, one of the members had moved out of the district, thereby creating a vacancy.

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At the meeting of July 12, 1966, three persons were nominated to fill the vacancy. At the direction of the President, the Secretary distributed blank pieces of paper to each member. After each member had written his choice, the ballots were collected and tallied. The result was four votes for Clarence S. Gale, two for Richard Johnson, one for Roy Ricci, and one blank ballot. The vote for Ricci was then transferred to Johnson by request of the member who had voted for him. The President thereupon declared Mr. Gale elected.

At the next meeting of the Board on July 26, petitioner Polonsky moved the following resolution:

> " 'Whereas three members of the Board of Education have submitted a letter to the State Board of Education requesting a hearing concerning both the conditions under which the votes were taken in the election of Mr. Gale and the fact that Mr. Gale did not receive the votes of a majority of the members of the Board of Education.
>
> " 'Therefore, the installation of Mr. Gale as a member of the Board of Education is postponed until after the hearing before the Commissioner of Education.' " (R2)

The minutes of the meeting continue and report that:

> "The President declared the motion out of order and said there was no authority for suspending action on the appointment.
>
> "The Secretary administered the oath of office to Mr. Clarence S. Gale who was then seated at the table."

The issues herein have been defined and stipulated as follows:

> "a. Was the vote challenged herein a secret ballot, and if so, is such a ballot contrary to public policy?
>
> "b. Was the manner of taking the ballot contrary to Board policy for filling a vacancy or contrary to parliamentary procedure adopted by the Board?
>
> "c. Did Clarence S. Gale have a majority of the votes cast? Was the president of the Board in error in declaring such a majority?"

A

The vote taken to elect a member to fill the vacancy was undoubtedly a secret ballot. The Commissioner knows of no reason why such a method of determining an election to fill a vacancy should be considered questionable or contrary to public policy. There is no statute or rule which prescribes the method of voting which all boards of education must employ. Boards of education may mold their procedures for the discharge of their duties as they deem most fitting, consistent with law. *R. S.* 18:7–56 provides that:

> "The board may make, amend and repeal rules, regulations and by-laws, * * * for its own government, the transaction of business * * *."

See also *R. S.* 18:7–55.

While it is general practice for boards of education to vote by calling for the "ayes" and "nays" viva voce or by roll call, such custom does not per se

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preclude resort to secret balloting when it appears appropriate or desirable. Nor is there any enunciation of public policy within the knowledge of the Commissioner that compels public notice be made of the vote cast by each board member. The sole requirement is that the will of the majority be determined and recorded as an official act in the minutes of the board.

B

It is stipulated that the Board of Education had adopted two rules pertinent to this matter as follows:

"Section 6—*Rules Governing Meetings:*

In the conduct of its business, the procedure of the Board will be governed by the educational laws of the State, by principles and rules set forth in these regulations, or otherwise by 'Cushing's Manual of Parliamentary Practice.'

"Section 9—*Vote by 'Ayes' and 'No's':*

The vote by 'ayes' and 'no's' shall be taken and recorded when demanded by any member, and it shall be taken and recorded on all questions involving elections and appointments or expenditures of money."

Petitioners contend that use of a secret ballot for an election such as that herein was contrary to the Board's rules. It is not disputed that the rule in Section 9 above calls for a recorded roll call vote and such a procedure was not followed. There is, however, no evidence that any member protested or questioned in any way the president's decision to vote by secret ballot. A board of education is not bound by its own procedural rules when no vested rights are involved. *Noonan and Arnot* v. *Paterson City Board of Education,* 1938 *S. L. D.* 331, affirmed State Board of Education, *Id.* at 336; *Silvestris* v. *Bayonne Board of Education,* 1959-60 *S. L. D.* 184, 190 Absent any violation of law or State Board rule, it must be held that there was no fault in the departure from the Board's own rules by the use of a secret ballot in which all members of the Board participated without protest.

C

Petitioners question the election of Mr. Gale for the reason that he failed to receive a proper number of votes. Their petition asserts that it is "unclear" whether a majority vote of the whole number of members of a board is required in such a case. The statutes specify precise questions on which a majority vote of the whole number of members is required for enactment. See *R. S.* 18:7–58, 18:14–3, 18:7–47.1, 18:7–68, 18:7–70, 18:7–70.3, 18:3–25, 18:13–13.7, 18:5–51.10, 18:12A–1. Nowhere do the statutes require such a vote for the filling of a vacancy on the board. The doctrine of *expressio unius est exclusio alterius* seems clearly applicable here. The relevant statute is *R. S.* 18:7–55, which reads as follows:

"The board may fill a vacancy in its membership except as provided in section 18:7–51 of this Title and except a vacancy caused by a failure to elect, or by removal of a member for failure to have the qualifications required by section 18:7–11 of the Revised Statutes or as the result of a

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> recount or contested election or one which is not filled within sixty-five days after the occurrence of the vacancy. The person so appointed shall serve only until the organization meeting of the board after the next election for members."

Nowhere does the statute express or imply that a majority of the whole number of members is needed to elect. It must be concluded, therefore, that where there are more than two candidates for election to fill the vacancy under this statute, a plurality of votes is sufficient.

> "In the absence of a statute or constitutional provision expressly requiring more, a plurality of votes is sufficient to elect." 29 *C. J. S., Elections,* § 241, p. 674

By receiving more votes than either of the other two nominees, Gale had a plurality of the votes. But even if it could be shown that a majority, rather than a plurality, was required, the vote for Gale would still be sufficient to elect him. Of the eight members present at the meeting, four voted for Gale, two for Johnson, and one for Ricci. The eighth member turned in a blank ballot, which cannot be considered a vote.

> "* * * electors present and not voting at an election acquiesce in the election made by those who did vote." 29 *C. J. S. Elections,* § 213, p. 598

The Commissioner finds, therefore, that Mr. Gale was elected by a plurality of the votes cast at a legally constituted meeting to a seat on the Board until the first meeting of the succeeding Board of Education.

Petitioners further contend that their motion at the July 26, 1966, meeting to postpone the seating of Mr. Gale until determination of the validity of his election should have been acted upon and not declared out of order by the President. The Commissioner finds no necessity to rule on this question. In any event, Mr. Gale's election was already accomplished. There was no necessity for Mr. Gale to wait until the next meeting to be seated. Having been declared elected at the July 12 meeting and so recorded in the minutes, he became entitled immediately to the seat in the board. He could have presented himself at any time thereafter to the Secretary of the Board or to any qualified official to take the oath of his office, whereupon he would have been in fact a member of the Board and entitled to all the rights of that office until and unless he were unseated or enjoined by a tribunal competent to act on the matter. Petitioners' motion and the President's rejection of it, whether right or wrong, were irrelevant and immaterial to the issue herein.

The Commissioner finds and determines that Clarence S. Gale was duly elected on July 12, 1966, to fill a vacant seat in the Red Bank Board of Education until the first meeting of the succeeding board of education in February 1967.

ACTING COMMISSIONER OF EDUCATION.

April 25, 1967.

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XXIX

BOND REFERENDUM NOT ADVERTISED ACCORDING TO LAW WILL BE SET ASIDE

HAROLD J. FUCCILLE,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LAKEHURST, OCEAN COUNTY,

Respondent,

For the Petitioner, Camp & Simmons (Roy G. Simmons, Esq., of Counsel)

For the Respondent, Haines, Schuman & Butz (Harold Schuman, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner contests the validity of a special referendum held on January 31, 1967, in the school district of Lakehurst, at which a proposal to construct an addition to the school buildings at a cost not to exceed $492,700 and to issue bonds in the amount of $404,350 therefor, was submitted to the electorate. The announced results of the election were 209 in favor of the proposal and 192 against.

Petitioner's challenge is grounded on four allegations: (1) failure to post the seven public notices in time as required by statute, (2) failure to advertise the election as required by law, (3) circulation of an unsigned communication pertaining to the referendum, and (4) permitting persons giving their addresses as "Pinehurst Estates" to cast ballots.

Testimony was heard and documentary evidence received by the Assistant Commissioner of Education in charge of Controversies and Disputes at a hearing held March 17, 1967, at the office of the Ocean County Superintendent of Schools, Toms River.

R. S. 18:7–46 states that all special elections shall be called in the manner provided for the calling of the annual school election. Before any school election, therefore, the public must be notified as set forth in *R. S.* 18:7–15, the pertinent portion of which reads:

> "At least 10 days before the date of the election the district clerk shall post not less than 7 notices of the election, one on each schoolhouse within the district and others at such other public places therein as the board shall direct. * * *
>
> "The district clerk shall also cause such election to be advertised at least one week before the holding of such election in a newspaper circulating in the district."

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In his testimony the Secretary admitted that he had neglected, through inadvertence, to post the seven required notices until the day before the election. Petitioner's first allegation is therefore established as true.

With respect to the second charge, there was admitted in evidence a document (Exhibit P-2) entitled "Proof of Publication" on which was exhibited a newspaper clipping of the proper form of advertisement of the referendum. The document disclosed that the advertisement of election appeared in the *Ocean County Daily Times*, a newspaper circulating in the district, on December 21, 1966. Petitioner's second allegation is therefore determined to be without foundation.

In support of his third allegation, petitioner attempted to introduce a letter pertaining to the election whose authorship was not identified, and which he claims came to his notice in the course of its circulation in the district. Petitioner was unable, however, to associate the authorship or dissemination of the letter to the Board of Education or any of its employees. Under such circumstance the document was not admitted. Petitioner was advised that if he wished to press this complaint under *R. S.* 18:5–82.32a, his proper recourse was to the County Prosecutor. The third allegation is, therefore, dismissed.

Petitioner's fourth charge is that persons who gave "Pinehurst Estates" as their address were permitted to vote when, in fact, they were not eligible. Counsel stipulated that 27 such persons signed the poll list and were given ballots. The testimony reveals that the area known as "Pinehurst Estates" is a housing project constructed under Title VII of the National Housing Act to serve the United States Naval Air Station, and is located within the municipal boundaries of the Borough of Lakehurst. It was conveyed to the United States Government on August 1, 1964. Although owned by the Federal Government, the area is subject to the same municipal, civil, and police jurisdiction and receives the same municipal services as the remainder of the Borough. Persons who occupy the residences in the project work within the Naval Air Station. Its commanding officer testified that his authority extends only to the limits of the Station and that he has no jurisdiction over the Pinehurst Estates area. Petitioner claims that the 27 persons who gave their address as "Pinehurst Estates" were not legally domiciled there and as a result, they were ineligible and not legally qualified to vote. While the Commissioner would conclude from the testimony that this charge is not true, he finds that this allegation belongs properly in another jurisdiction. The school law directs the election board appointed to conduct the election to compare the signature of each voter on the poll list with the signature in the signature copy register, and if they are determined to be the same "the voter shall be eligible to receive a ballot." *R. S.* 18:7–35.6 There is no showing herein that the persons who gave Pinehurst Estate addresses were not registered in the signature copy register. If they were so registered, they were entitled to vote under the school law. Any challenge to their eligibility is beyond the scope of the Commissioner's jurisdiction and must, therefore, be directed to the Ocean County Board of Elections. The Commissioner finds, therefore, that there is no authority for him to invalidate the ballots cast by the twenty-seven persons from Pinehurst Estates.

Petitioner's last three allegations having been dismissed, there remains the question of the effect of the proven first charge on the election.

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In its testimony, respondent offered issues of the *Asbury Park Press* for January 24, 27, and 30, 1967, and a copy of the *Ocean County Daily Times* for December 16, 1966, in each of which a news article about the referendum appeared. (Exhibits R-2, 3, 4, 5) Also introduced was a copy of a four-page leaflet entitled "PTA Patter" which was distributed to pupils to take home to their parents sometime in January 1967. The leaflet (Exhibit R-6) contained an announcement of the date, time, and place of the referendum. A notice of the election was also given to pupils by the principal to take home on the day of the election. (Exhibit P-3)

Respondent contends that the newspaper coverage and other sources of information furnished adequate notice to voters, more than would have been provided had the seven public notices been posted. It avers that through articles and reports in the press and other media, the electorate was fully aware of the date, time, place and purposes of the referendum. As proof of this contention respondent points to the fact that more votes were cast in this referendum than at any previous school election in the district. The Board argues that if the public was adequately informed, the expressed will of the majority should not be set aside because of the mere omission of seven public notices which are relatively ineffective at best.

In some jurisdictions, failure to give the required public notice is not fatal to the results of a special election if it appears that full and fair expression of the will of the electorate was not suppressed thereby. In other jurisdictions the courts have held that strict compliance with all of the statutory requirements of notice is essential, and failure to give such notice, regardless of other considerations, will vitiate the election. See 29 *C. J. S.* § 73, 166. All of the cases cited, however, are in out-of-state courts and shed no particular light on New Jersey requirements.

An issue somewhat similar to that herein was raised before the Commissioner *In the Matter of the Special Election in the School District of Beverly City*, 1964, *S. L. D.* 85. In that case the municipal clerk failed to publish the required newspaper notice. Similar arguments to those offered herein with respect to adequacy of notice through other sources were made in that matter. After considering all of the evidence the Commissioner concluded that the omission of the newspaper notice had not prevented the will of the voters from being fairly expressed and the result of the election was upheld. That decision was dated May 18, 1964. An appeal to the State Board of Education was ruled out of time. 1964 *S. L. D.* 88 The Commissioner notes, however, that thereafter this same matter came before Judge Wick, Superior Court, Law Division, on a motion for summary judgment in which Mario Farias was the plaintiff and William J. McCrudden, City Clerk, Board of Education of Beverly, and Common Council of Beverly were the defendants. In that action summary judgment was entered for plaintiff. The following pertinent excerpt is quoted from Judge Wick's Order of Judgment:

> "And it further appearing that the defendants have admitted and conceded that the City Clerk of the City of Beverly failed to publish a notice of the special election in question at least seven days prior to the date of said special election in a legal newspaper circulating in the municipality;
>
> "And the Court having considered all of the evidence, briefs and proofs offered in this cause and having heard and considered the arguments of

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counsel herein rendered a decision granting the plaintiff's motion for summary judgment herein and denying the cross-motion of the defendants for similar relief on the 30th day of July, 1964;

* * * * * * *

"It is on this 19th day of January, 1965, Ordered and adjudged that judgment in this cause be entered in favor of the plaintiff herein named and against the defendants herein named, together with costs to be taxed, for the reason that the notice required by N. J. S. A. 18:6–63 is a basic jurisdictional requisite which must be complied with before a valid election can be held thereunder * * *."

While it may be argued that the above cited action for summary judgment is not dispositive of the issue in this case, the Commissioner looks to the courts for guidance on questions, such as that herein, which call for the interpretation of law rather than educational expertise. In the light of this judgment of a New Jersey Court, it appears that strict compliance with the requirements of notice is essential to the validity of a special school election in this State. Under such circumstance, the Commissioner is constrained to reevaluate his finding in the *Beverly City* case, *supra.* The Commissioner now holds, therefore, that failure to provide the notices of a special school election as required by statute is a fatal defect which cannot be cured by other means. Proper statutory notice was not afforded the voters in the subject election and it must, therefore, be declared invalid and set aside.

The Commissioner finds and determines that the special school election held in the Borough of Lakehurst on January 31, 1967, was not conducted in strict compliance with the statutory requirements as to notice, and the results of the election are therefore set aside and declared to be null and void and of no effect.

ACTING COMMISSIONER OF EDUCATION.

April 25, 1967.

XXX

BUDGET CUTS PREVENTING ADEQUATE SCHOOL PROGRAM WILL BE RESTORED BY COMMISSIONER

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL,
Petitioner,

v.

BOROUGH COUNCIL OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,
Respondent.

For the Petitioner, Piarulli and Vittori (Frank E. Vittori, Esq., of Counsel)

For the Respondent, Palese and Palese (Donald Palese, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," taken pursuant to *R. S.* 18:7–82, certifying to the

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County Board of Taxation a lesser amount of appropriation for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on April 7, 1967, at the State Department of Education, Trenton.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $203,559 for current expenses and $24,315 for capital outlay. These items were reduced to $194,159 and $20,015 respectively and submitted again at a second referendum pursuant to *R. S.* 18:7–81 on February 28, 1967, but again failed of approval. The budget was then sent to the Council pursuant to *R. S.* 18:7–82 for its determination of the amount of funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, Council made its determination and certified to the Camden County Board of Taxation an amount of $154,959 for current expenses and $11,865 for capital outlay.

The pertinent amounts in this matter may be shown more clearly as follows:

	Bd.'s First Proposal	*Bd.'s Second Proposal*	*Council Certification*	*Reduction*
Current expenses	$203,559	$194,159	$154,959	$39,200
Capital outlay	24,315	20,015	11,865	8,150
Total	$227,874	$214,174	$166,824	$47,350

The Board makes no charge that Council acted arbitrarily or capriciously but does contend that the amount it certified is insufficient to provide an adequate system of education for the pupils of the school district. The Board appeals to the Commissioner to restore the funds deleted by the Council.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

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The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

> "* * * The Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

The Council set forth the items of the budget in which it believed economies could be effected, and its reasons therefor, in a communication to the Board dated March 27, 1967. (Exhibit R-1) These items may be shown as follows:

Item	*Board*	*Council*	*Reduction*
110—Salaries of Board Secretaries	$9,600	$8,600	$1,000
213.3—Remedial Reading Teacher	7,200	0	7,200
214—Librarian	7,000	0	7,000
215-a—Secretary to Principal	3,408	2,408	1,000
220—Textbooks	7,500	5,500	2,000
240—Supplies	7,000	4,000	3,000
250-a—Miscellaneous Supplies	4,000	1,000	3,000
520-a—Transportation	12,000	6,000	6,000
520-c—Field Trips	2,000	1,000	1,000
610-a—Janitors	25,763	22,263	3,500
630—Heat	10,000	7,000	3,000
640-b—Electricity	6,000	5,000	1,000
730—Equipment Replacement	1,000	500	500
Total Current Expenses			$39,200
1220-c4—Playground Improvement	1,250	0	1,250
1230-c2—Air Conditioning	1,500	0	1,500
1230-c3—Renovations	3,500	0	3,500
1230-c3a—Office Space	1,500	0	1,500
1240-b1—Equipment	400	0	400
Total Capital Outlay			$8,150
Total Reductions			$47,350

From the testimony offered by the Board the Commissioner concludes that almost all of the above items are important and highly desirable, and were he fixing the appropriations on his own independent judgment, he would

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certify the full amount of the Board's budget with no reduction. He is constrained, however, in a case of this sort, not to substitute his judgment for that of Council, and he may restore only those amounts which, if deleted, will so impair the schools that children will be deprived of their right to a thorough and efficient education program. With these restrictions in mind, the Commissioner will review each of Council's suggested economies.

It is readily apparent that certain of the above items cannot be reinstated in their original amounts by the Commissioner.

Item 110: The Board currently employs a secretary at $4,500 and an assistant secretary at $4,100. Next year it seeks to implement a new salary schedule and to increase each of these employees by $500. Council found these increases to be not necessary and deleted the proposed $1,000 for this purpose. The Commissioner finds no ground on which to over-rule Council's determination, and this item will stand as reduced.

Item 213.3: A remedial reading teacher is currently employed under a grant of Federal funds, four days a week at the public school and one day at a nonpublic school. The Board seeks to employ such a teacher five days a week. It contemplates using whatever Federal funds may be allocated for a "basic skills" class. Admittedly, if Federal funds are allocated, they could be used to continue the services of a reading specialist. The Board's intent is to assume the costs of the reading specialist and use the Federal funds which supported that service to initiate a new project. The real issue then is not to continue or abandon the remedial program, which will continue either under local or Federal funds, but the addition of a new service, a "basic skills" class. Desirable as the Commissioner agrees this might be, it cannot be found, under the circumstances herein, to be so essential that without it the school district will fail to meet minimum educational standards. The reduction made by Council of this item will not be disturbed, therefore.

Item 214: Two schools have library facilities. They are currently serviced by a full-time teacher-librarian. The number of library books is approximately 4,300. There is no public library in the community. One additional classroom teacher will be needed next year. The Board planned to assign the present teacher-librarian to the new class and replace her with a fully qualified librarian. The Council deleted this item evidently in the belief that there is now only a teacher serving incidentally as a librarian and a new position was intended. The need here, however, is for an additional classroom teacher, and the present teacher-librarian will take that assignment. There will then be a vacancy in the library and the Board seeks a qualified librarian for that position.

The Commissioner finds that this item must be reinstated. The need for an additional staff member is not disputed. Moreover, in a school system such as this, library facilities and the services of a qualified librarian are essential. The Commissioner concludes that curtailment of the library services would seriously impair the educational program, and he will direct that the amount necessary for this purpose be reinstated.

Item 215-a: The Board seeks to increase the amount of secretarial service from the present one and three-fifths to two full-time secretaries to the

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principals. This is another item which must be classified as desirable but not essential. It will remain as reduced by Council.

Item 220: Council reduced this time in the mistaken belief that there remains a large surplus in the funds appropriated for this purpose in the current year. The testimony reveals that the bookkeeping system failed to show that what appeared as a surplus was actually encumbered by purchases.

After examining the textbook needs set forth by the Board the Commissioner concludes that the total amount of $7,500 as requested is essential for an adequate educational program in this district and it cannot, therefore, be reduced.

Item 240: Apparent surpluses which did not exist were the basis for Council's reduction in this account also. The $7,500 requested for supplies is $500 less than the amount spent in the current year. The Commissioner finds that this item should be restored to the original budget request.

Item 250-a: Only $75 was budgeted for maps, charts, globes, and other miscellaneous instructional supplies in this year's budget. Council found an increase to $4,000 for next year excessive. The Board explains its need by citing the fact that in March 1966 a new school was opened and the number of classrooms increased from 19 to 31. No basic instructional materials were budgeted or purchased for these added rooms, with the result that what materials existed among 19 teachers were divided among 31. It appears that Council made its reduction without this knowledge.

The Commissioner concludes that this item is necessary to the maintenance of an adequate school program and under the circumstances the amount requested is not excessive. The original amount for this item will, therefore, be restored.

Item 520-a: The Board seeks to improve its transportation services and to reduce the amount of time some pupils must wait. It has not been shown, however, that this improvement is essential. The reduction made by Council will therefore, not be changed.

Item 520-c: While field trips are a valuable adjunct to the classroom teaching program, the Commissioner cannot find that the reduced amount allowed by Council for this purpose will drastically curtail the school program. This item will remain as reduced.

Item 610-a: Council finds no necessity for the increase in the janitorial staff from 4 to 5 which was made during this school year. The testimony fails to show that the additional funds requested by the Board in this account are essential. The Commissioner finds, therefore, that the amount set by Council will be sustained.

Items 630 and 640-b: After a winter's experience in the new school, the Board concurs in these reductions in the amount needed for heat and electricity.

Item 730: The Board concurs in this reduction.

In summary of the current expense items, the Commissioner finds that $7,000 for a librarian, $2,000 for textbooks, $3,000 for supplies, and $3,000

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for instructional equipment, for a total of $15,000, must be reinstated in the budget in order to maintain an adequate school program. The remaining $24,200 eliminated by Council will not be disturbed.

With respect to the elimination of funds for the five projects budgeted in the capital outlay account, the Commissioner finds no ground for interfering with the determination of Council. All of these projects appear eminently worthwhile but none of them is so essential to the school program that the Commissioner's intervention is required. The amounts certified by Council for capital outlay purpose will remain unchanged.

The Commissioner finds that the certification of the amount necessary for school purposes made by the Pine Hill Borough Council is insufficient by an amount of $15,000 for the maintenance of a thorough and efficient system of public schools in the district. He directs, therefore, that there be added to the certification previously made by the Council to the Camden County Board of Taxation the sum of $15,000 so that the total amount of the local tax levy for current expenses of the school district for the 1967-68 school year shall be $169,959, and for capital outlay $11,865, which when added to debt service of $6,783.50 will produce a total local tax levy for school purposes of $188,607.50 for the Borough of Pine Hill.

ACTING COMMISSIONER OF EDUCATION.

April 25, 1967.

XXXI

BOARD MAY REAPPOINT SUPERINTENDENT AT SPECIAL MEETING CALLED FOR THAT PURPOSE

HENRY S. CUMMINGS,

Petitioner,

v.

STANLEY LEHER, PRESIDENT OF THE BOARD; WILLIAM F. BROWN; JAMES HARDEN, SECRETARY OF BOARD; BOARD OF EDUCATION OF POMPTON LAKES, PASSAIC COUNTY,

Respondents.

For the Petitioner, *Pro Se*

For the Respondent, Slingland, Bernstein, & Van Hartogh (George W. Slingland, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

In this appeal petitioner, a member of the Pompton Lakes Board of Education, challenges for a second time the appointment by a majority of his associates on the Board of a superintendent of schools. In the previous case, *Henry S. Cummings* v. *Board of Education of Pompton Lakes and William F. Brown*, decided August 29, 1966, hereinafter referred to as "first case," a contract re-employing Superintendent Brown was determined by the Commissioner to be a nullity. Petitioner now seeks a similar finding with respect to a second contract.

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A hearing on the facts in issue was held by the Assistant Commissioner in charge of Controversies and Disputes in the office of the Passaic County Superintendent of Schools on March 21, 1967. Both parties waived the filing of briefs and agreed to rely on the testimony and evidence presented at the hearing.

The incumbent Superintendent of Schools, Mr. William F. Brown, was first employed under a contract beginning July 1, 1963, and terminating June 29, 1966, one day less than the statutory period required for the accrual of tenure. On June 29, 1965, when the contract had still a full year to run, the Board adopted a resolution by a vote of 4 to 2 renewing the Superintendent's contract for three years beginning a year thereafter on June 29, 1966. Because of the lack of a majority vote of the whole number of members of the Board, this action was ratified at a subsequent meeting on July 13, 1965, by a vote of 6 to 1. This action was challenged by petitioner on the ground that the Board had reached far beyond its own official life to take an action which belonged solely to the Board which would then be in office. The Commissioner sustained petitioner's challenge, found that the Board had acted beyond the scope of its authority, and declared the purported contract null and void. In his decision the Commissioner made the following statements:

> "There was no necessity for the 1965 Board to act on this matter, and to do so usurped the prerogative of the 1966 Board. There was no vacancy to be filled in June 1965, and the Board then in power had no authority to reach forward beyond its own official life and into the term of its successor to make a decision not due until then. *Brown* v. *Meehan*, 45 *N. J. L.* 189 (*Sup. Ct.* 1883); *Fitch* v. *Smith*, 57 *N. J. L.* 526 (*Sup. Ct.* 1895); *Dickinson* v. *Jersey City*, 68 *N. J. L.* 99 (*Sup. Ct.* 1902)
>
> "The Commissioner agrees with respondent that the elements of bad faith present in *Cullum* v. *North Bergen Board of Education*, 15 *N. J.* 285 (1954), and in *Thomas* v. *Morris Township Board of Education*, 89 *N. J. Super.* 327 (*App. Div.* 1965), affirmed 46 *N. J.* 581 (1966), are not present here. He does not question the motivation of the Board of Education to quiet any uncertainty and retain the services of a superintendent who had been carefully selected, and demonstrated his competence, and had inspired confidence in his leadership. But however meritorious its objectives may have been, respondent Board did not have the authority to perform the action herein contested, and it must therefore be set aside.
>
> * * * * * * *
>
> "* * * The Commissioner notes that the original contract with the Superintendent expired on June 29, 1966, and that the Superintendent's status has been in suspension pending the outcome of this litigation. With the determination now made voiding the action of July 13, 1965, the present Board of Education is authorized to take whatever action it deems appropriate with respect to reappointment of the Superintendent."

The Commissioner's decision was handed down on August 29, 1966. On September 6, at a special meeting of the Board, the following resolution was adopted by a 5 to 3 vote:

> "Be it resolved that the Board of Education of the Borough of Pompton Lakes, New Jersey, hereby engages, employs and hires Mr. William F.

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Brown as Superintendent of Schools of the Borough of Pompton Lakes, New Jersey, for a period from June 29, 1966 to June 30, 1967 at a salary of $18,900.00 Dollars. Said salary to be paid in equal monthly installments. It shall also be understood that the said Mr. William F. Brown shall have one month's vacation, the selection being based upon the best interests of the school system." (R-3)

Subsequently, at a regular meeting on October 11, 1966, eight members, including petitioner, voted to adopt a resolution which stated:

"WHEREAS, the Board President, Secretary and Superintendent of Schools have received copies of a petition sent to the New Jersey Commissioner of Education protesting the reappointment of Mr. W. F. Brown as Superintendent of Schools during the special meeting of September 6th, 1966 and,

"WHEREAS, the Board believes it has properly exercised its express power under the law and,

"WHEREAS, this petition is but one recent action of a continuing series of actions designed to force the Superintendent out of office by both public and private harassment,

"RESOLVED:

"1. That the Board hereby reaffirms its action of reappointment of the Superintendent during the special meeting of September 6th, 1966.

"2. That the Board protests the continuing series of petitions and publicity releases designed to weaken confidence in the Superintendent and Board.

"3. That the Board Secretary be instructed to send a copy of this resolution to the Commissioner of Education and request that the Commissioner arrange for an official review and report of the situation in Pompton Lakes so that the people may be properly informed." (R-2)

It has been stipulated that the issues in this case are as follows:

A. Was the action taken by the Board of Education challenged herein within the authority of the call for the special meeting for September 6, 1966?

B. Was the action of the majority of the Board of Education a proper exercise of the Board's discretionary authority to employ a superintendent?

C. Corollary to the above questions, was Mr. Brown in fact or law Superintendent of Schools from the date of the Commissioner's decision on August 29, 1966, to the adoption of the challenged resolution on September 6, 1966?

A

Petitioner alleges that the notice calling the special meeting of September 6, 1966, did not specifically provide for a renewal of the Superintendent's contract and that the special meeting was not called for the purpose of taking such action. He contends, therefore, that the action taken at that meeting was without authority.

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The testimony discloses that notice of a special meeting on September 6, 1966, was sent to all Board members by the Secretary by letter dated September 1. The pertinent portion of the notice reads as follows:

> "Special Meeting of the Board of Education of the Borough of Pompton Lakes on Tuesday, September 6th, 1966 at 7:30 o'clock p.m., in the High School Building, Lakeside Avenue, Pomptom Lakes, N. J., for the following purposes:
>
> * * * * * * *
>
> "3. To discuss and act on the ruling of the State Department in connection with Mr. William F. Brown's position.
>
> "4. To act on the status of position of Superintendent of Schools." (R-1)

The call of the meeting and its purposes are clearly stated. It is not reasonable to urge that the Board members failed to understand that action on the employment of the Superintendent was contemplated. Moreover, in addition to the notice, there had been a conference meeting on September 1 immediately following receipt of the Commissioner's decision in the prior matter. Petitioner contends that there was agreement at that meeting to appoint an acting superintendent and delay action on the employment of a superintendent. Respondent denies this allegation and says that it was agreed, as was the usual practice, to have a member of the staff "informally fill in" for the next few days until Mr. Brown returned from vacation. Respondent further says that it was insisted at that meeting that the issue of the Superintendent's status be disposed of promptly as soon as he returned and for that reason the call of the special meeting was issued immediately. In the particular circumstances of this case, where the question of the Superintendent's status had been in litigation for more than a year, it can hardly have come as a surprise to petitioner that the majority members of the Board wished to settle the issue as soon as possible. Moreover, any defect in the call of the meeting and the action of the Board was cured by the ratification at the meeting of October 11, 1966, *in which petitioner joined*. The Commissioner can find no merit in petitioner's first issue.

B

Petitioner contends that the election of the Superintendent to a new term was improper because no official written evaluation of his qualifications was ever made, no attempt was made to examine any other qualified candidates for the position, a motion to table the appointment until all the Board members, especially newly elected members, could make an evaluation was defeated, and the award of a contract to the Superintendent did not appear on the agenda for the meeting.

These contentions are without merit. There is no requirement in law, nor is there any rule that requires that a written evaluation of a candidate for a superintendency be made and recorded prior to his appointment. Nor does petitioner point to any such local rule. In the more than three years that Mr. Brown had served continuously as Superintendent since July 1, 1963, there was more than ample opportunity for members of the Board and the general public to evaluate his qualifications. Even the newly elected members had resided in the district for more than two years and had been in office

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since the previous February. It can hardly be said, therefore, that they had insufficient opportunity to assess the Superintendent's competency.

Respondent does not deny the fact that no other superintendent candidates were investigated or considered. This is not difficult to understand in the circumstances of this case. The Board had, in fact, made its evaluation and decided that Mr. Brown was qualified to continue as its Superintendent more than a year earlier. Its attempt to act at that time proved legally premature. The action taken a year later, in September 1966, when it had the power to make such appointment, was a not unexpected sequel to its earlier erroneous measures. In its Answer, respondent freely admits that it sought no other candidates and states that "from the standpoint of a majority of the Board, the reappointment of Mr. Brown was merely the rectification of a technical legal flaw in the invalidated contract and the majority favored the rehiring of Mr. Brown and the examination of others was not deemed necessary." The Commissioner is aware of no requirement that a board must *always* consider more than one candidate, especially where, as in this case, the sole candidate's qualifications in the position itself were well known.

The fact that a motion to table had been offered is insufficient to support a charge of abuse of discretion, especially since it was defeated.

Petitioner's further allegation that the agenda omitted the item with respect to the Superintendent is simply not supported by the evidence. As has already been noted, examination of the agenda reveals that the subject of Superintendent Brown's status specifically appears in the exact language of the call of the meeting recited *supra*.

Petitioner raises in a general sense, an issue of bad faith on the part of the majority and implies that the election of the Superintendent was rushed through without proper consideration by the Board, without proper notice, and without opportunity for the opposition, including the general public, to be heard. The evidence, however, does not support this position. The question of Mr. Brown's re-employment under a contract which would place him in a tenure status had been a matter of discussion by the Board and the community at large for more than a year. Seldom, indeed, has the election of any superintendent been the focus of as much attention as that herein. The litigation following the earlier Board's precipitate action and the subsequent voiding of the Superintendent's contract by the Commissioner received wide publicity and much local debate. In such an atmosphere there is no room for a charge of hasty, ill-considered, and private final action such as the Court condemned in the case of *Cullum* v. *North Bergen Board of Education*, 15 *N. J.* 285 (1954). That there was division of opinion with respect to the Superintendent among members of the Board and in the community is obvious. The minutes of the September 6 meeting disclose that members of this audience spoke both in favor of and against Mr. Brown's re-employment, and petitions were delivered to the Board representing both points of view. In essence, then, there was no question but that the Board, in acting with respect to the Superintendent's position, did so with full knowledge of the diversity of opinion which existed and were completely informed by all those who held such opinions.

Furthermore, even if the action of the Board were in some way defective, any such invalidity was cured by its action at the regular meeting on October

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11, 1966. Despite petitioner's assertion that he voted for the resolution because of its last paragraph, the fact remains that he did approve it, and that it ratified and endorsed the earlier action.

C

The final issue raised, whether Mr. Brown was Superintendent of Schools in fact or law from August 29, 1966, to September 6, 1966, must be answered in the affirmative. The Superintendent's first contract expired on June 29, 1966. He continued to serve as Superintendent beyond that date under a contested second contract under a proper presumption that the action of the Board was valid until proved otherwise. During that period he performed his duties and was paid his regular salary therefor. On August 29, 1966, the contract under which he was serving was declared invalid by the Commissioner. In his decision, however, the Commissioner authorized the Board "to take whatever action it deems appropriate with respect to reappointment of the Superintendent." The Board met on September 6, one week later, and re-employed the Superintendent from June 29, 1966. That action, and its subsequent confirmation on October 11, have already been determined to be valid. The Commissioner holds, therefore, that by its action the Board established the Superintendent's services as having been continuous since the date of his initial employment.

The Commissioner finds and determines in accordance with the foregoing, that the action of the Pompton Lakes Board of Education re-employing William F. Brown as Superintendent of Schools from June 29, 1966, to June 30, 1967, was in all respects legal and proper.

The petition herein is therefore dismissed.

ACTING COMMISSIONER OF EDUCATION.

April 25, 1967.

XXXII

REFUSAL TO WORK CONSTITUTES GROUND FOR DISMISSAL OF JANITOR

IN THE MATTER OF THE TENURE HEARING OF ADAM ROGALINSKI, SCHOOL DISTRICT OF BORDENTOWN REGIONAL HIGH SCHOOL, BURLINGTON COUNTY

For the Complainant, Henry B. Kessler, Esq.

COMMISSIONER OF EDUCATION
DECISION

A charge that Adam Rogalinski, a janitor, refused to perform the duties of his employment was certified to the Commissioner by the Board of Education of the Bordentown Regional High School District. On receipt of the certification of the charge, and proof of service of a copy of the charge and certification upon the respondent, the Assistant Commissioner in charge of Controversies and Disputes directed respondent to file answer to the charge if he wished to enter a defense thereto.

No answer or formal communication having been received, a hearing on the charge was set down peremptorily on April 17, 1967, at the State Depart-

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ment of Education, Trenton, and respondent was so notified. The hearing was conducted by a hearing examiner appointed for the purpose. The report of the hearing examiner is as follows:

The record in this case shows that charges of insubordination were filed with the Bordentown Regional High School Board of Education by its Superintendent of Schools. The charges were considered by the Board at a meeting on February 13, 1967, and certified to the Commissioner. Proof of service of a copy of the charges and certification consists of a certified mail receipt signed by "Adam Rogalinski" on February 17, 1967. On February 23, 1967, and again on March 10, respondent was directed to file answer to the charges if he wished to make a defense. On March 15, respondent, by telephone, informed the Assistant Commissioner that he had never received a copy of the charges. On April 7, no further word having been received, a peremptory hearing date was set for April 17, and respondent was so notified. Respondent did not appear at the hearing or otherwise indicate a reason for non-appearance. The testimony in this case therefore consists of the testimony offered by the Superintendent of Schools, the High School principal, and chief custodian.

Respondent was absent from his employment through much of the last half of November and all of December, 1966, and the first half of January, 1967, for reasons of illness. He was paid for 10 days of sick leave as provided by law. *R. S.* 18:13–23.8 *et seq.* On January 30, 1967, when the chief custodian delivered pay checks, respondent complained that he had not been paid for the remainder of his absence, and refused to work until he had been paid. In a conference with the Superintendent on that day, he said that his absence had been caused by an on-the-job injury and that he should be paid by the Board for the entire period of absence. On his reiteration of his refusal to work, the Superintendent suspended him until the matter was considered by the Board of Education. It was testified that respondent had not reported any injury to the principal, the school nurse, or the chief custodian. It was also testified that respondent's claim for workmen's compensation had been denied because the alleged injury had occurred prior to his employment by the Board.

In the absence of any testimony to the contrary, the hearing examiner concludes that by his persistent refusal to perform the duties of his employment, respondent has been insubordinate as charged.

* * * * * * *

The Commissioner has reviewed the findings and conclusion of the hearing examiner and concurs therein. The Commissioner observes that if respondent felt he had a proper claim to additional sick pay, his deliberate refusal to work was not the proper means to prosecute his claim. His contumacy in this matter cannot be condoned, and his right to employment is forfeit.

The Commissioner finds the charge of insubordination to be true in fact and sufficient to warrant dismissal. He therefore directs the Board of Education of Bordentown Regional High School to dismiss Adam Rogalinski from his employment.

April 28, 1967.

ACTING COMMISSIONER OF EDUCATION.

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XXXIII

WHERE BUDGET CUT IS NOT ARBITRARY AND APPROPRIATION IS ADEQUATE, COMMISSIONER WILL NOT INTERVENE

BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS,
Petitioners,

v.

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MORRIS, MORRIS COUNTY,
Respondent.

For the Petitioner, Bertram Polow, Esq.

For the Respondent, Mills, Doyle and Muir (John M. Mills, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriation for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on April 13, 1967, at the State Department of Education, Trenton.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $3,073,006.68 for current expenses and $83,401.55 for capital outlay. The items were submitted again on February 28, 1967, at a second referendum pursuant to *R. S.* 18:7–81 and again failed of approval. The budget was then sent to the Committee pursuant to *R. S.* 18:7–82 for its determination of the amount of funds required to maintain a thorough and efficient local school program.

Thereafter, following conferences with the Board, the Committee adopted a resolution certifying the amount of the tax levy for current expenses at $2,922,701.68, a reduction of $150,305. No decrease was made in the capital outlay item which was certified in the original amount of $83,401.55. The Board contends that the Committee's acton was arbitrary and capricious and the amount certified is insufficient to provide an adequate system of education for the pupils of the school district. The Board appeals to the Commissioner to restore the funds deleted by the Committee.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

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"* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

"* * * The Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the Board of Education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

The Committee suggested ten items in which it believed economies could be effected, as follows:

	ITEM	REDUCTION
1.	Instruction—Salaries	$ 87,600
2.	Field Trips	7,800
3.	Preliminary Architect Fees	15,000
4.	Student Activities	2,000
5.	Maintenance	25,000
6.	Food Services	2,500
7.	Administration—Salaries	6,000
8.	Transportation	3,000
9.	Referendum Brochure	905
10.	Dedication of Woodland School	500
		$150,305

Petitioner appeals from the reduction in items 1 to 4 above only and does not contest the amounts eliminated in items 5 to 10.

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Item 1: The Board's budget for instructional salaries included the addition of 35 new positions of which five were non-teaching. This added personnel is needed, the Board says, to maintain its long-established objective of maintaining a pupil-teacher ratio not to exceed 25 to 1. It says that only four new positions were added for the current year because of lack of more classrooms. A new 22-room school will open in 1967-68 and petitioner says it needs this many new positions to fill these classrooms and maintain its pupil-teacher ratio, although it anticipates an increase of only about 280 pupils next year.

Committee defends its reduction in this account by pointing to the fact that the pupil-teacher ratio is currently only a fraction above 25 to 1 and that the addition of 280 more pupils will require no more than 12 additional teachers. Even so, it says it permitted a margin of six more teachers to a total of 18 in case of scheduling problems. Nor did it eliminate the five non-teaching positions. Committee argues that under these circumstances the reduction of 12 teaching positions from 30 to 18 is entirely justified.

At the hearing there was extended discussion and debate with respect to the proper method of computing the ratio of teachers to pupils. The Commissioner recognizes no necessity to deal with this question. Regardless of what method is used, the fact is indisputable that a favorable ratio now exists in petitioner's schools and the addition of 18 new teaching positions permitted under Committee's reduction will not adversely affect that ratio. Desirable as the 12 additional positions might be, petitioner did not sustain the burden of proving that their elimination would so impair the educational program that minimum educational standards will be impossible to maintain. The Commissioner finds that Committee's reduction of this item was not arbitrary or unreasonable.

Item 2: The Commissioner has already endorsed the value and desirability of field trips in a good school program. *Cf. Willett* v. *Colts Neck Board of Education*, decided December 2, 1966. Field trips are an important adjunct of the classroom learning experience and as such are one of the hallmarks of a better-than-average school program. But worthwhile as they are, it cannot be said that field trips constitute such an absolutely essential part of the school program that their curtailment in this case will result in an inadequate school program. Under the guidelines laid down by the Court, the Commissioner finds no basis on which he can hold that this item must be reinstated.

Item 3: Senior high school pupils in this district now attend Morristown High School under a ten-year contract, pursuant to *R. S.* 18:14–7.3, which calls for withdrawal of one class a year beginning in September, 1972. The Board seeks to employ an architect to prepare plans for a high school in the district. The Committee's elimination of this item is based on its belief that such action is premature. It maintains that the Board should first determine the necessity of withdrawal from Morristown High School, the possibility of renewing the present contract, and the aspirations of the community with respect to maintaining its own secondary school.

Although the Board emphasizes the need to make timely preparations for a possible severance of the existing relationship with Morristown, it has not established the need to employ architectural services at this posture to the

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extent indicated by its budget request. In any event, however desirable the Board may view the employment of an architect at this time, it has not demonstrated that an adequate program of education cannot be mintained in the district next year if this amount is deleted from its appropriations. The Commissioner finds no basis, therefore, to interfere with the Committee's determination.

Item 4: The Board budgeted $1,323 for the support of various pupil activities for the current year. Next year it seeks to expand this program, principally by the inauguration of a student newspaper project, and increased the budget request to $3,428 therefor. The Committee reduced the amount by $2,000 to $1,428.

As in the other items considered, the Commissioner has no difficulty in finding that the publication of a student newspaper could be an effective educational experience which would provide worthwhile enrichment to the classroom program. He cannot find, however, that it meets the criterion of such an important aspect of the school program that its elimination would prevent the maintenance of a proper educational program. There is, therefore, no ground for the Commissioner's intervention with respect to this item, and the Committee's reduction will stand.

Both Board and Committee appear to have approached this matter with certain misconceptions of the function of the Commissioner in an appeal of this kind. In this petition the Board asks the Commissioner to override the determination of Committee with respect to four items. It argues that the programs these items would make possible are extremely desirable if the policies and standards of the school system are to be maintained. The Board fails to realize, however, that the criterion which the Commissioner must apply is not educational desirability but necessity. The Board has fallen far short of any showing that the amounts fixed by the Committee will be "insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards" for the Morris Township school system. See *Board of Education of East Brunswick* v. *Township Council of East Brunswick, supra,* 107. Absent such a showing, the Commissioner has no choice but to sustain the Committee's determination, much as he, like the Board, might value the contemplated programs and projects and desire to see them realized.

On the other hand, the Committee came to this hearing prepared to present evidence of other items in the budget which, in its opinion, could be curtailed, with the expectation that the Commissioner would then make further reductions beyond those already made by the Committee. The Commissioner finds no authority in the school law for so doing.

Although boards of education from time to time have protested the reductions made by local governing bodies in voter-rejected school budgets, it was generally assumed, prior to this year, that such action was a finality. Then in the *East Brunswick* case, *supra,* the Supreme Court determined that the Commissioner of Education has the power to review the action of the governing body on an appeal to him. It must be emphasized, however, that the Commissioner's power in such instances is not without bounds nor did the Court, in the Commissioner's opinion, intend it to be. The scope of the

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Commissioner's review is clearly defined by the Court. It permits him to go beyond a mere finding of arbitrariness to a determination of whether the maintenance of State-mandated programs or minimum educational standards cannot be realized under the appropriations fixed by the governing body. But the Court pointed out that the Commissioner's authority stops short of a substitution of his judgment for that of the governing body. Unless the Commissioner can find that the budget as set by the governing body falls short of what is required to maintain minimum educational standards in the district, he is powerless to intervene even though the appropriation is significantly below the budget proposed by the Board or the amount the Commissioner would fix if he were permitted to exercise his independent judgment.

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

In the light of these principles the Commissioner finds no grounds on which he can reinstate the amounts by which the Committee has reduced the school budget. Neither can he find any authority or reason for further curtailment of the appropriations as recommended by the Committee. The appropriations for school purposes to be raised by local tax levy for the 1967-68 school year will stand as certified to the Morris County Board of Taxation.

The appeal is dismissed.

ACTING COMMISSIONER OF EDUCATION.

May 2, 1967.

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XXXIV

FUNDS TO IMPLEMENT BINDING SALARY SCHEDULE MAY NOT BE CUT FROM SCHOOL BUDGET

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK,
Petitioner,

v.

MAYOR AND COUNCIL OF THE BOROUGH OF CLIFFSIDE PARK AND THE BERGEN COUNTY BOARD OF TAXATION, BERGEN COUNTY,
Respondents.

For the Petitioner, Bauer, Bogosian & Whyte (Eznick Bogosian, Esq., of Counsel)

For the Respondents, Paul Basile, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was twice rejected by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on April 10, 1967, at the State Department of Education, Trenton. The Bergen County Board of Taxation, as a nominal party respondent only, did not appear and was not represented at the hearing.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $1,386,858 for current expenses, $75,392 for capital outlay, and $1,200 for Evening School for Foreign Born. The voters also rejected the same items in the lower amounts of $1,380,958, $25,492, and $1,200 respectively at a second referendum held pursuant to *R. S.* 18:7–81. After receipt of the budget from the Board, the Council met on March 11, 1967, and determined by resolution to set the amount to be raised for current expense at $1,270,908, a reduction of $110,050. The capital outlay and Evening School for Foreign Born items were eliminated entirely. The pertinent amounts may be shown clearly as follows:

	Bd.'s First Proposal	*Bd.'s Second Proposal*	*Council Certified*	*Reduction*
Current Expenses	$1,386,858	$1,380,958	$1,270,908	$110,050
Capital Outlay	75,392	25,492	0	25,492
Evening School	1,200	1,200	0	1,200

Council thereupon certified the amount of $1,270,908 to the Bergen County Board of Taxation as the tax levy for school purposes in the Borough of

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Cliffside Park for the 1967-68 school year. The Board contends that the action of the Council was arbitrary and capricious and that the amount certified is insufficient to provide an adequate system of education for the pupils of the school district. It appeals to the Commissioner to restore the funds deleted by the Council.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

> "* * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

As part of its action Council made the following suggestions for economies and reductions in the school budget:

Item	*Reduction*
1. Eliminate seven new positions	
a. social worker	$8,500
b. learning disabilities specialist	7,700
c. teacher of emotionally disturbed	7,000
d. teacher of physical education	6,000

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Item		*Reduction*
e. guidance counselors (2)	16,000	
f. clerk	3,750	
		$48,950
2. Eliminate hospital insurance		17,000
3. Eliminate two teachers		11,000
4. Eliminate two janitors		8,100
5. Increase tuition revenue anticipated		25,000
Total Reductions		$110,050

The Commissioner will review these recommendations for reductions in the light of the principles enunciated by the Court recited *supra.* In so doing it should be remembered that he is not exercising his own independent judgment with respect to the desirability of the item. If permitted, he would be inclined to restore all of the amounts deleted in recognition of their value and the Board's desire to furnish a better educational program for the community. The Commissioner is constrained in this case, however, to a determination of whether Council's reductions are so drastic that a minimum school program cannot be maintained.

Item 1 a, b, and c: The Board seeks to add a school social worker, a learning disabilities specialist, and a teacher for a class for emotionally disturbed children. These new positions, it avers, are made necessary by the enactment of legislation which requires special services for the education of handicapped pupils. Council's position is that these new positions can be deferred for at least another year.

The Commissioner has carefully reviewed the testimony with respect to the present staff, the number of children classified as needing special service, the services now provided, and has taken notice of relevant data in the Office of Special Education Services. He concludes that while the addition of the three staff members proposed would be eminently desirable and would permit the school to provide much more adequately for its handicapped children, the immediate need for all three cannot be held to be absolutely essential. He does find, however, that the present staff cannot provide a thorough and efficient program for the number of children needing special help. He directs, therefore, that Council's reduction be amended to permit the filling of one of the three proposed positions and that $8,000 be reinstated for this purpose.

Item 1 d: At present there is one male teacher of physical education assigned to the elementary grades. He is assigned one period per week to grades 3 to 6. The regular classroom teacher carries on the health and physical education instruction on other days. The Board seeks to add a female teacher to instruct the girls and to provide more specialized physical education. Council believes this position to be unnecessary at this time.

The Commissioner can find no fault with the Board's purposes and believes that the addition of this staff member would add worthwhile dimensions to the curriculum. He cannot, however, find that this additional teacher is essential to the maintenance of an adequate program of education in the district.

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Item 1 e: Cliffside Park is the receiving high school for grades 10 to 12 from the Palisades Park and Fairview school districts. Beginning September 1967, Palisades Park will withdraw its tenth grade pupils and Cliffside Park's enrollment will be reduced thereby. The Board plans to change the system from its present three-year high school to a four-year high school comprised of grades 9 to 12. There are at present four guidance counselors assigned to grades 10 to 12, and two in grades 7 to 9. The Superintendent testified he would like to move one guidance person to be assistant to the high school principal and add two more guidance counselors because of the change from a three-year to four-year high school. The two counselors now assigned to the junior high school would remain in grades 7 and 8.

The Commissioner agrees that increased counseling services would be desirable, but on the facts presented these two positions cannot be classed as essential. There are currently 1,700 pupils in grades 7 through 12. The Superintendent's estimate for next year is 1,638. Absent other factors the addition of two counselors for 62 fewer pupils cannot be successfully justified. The Commissioner finds that the Board has not shown the necessity for these positions and Council's reduction of this amount must be sustained.

Item 1 f: The Board contemplated the addition of one clerk to discharge added clerical services created by the addition of the three positions discussed under Item a, b, and c *ante*. With the elimination of two of these positions, the addition of this item cannot be found to be essential. It will remain, therefore, as deleted by Council.

Item 2: The testimony discloses that on January 12, 1967, the Board entered into a new two-year salary schedule agreement with its professional staff pursuant to *R. S.* 18:13–5.1 to become effective September 1, 1967. One section of this agreement (Exhibit P-1) reads as follows:

> "XIII. *Special Benefits to All Employees*
>
> All employees of the Cliffside Park Board of Education shall receive, without cost to themselves, the coverage of Blue Cross, Blue Shield, and Major Medical Insurance Plan. * * *"

Council suggests that this benefit is unnecessary and the amount excessive, and recommends its elimination.

The Commissioner finds that this suggested reduction cannot be made. Under the provisions of *R. S.* 18:13–5.1 a salary schedule adopted by a board of education is fixed and binding for a period of two years. The language of the statute permits no reduction in this item:

> "* * * Every school budget thereafter adopted, certified or approved by the board of education, the voters of the school district, the board of school estimate, the governing body of the municipality or municipalities, or the Commissioner of Education, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year."

The Commissioner holds, therefore, that the amount of this item must be reinstated in the school budget.

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Item 3: Council suggests that the teaching staff can be reduced by two positions by reason of the reduction in enrollment anticipated for next year. This possibility was discussed at the first meeting between Board and Council and was apparently suggested by a member of the Board. The Board maintains, however, that it must retain these teachers, despite reduced enrollment, because of contingencies that may occur.

The Commissioner concurs that two additional teaching positions could be useful. He cannot find, however, that the Board has carried the burden of proving that these two positions are essential to the maintenance of its educational program. The pupil-teacher ratio is currently favorable and it should not be out of balance next year even with two fewer teachers. Council's reduction of $11,000 for this purpose must, therefore, be sustained.

Item 4: In its budget the Board provided for the employment of a matron and an additional janitor. The matron would be assigned to supervise the girls' locker rooms, lavatories, etc. The janitor would be an extra who would relieve others and reduce the overtime now being paid. Council suggests that these positions are not now necessary.

The Commissioner finds no basis on which he can act to restore this item. No additional facilities will be opened in the next school year and no sufficient necessity has been established which would permit the Commissioner to override Council's determination on this item.

Item 5: Council claims that the Board has under-estimated its revenue from tuition pupils next year and that $25,000 can be added to its anticipated receipts.

It is not possible, of course, to determine at budget time the exact number of pupils who will be sent or received. Sending districts customarily and properly make reasonable over-estimates of the number of pupils for whom it will have to pay tuition elsewhere in order to be on the safe side, in case of an unanticipated influx of children. It is similarly usual practice for receiving districts to under-estimate the number of tuition pupils it will receive and accordingly the revenue from this source. Past experience, drop-out data and appropriate studies are generally employed to keep these estimates within reasonable limits.

In this case, the testimony shows that the Superintendent estimated the number of high school tuition pupils to be received at 529. The Board used a figure of 500 on which to base its estimates of revenue receivable. The sending districts' estimates, however. are 308 from Fairview and 250 from Palisades Park, a total of 558. The tuition cost for 1967-68 is estimated at $675 per pupil. It appears, therefore, that there is a difference of more than $39,000 of potential revenue between the high and low estimates. In the Commissioner's judgment this is unnecessarily large and indicates a more than necessary under-estimation on the part of the Board.

The Commissioner finds that Council's determination of the probability of at least $25,000 more to be expected in tuition revenue is sound and the reduction of this amount from the school budget will, therefore, not be disturbed.

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No testimony or protest was offered by the Board with respect to the elimination of the Capital Outlay or Evening School for Foreign Born accounts. They will, therefore, remain eliminated as determined by Council.

In summary, the Commissioner finds that the Board has not sustained its burden of a clear showing that the elimination of the amounts recommended by Council, with the exception of one of three positions in Item 1 a, b, and c, and Item 2, will not be sufficient to enable compliance with mandatory legislative and administrative requirements or to meet minimum educational standards for a thorough and efficient school system in the Borough of Cliffside Park. Absent such a showing the Commissioner is without authority to intervene and must sustain the budget determined by Council. The Commissioner finds and determines therefore (1) that there is need for one position in the area of special services for handicapped children in order to carry out the State mandated program for such pupils and that $8,000 is to be reinstated in the school budget for this purpose; and (2) that the salary schedule adopted by the Board is a binding agreement, the amounts for which cannot be eliminated from the budget, and that, therefore, $17,000 for this purpose is to be reinstated in the school budget. The Commissioner directs that there be added to the certification previously made by the Council to the Bergen County Board of Taxation the sum of $25,000 so that the total amount of the local tax levy for current expense for the Cliffside Park School district for the 1967-68 school year shall be $1,295,908.

ACTING COMMISSIONER OF EDUCATION.

May 2, 1967.

Affirmed by the State Board of Education without written opinion, January 3, 1968.

XXXV

WHERE BUDGET CUT IS NOT ARBITRARY AND APPROPRIATION IS ADEQUATE, COMMISSIONER WILL NOT INTERVENE

BOARD OF EDUCATION OF THE TOWNSHIP OF GALLOWAY,
Petitioner,

v.

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF GALLOWAY, ATLANTIC COUNTY,
Respondent.

For the Petitioner, Walter S. Jeffries, Esq.

For the Respondent Township, *Pro Se.*

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *R. S.* 18:7–82, certifying to the

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County Board of Taxation a lesser amount of appropriation for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on April 19, 1967, at the State Department of Education, Trenton.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $353,372 for current expenses for the ensuing year. The budget was submitted again on February 28, 1967, at a second referendum pursuant to *R. S.* 18:7–81 in the reduced amount of $298,372 and again failed of approval. The budget was then sent to the Committee pursuant to *R. S.* 18:7–82 for its determination of the amount of funds required to maintain a thorough and efficient local school program.

On March 7, 1967, the Board met in consultation with the Committee to discuss the school budget. The Committee met thereafter and adopted a resolution certifying the amount of the tax levy for current expenses at $273,372, a reduction of $25,000. The Board contends that the Committee's action was arbitrary and capricious and the amount certified is insufficient to provide an adequate system of education for the pupils of the school district. The Board appeals to the Commissioner to restore the funds deleted by the Committee.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

> "* * * The Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum

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> educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education has fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

Testimony given at the hearing was conflicting and disclosed a lack of unanimity on the Board. Three distinct positions were expressed with regard to reinstatement of the $25,000 eliminated by the Committee: (1) to provide full-time non-teaching principals in each of the five schools; (2) to employ a physical education teacher and additional teachers who may possibly be needed because of increased enrollment; and (3) to recoup some of the surplus which has been depleted by appropriations in the last two budgets. The spokesman for the Committee testified that it was informed that the $25,000 was for full-time principals which the Committee felt was an unnecessary expenditure at this time.

In any event, the Commissioner finds that the Board has not demonstrated clearly that under the reduced budget it will be impossible to maintain standards of education required for a thorough and efficient school program in the district. Absent such a showing the Commissioner is without power to intervene and override the Committee's determination. The Commissioner is well aware that the Galloway school system maintains barely more than a minimum program now. Much needs to be done in order to offer its children the kinds of educational opportunities needed in these times. The Commissioner commends the Board of Education for its efforts to raise the sights of the community and hopes that funds will be forthcoming for a better than minimum program. Much as he would like not only to restore the funds deleted by the Committee, but to see additional sums raised beyond the amount proposed in the budget, the Commissioner cannot do either for the reason that no sufficient ground has been established herein for the first action and he has no authority to accomplish the second. The determination of the local tax levy for current expenses of the school district for the 1967-68 year in the amount of $273,372 will stand, therefore, as certified by the Committee to the Atlantic County Board of Taxation.

The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

May 2, 1967.

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XXXVI

BOARD MAY REASSIGN PUPILS TO ELIMINATE DOUBLE SESSIONS

WILLIAM A. WASSMER, MARIE WASSMER, JOSEPH R. PERRELLA, ANGELA M. PERRELLA, JOHN R. NEWKIRK, JR., PATRICIA NEWKIRK, WILLIAM E. NELSON, JOSEPHINE F. NELSON, PETER S. HILL, DOROTHY JEAN HILL, THOMAS J. FARRELL, PATRICIA FARRELL,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WHARTON, MORRIS COUNTY,

Respondent.

For the Petitioners, Scerbo, Glickman and Koblin (Herbert S. Glickman, Esq., of Counsel)

For the Respondent, George Korpita, Jr., Esq., Aaron Dines, Esq. (Associate Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioners, a group of parents, protest the adoption by the respondent Board of Education of a resolution reorganizing certain classes in the schools of the district. They contend that irreparable harm will result to the pupils of the district if the Board is permitted to put its reorganization plan into effect. Petitioners request that the Commissioner restrain the Board from proceeding pending a full hearing on the merits of the controversy.

Because of the urgency of this matter, an immediate hearing was conducted before the Assistant Commissioner in charge of Controversies and Disputes at the office of the Morris County Superintendent of Schools on March 28, 1967. By agreement of counsel the testimony was limited to the factual issues and argument on the question of a stay of the Board's contemplated action.

The Wharton school district is organized under the provisions of Chapter 7 of Title 18 with an elected board of education of seven members. The normal school day which most pupils attend is from 8:35 a.m. to 2:30 p.m. The third and fourth grades, however, have been on "split" or "double sessions" during all of this school year. Thus, half of these classes attend from 8 a.m. until 12 noon, and the remainder from 12:30 to 4:30 p.m.

It appears that shortly after taking office in February, the Board considered the elimination of the double sessions in both grades. The County Superintendent was consulted with respect to the use of certain rooms as emergency

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classrooms for this purpose, and a written specification of the minimum conditions upon which approval of the facilities could be given was received from him. The matter was also discussed with members of the administrative staff and before the public at Board meetings.

On March 15, 1967, the Board adopted the following resolution by a vote of 4 to 2:

> "That the Board of Education authorize the Board Policy Chairman to direct the School Administrators to implement the outlined plans for the immediate elimination of split sessions in the fourth grade."

Under the Board's proposed plan the four classes of fourth grade pupils housed in the Duffy School, two in the morning session and two in the afternoon, would be regrouped into three classes. One classroom in the Curtis School would be freed by rescheduling the sixth, seventh, and eighth grades in that building. Reassignment of one fifth grade group, now housed in the Duffy School, to the vacated room in the Curtis School would release the classroom needed for the newly organized third section of the fourth grade. The plan thus requires alteration in room assignments for sixth, seventh, and eighth grades, a change of school for one fifth grade, and a regrouping of four fourth grade classes into three. Approximately 22 fourth grade pupils would be involved in the reassignment. Instead of four classes of 21 or 22 pupils, there would be three groups of 28 or 29.

Petitioners contend and respondent admits that the Superintendent, principal, and most of the teachers are opposed to implementation of the plan. The County Superintendent likewise has recommended "that the Board of Education give serious reconsideration to its proposal to eliminate the split sessions at this time of year." Although petitioners do not defend split sessions as desirable, they contend that it is unwise to make the alleged drastic changes required with so little time remaining in the school year. They argue that any gains made by the elimination of double sessions will be more than offset by the damage to the pupils' continuity of learning and sense of security. Petitioners urge that respondent's persistence in seeking to implement the plan, which the professional staff opposes as educationally unsound, will result in irreparable harm to the pupils and constitutes a shocking abuse of discretion. Petitioner asks, therefore, that the Commissioner intervene and immediately restrain the Board from carrying out its resolution, and that subsequently, after a further hearing, the Commissioner order the resolution rescinded.

Respondent contends that the decision to eliminate double sessions is one which it has the power to make, and denies that it acted arbitrarily in reaching the conclusion that it did. It maintains that it considered all aspects of the problem, including the disapproval of its staff, before it acted, and that even if there is disagreement with respect to its proposal, the ultimate responsibility and authority to decide belong to the Board alone.

Local boards of education are vested with broad powers in the making of decisions affecting the day-to-day operation of the schools under their jurisdiction. They have the authority to adopt rules and policies for the government

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and management of the schools, provided such regulations are not inconsistent with the school laws or rules of the State Board. *R. S.* 18:7–56 In the exercise of this authority boards of education are constrained to act reasonably and in ways which are not arbitrary or capricious. *Angell et al.* v. *Board of Education of Newark*, 1959-60 *S. L. D.* 141, 143, dismissed by State Board of Education, October 17, 1964

The Commissioner of Education has supervision over all of the public schools of the State and he is required to make certain that the terms and policies of the school laws are effectuated. *Laba* v. *Newark Board of Education*, 23 *N. J.* 364 (1957); *R. S.* 18:3–7 He is also vested with quasi-judicial powers to hear and decide controversies and disputes which arise under the school laws. *R. S.* 18:3–14 However, such powers are not without bounds, for:

> "* * * The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal." *Kenney* v. *Board of Education of Montclair*, 1938 *S. L. D.* 647, affirmed State Board of Education, 649, 653

Further:

> "* * * it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions." *Boult and Harris* v. *Board of Education of Passaic*, 1939-49 *S. L. D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N. J. L.* 329 (*Sup. Ct.* 1947), 136 *N. J. L.* 521 (*E. & A.* 1947)

In this case the Commissioner finds no ground for interfering with the resolution adopted by respondent. The evidence does not support a charge of arbitrary conduct. Although the Board adopted the contested resolution soon after it took office, it is apparent that the matter had previously been considered and discussed by members of the Board and, in the case of some, before they were elected. The fact that the Board's decision to eliminate double sessions immediately ran counter to the wishes and opinions of the professional staff and of some of the parents does not establish its action as arbitrary. While the Commissioner would expect that all boards of education look to their professional employees for recommendations and guidance in matters in which educational judgments are to be made, the board is not compelled to accept the suggestions or advice it receives, for it has the authority to make the ultimate determination.

Nor is the charge of unreasonable action supported by the testimony. Unreasonableness connotes an absence of substantial or rational relationship

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to a valid educational purpose. *Angell et al.* v. *Board of Education of Newark, supra* The testimonial purpose of respondent's action herein is to eliminate an administrative expedient made necessary by reason of a dearth of facilities, and to restore to children who had been deprived thereof the benefits of a normal school day. Such an objective, standing alone, is not only reasonable but laudable. While unusual conditions may require the use of short sessions from time to time, the Commissioner has always deplored the inevitable loss which children suffer as a result of such curtailment of the school program. See *Bradley Beach Board of Education* v. *Asbury Park Board of Education,* 1959-60 *S. L. D.* 159.

It is clear that petitioners do not advocate or justify the indefinite continuation of double sessions. Their concern is directed toward the timing of respondent's action. With a relatively short time remaining in this school term, petitioners believe it is unwise to make the changes the Board's plan would necessitate. Certainly the County Superintendent's advice is based not on an endorsement of short sessions but on his belief that the proposed changes might better wait until the beginning of a new school year. This is also the rationale of the professional staff and the parents who bring this action. But this is plainly a matter of judgment which the Board has the ultimate power to make. Such a decision may raise a question of wisdom, but not of legality. And as has already been pointed out, the Board is answerable only to its constituency and not to the Commissioner for the wisdom of its action. *Cf. Boult and Harris* v. *Passaic, supra.*

The hearing herein was limited to the facts of the dispute for the purpose of petitioners' request for a stay of the Board's proposal to eliminate double sessions. Petitioners express a desire to go beyond this hearing in order to present opinion testimony on the merits of the plan. The Commissioner finds no necessity for such further hearing. As has been stated, absent a clear showing that the Board of Education has acted unreasonably and beyond the scope of its discretionary authority, in bad faith, in violation of the law, or in any other illegal manner, the Commissioner is without authority to intervene. No such unreasonable improper conduct has been shown. No amount of interference or exercise of discretion on the part of the Commissioner is called for in a case such as this, since it is purely a matter of the exercise of the discretionary authority vested in the Board of Education by the Legislature. See *Rocco* v. *Fanwood,* 59 *N. J. Super* 306 (*App. Div.* 1960). Any intervention by the Commissioner would constitute an attempt to substitute his independent judgment for that of the elected representatives of the community. This he has always declined to do except in those instances in which children would be exposed to irreparable educational detriment. There is no clear showing of such harm in this case and the circumstances do not warrant the Commissioner's intervention. Therefore, the Commissioner can find no reason to continue this matter for the purpose of receiving testimony to show that the Board acted erroneously.

For the reasons stated the Commissioner finds and determines (1) that the reorganization of classes within its schools for the purpose of eliminating double sessions is a matter which lies solely within the Board's discretionary authority; (2) that petitioners have not shown that the decision embodied in its resolution to effectuate such a reorganization was arbitrary, unreasonable,

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or educationally unsound; and (3) that no irreparable harm to the pupils resulting from the implementation of respondent's plan has been demonstrated.

Having upheld the right of the Board of Education to make its independent determination with respect to the elimination of double sessions, the Commissioner joins with the County Superintendent in urging the Board to consider further the necessity for instituting such a proposal at this period of the school year. While the Commissioner has concluded that the pupils will not suffer irreparable harm, he does suggest that the objectives sought by the Board may be offset by such factors as the limited length of time in which to make adjustments and establish routines and the alienation and loss of support of the staff and a segment of the community which has developed around this controversy. It may well be, now that the Board's authority has been sustained, that voluntary postponement, until a more complete and satisfactory program eliminating all double sessions can be put into effect, will do much to dissipate the unfortunate effects engendered by the disagreement herein.

The request for stay is denied and the petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

May 4, 1967.

XXXVII

BUDGET ITEMS REQUIRED BY LAW MAY NOT BE REDUCED BY MUNICIPAL GOVERNING BODY

BOARD OF EDUCATION OF THE TOWNSHIP OF FRELINGHUYSEN,
Petitioner,

v.

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF FRELINGHUYSEN, WARREN COUNTY,
Respondent.

For the Petitioner, Morris, Downing & Sherred (John R. Knox, Esq., of Counsel)

For the Respondent Township, Archie Roth, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriation for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of

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the Divisions of Controversies and Disputes and of Business and Finance on April 24, 1967, at the State Department of Education, Trenton.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $168,653 for current expenses and $1,385 for capital outlay. The items were submitted again in the same amounts on February 28, 1967, at a second referendum pursuant to *R. S.* 18:7–81 and again failed of approval. The budget was then sent to the Committee pursuant to *R. S.* 18:7–82 for its determination of the amount of funds required to maintain a thorough and efficient local school program.

On March 7, 1967, the Board met in consultation with the Committee to discuss the school budget. The Committee met thereafter on March 10 and adopted a resolution certifying the amount of the tax levy for current expenses at $147,673, a reduction of $20,980, and for capital outlay at $535, a reduction of $850.

The Board contends that the Committee's action was arbitrary and capricious and the amount certified is insufficient to provide an adequate system of education for the pupils of the school district. The Board appeals to the Commissioner to restore the funds deleted by the Committee.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

> "* * * The Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that

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the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

The Committee has indicated that its reduction is made up of the following suggested economies:

Item	*Board's Budget*	*Suggested Reduction*	*Remaining Amount*
a. full-time principal	$9,500	$5,500	$4,000
b. substitute teachers	2,000	1,000	1,000
c. improvement reimbursement	250	250	0
d. board expenses	600	300	300
e. regional district study	1,000	900	100
f. library	400	200	200
g. travel expenses	100	50	50
h. transportation	7,350	3,600	3,750
i. water	1,700	700	1,000
j. equipment replacement	1,000	500	500
k. maintenance	1,000	500	500
l. tuition	71,840	6,080	65,760
m. unspecified	------	1,400	------
Total Current Expense Reduction		$20,980	
n. equipment	850	850	0
Total Capital Reduction		$850	
Total Reduction		$21,830	

Item a: The staff comprises 13 teachers, 10 of whom teach full time. The principal is assigned to teach the fifth grade for half a day and is relieved by a part-time teacher the remainder of the session. The Board seeks to relieve the principalship of teaching duties in order that more time may be devoted to administrative and supervisory functions. The Committee sees no necessity for this expenditure.

Employment of a full-time principal who could devote more time to administrative duties and whose classroom teaching would not suffer from the constant interruptions which beset teaching principals would be a desirable improvement, in the Commissioner's judgment. It is not, however, an essential measure which has to be taken at this time in order to maintain an adequate educational program. The Commissioner finds no ground, therefore, on which he can reinstate the amount for this item deleted by the Committee.

Item b: In 1964-65 the Board paid $1,550 for substitute teachers, $972 in 1965-66, and $830 to March 1 of this school year. In the light of this experience the Committee contends that $1,000 is sufficient for this account. The Board justifies the need for $2,000 by pointing out that it must raise the per diem rate for substitutes next year from $22 to $25 in order to remain competitive and that it needs leeway in this account because of inability to make precise estimates of need.

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The Commissioner will not interfere with the Committee's reduction of this item as it appears that $1,000 may suffice.

Item c: It has been the Board's policy for the past seven years to reimburse teachers who enroll in college courses for purposes of professional growth, at the rate of $10 per credit to a limit of six credits. The Committee contends that this is not a mandatory expense and for that reason it can be eliminated.

The testimony reveals that the Board adopted a salary schedule on December 19, 1966, and that this benefit was included and made a part of the salary agreement. Amounts necessary for the implementation of such a schedule are mandatory (*R. S.* 18:13–5.1) and this item, therefore, cannot be eliminated. The Commissioner directs that the amount of $250 budgeted to reimburse teachers for professional improvement courses is to be restored.

Item d: Expenditures for attendance at county and state workshops for board members and for dues to the State Federation of District Boards of Education have been as follows:

1964-65	$1,125
1965-66	867
1966-67	825

The Committee feels that $300 is adequate for this purpose.

The Commissioner cannot agree. Membership in the State Federation of District Boards of Education is automatic and mandatory (*R. S.* 18:9–1) and the expenses of delegates to its meetings are a legitimate and necessary school district cost (*R. S.* 18:9–6). The same is true for county workshops and similar meetings. The Commissioner holds that the right to attend such meetings and to be reimbursed for reasonable expenses incurred thereby is inherent in the election to the office of board members. The amount deleted from this account by the Committee must be restored.

Item e: The testimony discloses that the subject school district has entered into an agreement with certain of its neighbors to study the advisability of forming a regional school district. (*R. S.* 18:8–1) Certain commitments have been made by each of the Boards participating in the study for the sharing of expenses necessary thereto. It further appears that the subject Board's share may amount to $1,000 and that if it is unable or unwilling to assume such cost it will not be included in the study.

Under such circumstances the Commissioner holds that this item cannot be reduced. The study in which the Board is engaged involves to a high degree the maintenance of a thorough and efficient school system, and is a study specifically authorized by law. The Commissioner finds that having embarked on such an investigation and having committed the school district to an expenditure of funds for such purpose, the amounts so agreed upon cannot be eliminated from the budget. The $900 reduction made by the Committee must, therefore, be reinstated.

Item f: The Committee indicates that it based its reduction from $400 to $200 for library books on information that prior years' expenditures for this purpose did not exceed $200. The testimony shows that the Board has been expending $400 per year.

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Even $400 per year for library books for a school enrolling 241 pupils is far too little, in the Commissioner's judgment, for the maintenance of an adequate school program. This amounts to less than $1.70 per pupil and is to be contrasted with the generally accepted standard recommended for New Jersey public schools of $4.00 per pupil. It is obvious, therefore, that the Board's request is minimal and must be sustained in order to insure an adequate school program in the district. The Commissioner directs that the $200 reduced by the Committee for this item be reinstated in the budget.

Item g: This item covers travel expenses of teachers for attendance at county institutes and workshops. The Board's financial reports show that it has spent more than $100 for this purpose in the last two years. The testimony also reveals that reimbursement of such expenses is included in the salary schedule adopted by the Board and is, therefore, a mandatory expense which cannot be reduced. *Cf. item c supra.* The Commissioner directs, therefore, that the $50 deleted by the Committee is to be restored.

Item h: Currently, certain pupils are dismissed 15 minutes early each day in order to meet buses which transport pupils to and from the receiving high school in another district. The Board proposes an additional bus route to eliminate the shuttle scheduling and the school time lost thereby. The Committee avers that this is one item of expense which the Board indicated could be eliminated at the time of their consultation. This allegation was contested by the Board members present at the hearing.

Deprivation of normal school time for some pupils and the disruptive effect on all classes that is a consequence of such scheduling, cannot be justified by failure to provide adequate transportation services, particularly when only 25% of the cost of such services is borne by the local school district. The Commissioner finds, therefore, that an adequate educational program cannot be maintained for the children of the district under the present system of inadequate transportation services and consequent disruption of the school day. He directs the reinstatement of the $3,600 eliminated by the Committee.

Item i: The Board is forced to purchase bottled water and drinking cups for the pupils because of contamination of the school's well. From the testimony it appears that the Board accepted the reduction in this item at the time it consulted with the Committee, and will purchase less expensive cups. The Board having failed to show that this reduction will impair the school program to an impermissible degree, the amount will stand as reduced by the Committee.

Item j: The Board testified that it proposed to replace one classroom of pupil desks and chairs at a cost of $700 and one chalkboard, now unusable, for $200. The remaining $100 of the $1,000 budgeted is unallocated. The Board avers that it is currently using 21 desks which were discarded by another school system, 21 folding chairs as pupil seats, and 15 desks which have large holes in their tops. These allegations were not refuted by the Committee.

The Commissioner directs that this reduction be restored. A minimum program of education encompasses the use of a suitable chair and desk with a proper surface for writing. Replacement of worn out and obsolete equipment is a necessary and justifiable public school expense, and the testimony indicates that some such gradual replacement as the Board proposes should no longer

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be delayed. The Commissioner directs the reinstatement of the $500 deleted by the Committee for this item.

Item k: In its testimony the Board stated that it spent $1,200 last year and more than $600 so far this year on maintenance expenses. This amount is made necessary by the contamination of its well which causes damage to the school plumbing system, requiring an unusual amount of repairs.

In the Commissioner's judgment $1,000 for maintenance of a school plant valued at $220,000 when considered with the unusual water problem herein, is a minimum anticipated expense. Such an amount appears necessary to continue proper operation of the school plant and is, therefore, required for the operation of a thorough and efficient school system. The Commissioner directs that this item be reinstated in the original amount budgeted.

Item l: In its Answer, the Committee says that its reduction of $6,080 for tuition to other districts comprises $2,880 representing four fewer high school pupils than budgeted by the Board, plus $3,200 which is one-half of the amount asked by the Board for a special class.

The testimony shows that this item cannot be reduced. The 87 pupils at $720 per pupil sent to Blairstown High School on which the Board based its budget are not an estimated number but are already known. The Board has also classified 8 pupils as needing a special program at $800 each and believes that that number may be enlarged to 13. In addition it is already paying $2,800 in tuition to the Oxford school district for children with special needs. In the Commissioner's opinion, this account is already cut too fine, based as it is on pupils already accounted for and with no provision for any increase either in high school pupils or children with special needs. The Commissioner finds that the Committee's reduction in this account will not permit the Board to provide the education to which its high school students and handicapped children are entitled and the full amount will, therefore, be restored.

Item m: In addition to the above, the Committee eliminated an additional $1,400 for which it gave no reason or specific recommendation. Under such circumstance the Commissioner must consider this unaccounted for reduction to be an arbitrary action on the part of the Committee made without proper consideration of the needs of the school district. *Cf. Board of Education of National Park* v. *Borough Council of National Park*, decided by the Commissioner on April 10, 1967. The Commissioner will, therefore, direct that this reduction be restored.

Item n: Both parties agree to the elimination of $850 for the purpose of repairing school roadway and parking areas, on the representation of the Committee that it will undertake this improvement with its own equipment and work force.

The Committee contends that an additional $5,000 should be eliminated for the reason that the Board has certified such an amount in its Debt Service account to repay funds owed to the Committee which it has not paid but has used for other purposes. It appears that the Committee loaned a prior Board $20,000 interest free on an agreement to repay $5,000 a year. Although such an amount was certified in the current year's budget, the Board has as yet made no payment to the Committee on this loan.

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The Commissioner holds that the matter of the loan and its repayment is not within the bounds of this appeal. He suggests that the two bodies attempt a solution of this problem through their respective counsel.

Finally, the Commissioner would point out that this school district now provides no more than a minimum educational program. The expenditures proposed by the Board are also minimum and will permit little if any improvement toward a more adequate school program. Despite voter rejection of the budget and what the Commissioner is sure were sincere and well-intentioned efforts by the Committee to keep expenditures low in the interest of the local tax rate, it is not reasonable to expect that an already minimum budget can be reduced further without adversely affecting the interests of the children. For this reason the Commissioner finds it necessary to override part of the determination of the Committee and to increase the appropriations it certified for school purposes.

In summary the Commissioner will not interfere with the reductions made by the Committee as follows:

Item	*Reduction*
a. full-time principal	$5,500
b. substitute teachers	1,000
i. water	700
n. capital outlay-equipment	850
Total Reductions	$8,050

The Commissioner finds that elimination of the following amounts will impair the school program of this district to such an extent that minimum educational standards required for a thorough and efficient school system cannot be maintained and these amounts will, therefore, be reinstated in the Board's budget:

Item	*Amount Reinstated*
c. improvement reimbursement	$250
d. board expenses	300
e. regional district study	900
f. library	200
g. travel expenses	50
h. transportation	3,600
j. equipment replacement	500
k. maintenance	500
l. tuition	6,080
Unspecified	1,400
Total amount reinstated	$13,780

The Commissioner finds and determines that the certification of the amount of appropriations for school purposes made by the Frelinghuysen Township Committee is insufficient to support a thorough and efficient system of public schools in the district. He directs that there be added to the certification previously made by the Committee to the Warren County Board of Taxation the sum of $13,780 so that the total amount of the local tax levy for current expenses of the school district for the 1967-68 school year shall be $161,453.

ACTING COMMISSIONER OF EDUCATION.

May 12, 1967.

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XXXVIII

WHERE BUDGET CUT IS NOT ARBITRARY AND APPROPRIATION IS ADEQUATE, COMMISSIONER WILL NOT INTERVENE

BOARD OF EDUCATION OF THE BOROUGH OF LODI,
Petitioner,

v.

MAYOR AND COUNCIL OF THE BOROUGH OF LODI, BERGEN COUNTY,
Respondent.

For the Petitioner, Gerald P. LoProto, Esq.

For the Respondent, Carbonetti and Di Maria (John M. Di Maria, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," taken pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriation for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on April 25, 1967, at the State Department of Education, Trenton.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $1,895,466 for current expenses. This amount was reduced to $1,870,466 and submitted at a second referendum pursuant to *R. S.* 18:7–81 on February 28, 1967, but again failed of approval. The budget was then sent to the Council pursuant to *R. S.* 18:7–82 for its determination of the amount of funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, Council made its determination and certified to the Bergen County Board of Taxation an amount of $1,845,466 for current expenses, a reduction of $25,000.

The Board contends that the amount certified is insufficient to provide an adequate system of education for the pupils of the school district, and appeals to the Commissioner to restore the funds deleted by the Council.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles

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for the review of twice-rejected school budgets by the municipal governing body as follows:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

> "* * * The Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

In its Answer the Council set forth the items of the budget in which it believed economies could be effected as follows:

1.	Repair and replacement account	$15,000
2.	Clerks for elementary schools	10,000

From the testimony offered by the Board the Commissioner concludes that both of the above items are important and highly desirable, and were he fixing the appropriations on his own independent judgment, he would certify the full amount of the Board's budget with no reduction. He is constrained, however, in a case of this sort, not to substitute his judgment for that of Council, and he may restore only those amounts which, if deleted, will so impair the schools that children will be deprived of their right to a thorough and efficient education program. With these restrictions in mind, the Commissioner will review each of Council's suggested economies.

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Item 1: Recommendations of repairs and replacements made by the staff totaled $136,000. After reviewing these requests the Board selected the most needed and fixed an amount of $50,000 for this purpose. This was subsequently reduced to $40,000 at the second referendum. The Board contends that the further reduction of $15,000 suggested by Council, leaving only $25,000 in this account, will foreclose the execution of many needed repairs. Included in the work contemplated by the Board are such items as painting, waterproofing exterior masonry, improvement of lighting, resurfacing floors, purchase of furniture, educational equipment, a new truck, boiler repairs, etc. Moreover, the Board contends, it spent $90,000 on such maintenance costs this year and to limit its expenditures next year will thwart the program of plant rehabilitation planned over a span of years.

Council defends its action on the ground that it made only a token cut in the budget and that both this reduction and the one for clerks can be absorbed by the Board with no harm to the educational program.

The Commissioner finds no ground on which he can intervene to override Council's determination. While he has no doubt that the work to be done on the school plant and the equipment planned to be purchased are highly desirable, he cannot find from the testimony that they are essential to the maintenance of an adequate school program in this district. Absent a showing that failure to restore these funds will result in such an unreasonable curtailment of the educational program that it will fall below the minimum standards mandated by the State, the Commissioner is constrained from interfering with the governing body's determination. There is no such showing here. The Commissioner notes further that the Board has a sufficient surplus in its caiptal outlay account, which, upon approval of the voters, could be used for the desired repairs and replacements. The Commissioner finds that this item will remain as fixed by Council.

Item 2: None of the principals in the five elementary schools has a clerk. The Board alleges that such a condition results in the principals having to spend too much time performing clerical duties at a sacrifice to their supervisory responsibilities. It says, further, that although a work-study program is in operation whereby business education pupils from the high school are assigned to the elementary school offices, this service, while helpful, is not adequate. The Board, therefore, seeks to employ clerks for at least the three larger schools next year.

The Commissioner has no difficulty in agreeing with the Board that relieving the elementary school principals of clerical duties would increase their efficiency and supervisory effectiveness. He cannot stretch this conclusion, however, to a finding that provision of such clerical service is so essential, desirable as it undoubtedly is, that an adequate school program cannot be maintained without it. That being so, the determination made by Council will not be disturbed.

It is, of course, true that the Board is not compelled to effect the particular economies suggested by Council. It is possible that further study of the budget may disclose savings which will permit the accomplishment of part or all of the Board's proposals. In the Commissioner's judgment, Council's reduction of

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$25,000 in a budget totaling more than $2,400,000 should not impair the Board's program to any serious degree.

The Commissioner finds and determines that the Board has failed to show that Council's reduction of $25,000 in the amount certified to the Bergen County Board of Taxation for school purposes for the 1967-68 school year is insufficient to maintain a thorough and efficient program of public education in the district. The certification made by the Council will, therefore, remain undisturbed.

The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

May 12, 1967.

XXXIX

JANITOR MAY BE DISMISSED FOR INEFFICIENCY

IN THE MATTER OF THE TENURE HEARING OF ELIZABETH SUTTON, SCHOOL DISTRICT OF EGG HARBOR TOWNSHIP, ATLANTIC COUNTY

For the Complainant, Blatt, Blatt and Consalve (Martin L. Blatt, Esq., of Counsel)

For the Respondent, James Greene, Esq.

COMMISSIONER OF EDUCATION

DECISION

Complainant Board of Education has certified charges to the Commissioner of Education that respondent, a janitress in its schools, has violated its rules governing her duties and that she has failed and neglected to perform her duties in an efficient manner.

A hearing on the charges was held on February 28, 1967, at the office of the County Superintendent of Schools in Mays Landing by a hearing examiner appointed by the Commissioner for that purpose. The report of the hearing examiner is as follows:

The record in this matter shows that on June 1, 1966, personal service of a 90-day notice of inefficiency, pursuant to *R. S.* 18:3–26, was made on respondent. However, upon information that respondent claimed that she had not received such notice, service by certified mail of the same notice was made on August 13, 1966. At a meeting on September 1 the complainant Board by unanimous vote certified the charges herein. However, the charges and certification were not forwarded to the Commissioner or served upon respondent until November 28, 1966. Respondent continued in her duties until her services were terminated early in February, with pay to the middle of that month. The record further shows that the hearing in this matter was con-

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tinued at respondent's request, but that when respondent failed to reply to repeated requests for an answer to the charges and some indication of her intentions as to offering a defense, the hearing was set down peremptorily on February 28, 1967.

Initially, it should be noted that the procedure with respect to certification of the charges in September and the forwarding thereof to the Commissioner nearly three months later was irregular. The hearing examiner concludes from the testimony, however, that this partly stemmed from a continuing effort to give respondent more than was explicitly required by law in the way of opportunity for correction of her alleged inefficiencies. The delay, therefore, should not be held to be fatal to the prosecution of the charges, and the hearing examiner so recommends.

The charges allege failure to obey specific items of "Rules for Janitors of Egg Harbor Township Public Schools" (P-3), *viz*: Rules 2, 6, 7, 8, 12, 16, 23, 26, and 31, which require dusting and cleaning, scrubbing, waxing, removal of trash and garbage, and filling of soap, towel, and tissue dispensers. The charges further allege specific failures by respondent to raise the school flag, spray for flies and other insects, replace a light bulb, clear snow from the sidewalk, clean lavatories, and properly secure the school building. Testimony was given by the school principal as to each of the charges, and copies of letters which he personally delivered to respondent pointing out her failures of performance during the 1965-66 school year were offered in evidence. (P-5) The principal testified that respondent's work continued to be unsatisfactory during the fall of 1966, even after receipt by respondent of notice of inefficiency and before the charges and certification thereof were forwarded to the Commissioner. Also offered in evidence was a copy of the "Rules for Janitors," *supra*, bearing respondent's receipt (P-3), and a photocopy of particular rules for the janitor in respondent's school (P-4), which the principal testified he had posted in the janitor's workroom. The supervisor of janitors testified that he visited the school daily, that respondent had been instructed in the use of the cleaning materials and equipment provided, and that he had personally observed her failures to perform the duties required by the rules.

Respondent denied failure to perform her duties as required. She testified that she did the general cleaning of the building in the late afternoon and evening, returning in the morning to clean the lavatories and raise the flag. It is clear from her testimony, however, that reliance was placed on others to unlock the building and attend the furnace in the morning, and that she arrived at the school at 8 a.m. or later, and was not always able to get her morning work completed at the time required. It is also clear that she permitted trash, paper, and rubbish to be in the furnace room, regardless of who had put it there. She denied or could not remember receiving some of the letters (P-5) which the principal testified he had given her and which called to her attention specific failures in performance of her work. She further alleged that some of the charges referred to a period in January and February of 1966 when she was on sick leave. No testimony clearly establishes the dates of respondent's absence.

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The hearing examiner finds from the testimony and exhibits that the charge of failure to obey rules, with the exception of Rule 16 having to do with the cleaning of windows, has been sustained by the evidence. He further finds that charges B and H, and that part of charge C which alleges failure to raise the flag on time, are true. Charges D, G, J, K, and L, and that part of charge C which complains of many flies in the lunchroom, are found to establish that respondent did not clean various areas of the school in an efficient and satisfactory manner. Charge E, alleging that children had been stung by wasps, was not proved to be due to respondent's neglect or inefficiency and should be dismissed. Charge F, that a light bulb had not been replaced, should also be dismissed in the light of respondent's unrefuted testimony that she did not receive supplies of replacement bulbs. Charge I, alleging failure to shovel snow from sidewalks, should be dismissed in view of the absence of proof refuting respondent's claim that she was on sick leave at the time.

The thrust of the certified charges is that respondent did not perform her duties in an efficient manner. Except with respect to certain specific charges, *supra*, the Board has sustained its allegations by the weight of the credible evidence. It is the conclusion of the hearing examiner that the proved charges of inefficiency are sufficient to warrant dismissal of respondent from her employment in the Egg Harbor Township schools.

* * * * * * *

The Commissioner has considered and reviewed the report of the hearing examiner and he concurs with the recommendation, findings, and conclusions as stated therein. The proven charges reveal a patent inefficiency which the Board need not be required to tolerate. Accordingly, the Board of Education of Egg Harbor Township is directed to dismiss Mrs. Elizabeth Sutton from her employment as a janitress in its schools, such dismissal to be retroactive to the date when she received her final salary payment by the Board.

ACTING COMMISSIONER OF EDUCATION.

May 12, 1967.

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XL

BUDGET ITEMS REQUIRED BY LAW MAY NOT BE CUT BY MUNICIPAL COUNCIL

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER,
Petitioner,

v.

BOROUGH COUNCIL OF THE BOROUGH OF BUTLER, MORRIS COUNTY,
Respondent.

For the Petitioner, Edwin J. Nyklewicz, Esq.

For the Respondent, Young and Sears (Harry L. Sears, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was twice rejected by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on May 4, 1967, at the State Department of Education, Trenton.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $848,854 for current expenses and $19,346 for capital outlay. At a second referendum pursuant to *R. S.* 18:7–81, held on February 28, 1967, the proposals were submitted in the lesser amounts of $825,998 and $17,796 respectively and were again rejected. The budget was then submitted to Council pursuant to *R. S.* 18:7–82. After receipt of the budget from the Board, the Council met and determined by resolution to set the amount to be raised for current expense at $737,998, a reduction of $88,000. The capital outlay amount was not changed. The Board contends that the action of the Council was arbitrary and capricious and the amount certified is insufficient to provide an adequate system of education for the pupils of the school district and appeals to the Commissioner to restore the funds deleted by the Council.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

"* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be

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independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

"* * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

In its Answer, Council specified the line items of the budget in which it considered savings could be effected without affecting the quality of education to be provided, as follows:

	ITEM	SAVINGS
1.	Pupil transportation	$13,000
2.	Unanticipated tuition revenue	15,000
3.	Unappropriated surplus	10,000
4.	Hospitalization insurance	15,000
5.	Guidance personnel	10,500
6.	Additional teachers	11,100
7.	Administrative salaries and surplus teachers	13,400
		$88,000

The Commissioner will review these recommendations for reductions in the light of the principles enunciated by the Court recited *supra*. In so doing it should be remembered that he is not exercising his own independent judgment with respect to the desirability of the item. If permitted, he would be inclined to restore all of the amounts deleted in recognition of their value and the Board's desire to furnish the best possible educational program for

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the community. The Commissioner is constrained in this case, however, to a determination of whether Council's reductions are so drastic that a minimum school program cannot be maintained.

Item 1—Pupil Transportation. The Board's budget provides for an appropriation of $28,600 for pupil transportation services. Although the Borough of Butler is less than one and one-half miles square, the Board's policy has been to transport many children for lesser distances than those mandated by law, at full local expense. Thus, of 652 pupils bussed to and from school this year, only 136 meet the requirements for State-aided transportation. At the hearing, Council expressed the belief that much of this transportation constituted an unnecessary expense, particularly in view of the construction of an overpass over Route 23, the employment and assignment of school crossing guards to dangerous intersections, and a sidewalk construction program upon which the Borough is embarked. The Board contends that its transportation policies are necessary in order to offset hazardous conditions of travel for children and to insure their safety in going to and from school.

This issue has been raised in previous appeals to the Commissioner, the most pertinent of which is *Iden* v. *West Orange Board of Education,* 1959-60 *S. L. D.* 96, 97, which contains the following statement:

> "* * * There can be no question that boards of education are concerned for the safety and welfare of their pupils but the responsibility for safe conditions of travel within the community is a function of municipal government. In the case of *Read, et al.* v. *Roxbury Township Board of Education,* 1938 *S. L. D.* 763 at 765, the Commissioner said:
>
> > 'Boards of education are not authorized by law to provide for the safety of children in reaching school. While a board should be concerned as to the safety of children and should report to the State Police or local officers the reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. Highways and street dangers demand parental concern and care of children to avoid accidents and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation * * *.' "

The State Board of Education, in a resolution adopted as a guide in the approval of transportation routes, also states:

> "State aid for shorter distances for the sole reasons of traffic hazards should not be given, inasmuch as traffic hazards are a local responsibility * * *."

The State provides 75% of the cost of transportation of children who live remote from school. Pupils who are within walking distance of school may be transported but the entire cost in such cases is at local district expense. In this case the voters have twice refused to authorize the appropriations sought by the Board. It seems a fair inference that such rejection indicates the desire of the public to have economies effected in school district expenditures. One of the most obvious savings is certainly in nonmandated transportation. Such transportation can be eliminated without effecting the edu-

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cational program and is, therefore, not essential to the maintenance of a thorough and efficient system of public schools. The Commissioner finds no ground upon which to interfere with Council's reduction of $13,000 in this item.

Item 2—Unanticipated Tuition Revenue. Butler is the receiving district for high school pupils from the Borough of Bloomingdale. The testimony discloses that final determination of the tuition rate produced a balance in favor of Butler. This balance was reported erroneously to Council as $15,000 owed by Bloomingdale which had not been anticipated as revenue by the Board in its budget. By the time of the hearing, it had been determined that the correct amount receivable is $7,664.53. Council contends that such accounts receivable should have been included in the budget as anticipated revenue. The Board does not dispute the fact that it is owed money by Bloomingdale which it will receive in the normal course of business and which it did not include in its budget, but it denies that the amount is more than $7,664.53. At the hearing Council appeared disposed to accept this correction.

On the basis of the Board's admission that the budget failed to include an amount of anticipated tuition receipts the Commissioner will sustain the Council's action to reduce the school appropriations for this reason. He directs, however, that the amount be corrected from the erroneous figure of $15,000 to the correct $7,664.53. The difference, amounting to $7,335.47, will be reinstated in the school appropriations.

Item 3—Appropriations from Surplus. In its 1967-68 budget the Board appropriated $31,000 from anticipated free balances in the current expense account at the close of the current school year. Council's position is that there will be a sufficient surplus to increase the appropriation by another $10,000. The Board contends that to take an additional $10,000 from surplus will leave it with too small an operating balance to meet unexpected contingencies.

The testimony and exhibits (P-2 and P-3) show that the Board had an unencumbered free balance in the current expense account on May 1, 1967, of $27,780. Appropriation of an additional $10,000 would reduce this surplus to $17,780. The Board considers this too small an operating margin, but Council contends it is sufficient.

The Commissioner recognizes no necessity to reach the question of optimum operating surplus in this case. Council has made a determination to reduce the school appropriation by $10,000. It has the power to take such action unless the Commissioner can find that such a reduction will so adversely affect the operation of the school district that an adequate program of education cannot be maintained. It is obvious that he can not do so with respect to this item. Council's reduction of $10,000 will, therefore, remain undisturbed.

Item 4—Hospitalization Insurance. In its testimony the Board disclosed that it entered into a salary agreement with the professional staff, pursuant to *R. S.* 18:13–5.1, and that part of that agreement calls for the payment of hospitalization insurance. The cost of such insurance is $93.00 per employee. With 123 professional and 37 nonprofessional employees currently employed,

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the cost of this program would aggregate $14,880. Council deems this an unnecessary expense and recommends the elimination of $15,000 budgeted for this purpose.

In the Commissioner's judgment only that part of the cost of hospitilization insurance which pertains to nonprofessional employees is subject to elimination. *Chapter* 236, *Laws* of 1965 (*R. S.* 18:13–5.1) specifically protects the salary agreements entered into by the Board and the professional staff and the funds required for their implementation:

> "A board of education of any school district may adopt a salary policy, including salary schedules for all teachers which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board of education and upon all future boards of education in the same district for a period of 2 years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments. Every school budget thereafter adopted, certified or approved by the board of education, the voters of the school district, the board of school estimate, the governing body of the municipality or municipalities, or the Commissioner of Education, as the case may be, shall contain such amounts as may be necessary to fully implement such policy and schedules for that budget year."

In the Commissioner's opinion, agreement to underwrite the costs of hospitalization insurance, when included in such a salary policy, becomes a valid and binding part of such policy and the funds required for such purpose become a mandatory item in the budget not subject to reduction. The statute applies, however, only to "teachers" which is used in this case in its genuine sense to include all full-time members of the professional staff. *R. S.* 18:13–5.2 No such protection is afforded to other employees. The Commissioner holds, therefore, that the amount required to provide hospitalization insurance for members of the full-time professional staff must be restored, but that such costs may be eliminated for other personnel. According to the testimony there are 123 certified staff members and 37 other employees. The Commissioner directs, therefore, that Council's reduction of $15,000 in this account be amended to $3,441 and that $11,439 be reinstated in the school budget.

Item 5—Guidance Personnel. The present guidance staff consists of a director, two counselors assigned to the high school and one counselor assigned to grades 7 and 8. The high school enrollment is currently 769 with an estimated increase next year to 847. Federal funds under the N. D. E. A. program made possible the extension of guidance services this year to the upper elementary grades. In order to continue this program the Board increased its budget request for guidance personnel from $28,350 this year to $39,600 in 1967-68. Council takes the position that increased expenditures for guidance services are not necessary and deleted $10,500 from this line item. The Superintendent, testifying for the Board, maintains that elimination of a guidance position will be taking a step backwards in the implementation of a good school program.

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The Commissioner recognizes the need for and value of guidance services and is aware that in order to be effective, counselors should not be assigned an excessive number of pupils. While the Commissioner can appreciate the desires of the Superintendent and the Board to improve the guidance functions, he cannot find, in this case, that Council's recommended curtailment will result in the denial of a thorough and efficient school program to the pupils of the district. It has not been clearly shown that the reduction of $10,500 in this item will so adversely affect the school program that the Commissioner's interference is required. The reduction of $10,500 made by Council must, therefore, remain undisturbed.

Item 6—Additional Teachers. The Superintendent testified that additional teachers are needed for kindergarten, Spanish, art, business education and mathematics classes. His request for four new teachers was reduced by the Board to two. Council recognizes no necessity for these two new positions and reduced the budget by $11,100 therefor.

The Commissioner finds that the Council's action with respect to this item must be sustained. Examination of statistical reports and other data for the Butler school district indicate that its ratio of teachers to pupils is better than that of most New Jersey school districts. This is particularly true in the high school which would rank in the top 25% of New Jersey high schools with respect to adequacy of staff as related to enrollment. In the Commissioner's opinion this is a highly desirable condition which provides a basis for high standards of teaching and learning. He cannot, however, find that it is essential to the maintenance of an adequate program of education and he is constrained under such circumstances not to interfere with Council's determination. The $11,100 reduction will, therefore, stand.

Item 7—Administrative Salaries and Surplus Teachers. Without specifying exact amounts or positions, Council raises a general question with respect to salary increases for administrative personnel. It also expresses the belief that there are more teachers employed than are necessary to provide an adequate curriculum. The remainder of its total reduction of $88,000, an amount of $13,400, appears to be applied to these two suggested economies.

The salaries of administrative personnel are fixed according to the terms of the Board's adopted salary policy and this item is not subject to reduction in the budget for the reasons stated under Item 4 *supra.* Because Council did not specify particular increases which it questioned and intended to reduce, the Commissioner will assume that the reduction applied to increases for the entire administrative staff. Such increases include those for the Superintendent, three school principals, and the School Business Administrator, and total $4,279. The Commissioner directs, therefore, that the amount of $4,279 be reinstated in the school appropriations for the reason that elimination of this item is contrary to law.

With respect to the alleged surplus of teachers, the Mayor testified that he had made a study of the curriculum of the high school, the number of courses offered, and the number of pupils enrolled in particular classes. He cited more than 20 classes and raised questions whether the low number of pupils enrolled in them justified their continuance and if so whether such

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subjects could not be offered in alternate years. He expressed the opinion, based on his studies, that more effective staff utilization would make possible the elimination of several teaching positions. On this basis Council made its further reduction in the budget.

The Commissioner is aware that retrenchment such as Council suggests is not as easily accomplished as it may appear on the surface. It is sometimes difficult to find teachers on the staff with the exact combination of competencies needed for the classes to be assigned. Butler High School now enrolls many fewer pupils than formerly because of the withdrawal of sending districts. Although it has grown smaller it has attempted to maintain the broad curriculum which it had developed for a larger student body. The result has been that some courses now offered enroll only a few pupils. Such a condition provides for a high degree of individualized instruction and excellent opportunities for learning, and is highly commendable and desirable from the standpoint of quality of educational program.

Because of his concern to see the best possible educational opportunities afforded to the children and youth of this State, the Commissioner finds it extremely difficult not to be able to support the Board with respect to this item and it is with great reluctance that he finds that he must sustain Council's position. The very favorable ratio of teachers and pupils in Butler High School has already been noted under Item 6 *supra*. This fact is related to the per pupil cost which at $1,042 is the second highest in Morris County. While the Supreme Court made it plain that voter reaction is not the sole consideration in determining the appropriation necessary to support the school program, the will of the people is not to be ignored. In this case the electorate of Butler has recorded its unwillingness to support the program proposed by the Board. Council has in turn indicated the amount by which it considers the school budget can be reduced and has suggested areas in which economies can be effected. Under the facts and circumstances herein, the Commissioner must find that Council's determination with respect to this item of size of staff is not unreasonable. The Commissioner will, therefore, sustain Council's reduction of the balance of the $13,400 recommended under this item, an amount of $9,121.

In order that the Commissioner's position may be clear to the parties herein, he reiterates his concept of the function assigned to him in an appeal of this kind, which was enunciated in the case of *Morris Township Board of Education* v. *Township Committee of Morris Township*, decided May 2, 1967, as follows:

> "Although boards of education from time to time have protested the reductions made by local governing bodies in voter-rejected school budgets, it was generally assumed, prior to this year, that such action was a finality. Then in the *East Brunswick* case, *supra*, the Supreme Court determined that the Commissioner of Education has the power to review the action of the governing body on an appeal to him. It must be emphasized, however, that the Commissioner's power in such instances is not without bounds nor did the Court, in the Commissioner's opinion, intend it to be. The scope of the Commissioner's review is clearly defined by the Court. It permits him to go beyond a mere finding of arbitrariness

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to a determination of whether the maintenance of State-mandated programs or minimum educational standards cannot be realized under the appropriations fixed by the governing body. But the Court pointed out that the Commissioner's authority stops short of a substitution of his judgment for that of the governing body. Unless the Commissioner can find that the budget as set by the governing body falls short of what is required to maintain minimum educational standards in the district, he is powerless to intervene even though the appropriation is significantly below the budget proposed by the Board or the amount the Commissioner would fix if he were permitted to exercise his independent judgment.

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

See also *Board of Education of Cliffside Park* v. *Mayor and Council of Cliffside Park,* decided by the Commissioner of Education May 2, 1967.

In summary, the Commissioner finds and determines that the Board has not sustained its burden of a clear showing that the elimination of the amounts recommended by Council, with the exception of $7,335.47 in tuition receivable, $11,439 for hospitalization insurance, and $4,279 for salaries of administrators, aggregating $23,053.47, will result in insufficient appropriations to enable the Board to comply with mandatory legislative and administrative requirements or to meet minimum educational standards for a thorough and efficient school system in the Borough of Butler. Absent such a showing, the Commissioner is without authority to intervene and must sustain the budget as determined by Council. For the reasons stated heretofore, the Commissioner directs that an amount of $23,053.47 be added to the certification made by Council to the Morris County Board of Taxation of the appropriations for school purposes for the year 1967-68.

ACTING COMMISSIONER OF EDUCATION.

May 22, 1967.

Affirmed by State Board of Education without written opinion, January 3, 1968.

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XLI

JANITOR MAY BE DISMISSED FOR NEGLECT OF DUTY

IN THE MATTER OF THE TENURE HEARING OF JOSEPH FORTUNA, SCHOOL DISTRICT OF BELLMAWR, CAMDEN COUNTY

For the Complainant, Ralph J. Kmiec, Esq.

For the Respondent, *Pro Se.*

COMMISSIONER OF EDUCATION

DECISION

Complainant, the Board of Education of the School District of Bellmawr, has certified to the Commissioner charges against respondent, a janitor in its schools, pursuant to the Tenure Employees Hearing Act. The charges allege that respondent has neglected to perform the duties of his position. Upon certification of the charges on January 27, 1967, respondent was suspended without pay as of January 31, 1967.

A hearing upon the charges was conducted on March 21, 1967, at the office of the Camden County Superintendent of Schools, Pennsauken, by a hearing examiner appointed by the Commissioner for that purpose. The report of the hearing examiner is as follows:

Respondent was employed as a janitor and assigned the duty of sweeping and cleaning a 24-room school, including two small lavatories and the hallways, between the hours of 3:30 p.m. and midnight each school day, and mopping and waxing two classrooms on Saturday morning. Beginning in mid-September 1966, and continuing until December 21, the principal, through a series of oral notices and written memoranda, called to respondent's attention that he was not using the cleaning compound provided for sweeping classrooms, that he failed to sweep classrooms completely, and that on one occasion (Exhibit P-2) he had not swept six classrooms and a hallway at all. On December 21, 1966, following a discussion between respondent and the Superintendent in which respondent was told that his englect of duty would be tolerated no longer, the charges herein were filed with the Board of Education.

Respondent does not deny having been frequently told by the principal that his work was unsatisfactory, nor does he deny receiving the written memoranda. Respondent's defense is rather an explanation of the alleged neglect than a denial of the charges. He contends that the school administration was constantly "picking on" him, and that it was humanly impossible for one janitor to do the amount of cleaning that his work schedule required. The testimony of the principal, however, was that previous janitors had performed the same amount of work satisfactorily in the alloted time.

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The hearing examiner finds that the charges have been established as true, and that the proven charges are sufficient to warrant dismissal of respondent from his employment.

* * * * * * *

The Commissioner has reviewed the report of the hearing examiner and concurs in the findings. Laxity and neglect of duty which results in unclean and unsanitary conditions in a school cannot be condoned. He therefore directs the Board of Education of the School District of Bellmawr to dismiss Joseph Fortuna from his employment effective as of February 1, 1967.

ACTING COMMISSIONER OF EDUCATION.

May 26, 1967.

XLII

WHERE BUDGET CUT IS NOT ARBITRARY AND APPROPRIATION IS ADEQUATE, COMMISSIONER WILL NOT INTERVENE

BOARD OF EDUCATION OF THE BOROUGH OF LAKEHURST,
Petitioner,

v.

MAYOR AND COUNCIL OF THE BOROUGH OF LAKEHURST, OCEAN COUNTY,
Respondent.

For the Petitioner, Haines, Schuman and Butz (Harold A. Schuman, Esq., of Counsel)

For the Respondents, Camp and Simmons (Roy G. Simmons, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," taken pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriation for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on May 1, 1967, at the State Department of Education, Trenton.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $47,161 for current expenses for the 1967-68 school year. On February 28, 1967, this same proposal was submitted at a second referendum pursuant to *R. S.* 18:7–81 and again failed of approval. The budget was then sent to the Council pursuant to *R. S.* 18:7–82 for its

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determination of the amount of funds required to maintain a thorough and efficient local school system.

After consultation with the Board and a review of the budget, Council made its determination and certified to the Ocean County Board of Taxation an amount of $41,161 for current expenses, a reduction of $6,000 in the local tax levy.

The Board alleges that the Mayor and Council acted aribtrarily, capriciously and unreasonably without consideration of the needs of the school system and contends that the amount certified by the Council is insufficient to provide an adequate system of education for the pupils of the school district. The Board appeals to the Commissioner to restore the funds deleted by the Council.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner, when, after the governing body has made its determination, the Board appeals from such action:

> "* * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

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The budget in this school district calls for the expenditure of $435,944 for current expense in the 1967-68 school year. Most of the revenues to support this cost are derived from State Aid ($214,517) and Federal Aid ($152,000). As a result the local tax levy is small, amounting to only $47,161 in the Board's proposal. From this Council cut $6,000 following the second rejection by the voters. The Board argues that although the amount appears small, it represents one-eighth of the total tax levy and its loss will deprive the school system of necessary teaching staff and physical facilities.

In its Answer Council failed to indicate where it believed economies could be effected. However, at the hearing its witness testified that Council decided that some reduction should be made in recognition of the rejection of the budget by the electorate and that it believed that a new teaching position could be eliminated at a saving of $6,000.

The Board testified that the present enrollment of 560 pupils is instructed by a staff of 21 classroom teachers and three specialists. Next year it is estimated that the enrollment will reach 575 pupils. The Board planned to employ one additional classroom teacher in order to maintain a desirable class size. The Board claims that if Council's reduction of $6,000 is permitted to stand, the additional position must be foregone.

After a study of the budget herein, it is clear that the Board has attempted to keep its expenditures to a minimum. There appears to be no excess in any of the accounts and almost no margin for contingencies. Nor is there any unencumbered balance for the reason that whatever there was has been appropriated in prior years' budgets to reduce the tax levy. The appropriation balance on June 3, 1966, was in fact as low as $20.07. Certainly the Commissioner would have no hesitancy in certifying the Board's full budget were he in a position to make his own independent determination. Such is not the case herein, however, and the Commissioner is constrained to consider this appeal within the framework of the principles laid down by the Court quoted *supra*. Thus he may restore only those funds which, if deleted, will so impair the schools that children will be deprived of their right to a thorough and efficient program of education.

With that restriction in mind, the Commissioner notes that although the Board included $6,000 in the instruction salaries account of its budget for a new teaching position, it has since committed $2,750 of this amount to increase the salaries of teachers already employed. The remaining $3,250 is insufficient to employ an additional teacher in any case. Further examination discloses that employment of an additional teacher, while desirable, is not critical. The current pupil-teacher ratio is adequate and the contemplated increase in enrollment is not so great as to cause any significant change in this respect, There is, therefore, an amount of $3,250 in the salaries account which can be applied against the $6,000 eliminated by Council.

The testimony also discloses that increased expenditures were provided for in the operations section of the budget in contemplation of added costs resulting from an addition to the school building. It is now clear that the addition will not be accomplished during the 1967-68 school year and the anticipated extra costs will not occur. As a result the increase of $2,200

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budgeted for a part-time janitor, $150 for additional supplies, and $200 for heat, will not be required as previously thought. These amounts, aggregating $2,550, can be used to offset the remaining $2,750 deleted by Council.

There remains then a real reduction of only $200. The Commissioner finds no necessity to deal precisely with this *de minimis* remainder, for the reason that the Board will know best where such an amount can be absorbed best in its more than $400,000 budget.

With respect to the allegation that Council's action was arbitrary and capricious, the Commissioner finds insufficient evidence to support such a charge. The testimony indicates that Council considered the matter and decided to eliminate the additional teaching position proposed in the amount of $6,000. Although another teaching position would be a desirable addition to the school program and one the Commissioner would endorse, he cannot find that Council's determination to eliminate the amount necessary to underwrite such a proposal was arbitrary, capricious or so unreasonable as to require the intervention of the Commissioner to set it aside.

The Commissioner finds and determines (1) that the action of Council to reduce, by $6,000, the appropriations for the current expenses of the school district for 1967-68 was not arbitrary, capricious or unreasonable and (2) that the reduction of $6,000 can be absorbed in the instruction salaries and operations accounts without adverse effects upon the operation of an adequate program of education.

The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

May 31, 1967.

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XLIII

WHERE BUDGET CUT IS NOT ARBITRARY AND APPROPRIATION IS ADEQUATE, COMMISSIONER WILL NOT INTERVENE

BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT,
Petitioner,

v.

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SHREWSBURY,
THE MAYOR AND COUNCIL OF THE BOROUGH OF EATONTOWN,
THE MAYOR AND COUNCIL OF THE BOROUGH OF NEW SHREWSBURY,
MONMOUTH COUNTY,
Respondents.

For the Petitioner, Vincent C. DeMaio, Esq.

For Respondent Eatontown, Saling, Boglioli & Moore (Henry J. Saling, Esq., of Counsel)

For Respondent Shrewsbury, Lane & Evans (Harry S. Evans, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondents, hereinafter "Council," taken pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriation for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on April 17, and May 10, 1967, at the State Department of Education, Trenton.

At the annual school election on February 21, 1967, the voters rejected the Board's proposals to raise $962,467 for current expenses and $13,576 for capital outlay. The items were submitted in the same amounts on March 7, 1967, at a second referendum pursuant to *R. S.* 18:7–81 and again failed of approval. The budget was then sent to the Councils pursuant to *R. S.* 18:7–82 for their determination of the amount of funds required to maintain a thorough and efficient local school program.

Thereafter, following a conference with the Board, the governing body of each of the three constituent municipalities adopted a resolution certifying the total amount to be raised by taxation for the school purposes of the regional school district at $1,148,030. That total included an amount of $246,987 for debt service which left a sum of $901,043 for current expenses and capital outlay, a reduction of $75,000. The Board contends that the

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Councils' action was arbitrary and capricious and the amount certified is insufficient to provide an adequate system of education for the pupils of the school district. The Board appeals to the Commissioner to restore the funds deleted by the Councils.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

> "* * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

The Board alleges that the Councils made their determination in haste, without proper consultation with the Board, and without giving adequate study and consideration to the financial needs of the school district. It contends, therefore, that the amounts fixed and certified were arrived at arbitrarily and capriciously.

The testimony reveals that following the second referendum, members of the three governing bodies met with members of the Board to discuss the budget. Questions were asked by several of the councilmen, members of the Board were asked to suggest areas in which economies could be best effected,

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and at least two councilmen indicated items which appeared to them to be capable of reduction. Following this discussion, variously estimated as lasting from an hour and a quarter to an hour and a half, the three Councils met, each in a separate room and then jointly, and arrived at an agreement to recommend an overall reduction of $75,000. This agreement was implemented by appropriate resolutions adopted subsequently by each of the three governing bodies, and the reduced amount was certified to the Monmouth County Board of Taxation.

The Councils deny arbitrary or capricious action. They maintain that individual councilmen had knowledge and information about the school's budget during the course of the referendums and had already formulated some tentative ideas with respect to it. The Councils also contend that they were supplied with gross data only and that the Board made no attempt to provide more specific information which it had in its possession. The Board denies any intention to withhold information. It avers that it gave the councilmen whatever they asked for except for "worksheets" which the Board contends would have been meaningless and misleading to other than Board members who had formulated them.

The Commissioner has been called upon recently to hear a series of appeals by boards of education contesting the adequacy of school appropriations fixed by municipal governing bodies. In several of these matters he has noted an unfortunate lack of cooperation and even a degree of hostility developing between board and council. Such a condition is to be deplored. Understandably, the board of education is apt to feel chagrined and frustrated at a double rejection by the electorate. It is also true that boards of education in such a situation often question the wisdom of the statutory plan which assigns the determination of the school district's financial needs to a separate governmental entity which may or may not be well informed on the subject. The fact remains, however, that such is the legislative scheme and it behooves all who are in any way involved to lend their best efforts and cooperation to making the procedure operate as effectively as possible in the interests of the children to be served. The governing body's task is a difficult one. It is required to consider an extremely complex matter and to reach a decision which will have important and far-reaching effects, in a very short period of time. If the governing body is to discharge such a duty properly, it must have the advantage of as much information as can be useful to it in arriving at a sound determination. The board of education should, therefore, take the initiative to supply detailed data and helpful information for the governing body's use and should be prepared to consult and assist in any helpful way. The governing body, in turn, should take as much time as possible to digest the information supplied and to consult with the board with respect to the problems and educational needs to be met. It is in such a spirit of mutual understanding and cooperation, with the educational welfare of the children of the community as the paramount consideration, that the legislative plan must proceed, if it is to be successful.

In this case the evidence fails to support a finding of arbitrary or capricious action by the governing bodies such as the Commissioner condemned in *Board of Education of National Park* v. *Town Council of National Park*, decided by the Commissioner April 10, 1967. The brevity of the councilmen's

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consultation with the Board followed by a determination that same night does give rise to a question whether there was adequate consideration of the problem. It appears also that the Councils did not take advantage of offers made by the Board for further discussion and consultation before a decision was reached. There is evidence, on the other hand, that several members of the Councils were informed with respect to the budget, had given it study, and were prepared to make a determination after the relatively short consultation period which occurred. While more extended discussion and deliberation would be called for generally, in the circumstances of this case and in the light of the conclusion reached by the Councils, the Commissioner determines that the evidence herein is insufficient to support a finding of arbitrary or capricious conduct which would warrant setting the action of the Councils aside.

The Board's second allegation is that the Councils' reduction of $75,000 will make it impossible to maintain a thorough and efficient program of secondary education in the district. The Councils deny this contention and suggest a number of line items in which they contend reductions can be made without adversely affecting the school program. The Councils argue further that even if the Board chooses not to implement their recommended economies, it still has enough funds in unencumbered surpluses to finance its proposals.

The evidence supports the Council's position. The financial reports show that the Board has available an amount of $82,000 in unappropriated surplus. It is also clear that there will be revenues in excess of amounts anticipated from several sources (additional State and Federal Aid and savings from current year operations) which could raise that figure to a possible $150,000. Under such circumstances, the Board may choose whether to preserve its surplus and forego the programs contemplated under the $75,000 curtailed by the Councils or to ignore the Councils' recommendations and use part of its surplus to implement its full program. In the light of these facts, there is no ground to support a finding that the school district will be unable to maintain a thorough and efficient system of public schools, and the Commissioner is, therefore, powerless to intervene or interfere with the reduction made by the Councils.

From his review of the testimony and evidence offered, the Commissioner finds and determines (1) that there has been no clear showing of arbitrary or capricious action by the respondent Councils with respect to their certification of the amount of appropriations necessary for the school purposes of the district for the 1967-68 school year; and (2) that the Councils' reduction of $75,000 from the amount requested by the Board, although significant, will still produce an amount which, with available surplus funds, will be sufficient to maintain a thorough and efficient program of education in the school district.

The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

June 5, 1967.

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XLIV

WHERE BUDGET CUT IS NOT ARBITRARY AND APPROPRIATION IS ADEQUATE, COMMISSIONER WILL NOT INTERVENE

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK,
Petitioner,

v.

THE TOWNSHIP COUNCIL OF EAST BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

For the Petitioner, Cohen, Hoagland & Cohen (Richard S. Cohen, Esq., of Counsel)

For the Respondent, Stanton L. Levy, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," taken pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1966-67 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The Board seeks the restoration of the funds eliminated by the Council.

At the annual school election of February 8, 1966, the Board sought voter authorization for the appropriation of $4,048,012 for current expenses and $114,412 for capital outlay for the 1966-67 school year. The voters failed to approve these amounts. At a second election held pursuant to *R. S.* 18:7–81 on February 23, 1966, the same proposals were submitted and they were again rejected. The Board thereupon delivered its budget to respondent Council as provided by law. *R. S.* 18:7–82 On March 4, 1966, the Council determined the amount necessary to be raised for current expenses at $3,913,012, a reduction of $135,000, and for capital outlay $54,412, a reduction of $60,000. Thus, the total amount determined to be necessary by the Council was $195,000 less than proposed by the Board of Education. The Board thereupon instituted the present appeal on March 11, 1966, alleging that the reduced appropriations would not permit the operation of a thorough and efficient system of public schools and that the quality of education in the school district would suffer serious adverse effects. The Board alleged further that respondent's action was arbitrary, unreasonable and capricious, was without consideration of the needs of the school system, and was grounded upon improper standards and in satisfaction of prior political commitments.

In its Answer, respondent Council maintained as one of its defenses that the issues raised by petitioner did not constitute a controversy or dispute arising under the school laws and that the Commissioner of Education, therefore, was without jurisdiction to hear the matter.

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On March 6, 1966, five days prior to the institution of this action before the Commissioner, the Board had filed a complaint in Superior Court, Law Division, demanding that the Council be restrained from certifying the reduced amounts of appropriations to the Middlesex County Board of Taxation. On March 18, 1966, the restraint was granted and the Board was directed to file a petition with the Commissioner for a full determination of the meritorious issues raised. The Council appealed that decision to the Appellate Division and further proceedings before the Commissioner were stayed by agreement of counsel, pending the determination of the Court.

Subsequently, however, on March 31, 1966, the Law Division dissolved the restraint and Council certified the reduced budget to the Middlesex County Tax Board with the understanding that in the event of an adverse final judgment requiring the provision of additional funds up to $195,000, the Council would make an emergency appropriation under *R. S.* 40A:4–46 and borrow the necessary funds under *R. S.* 40A:4–51.

In an opinion cited as *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 91 *N. J. Super.* 20 (*App. Div.* 1966), the Court confirmed the authority of the Commissioner of Education under *R. S.* 18:3–14 to review the action of the Council with respect to the school budget within the limits specified by the Court. Respondent Council then appealed to the New Jersey Supreme Court.

In a decision rendered on October 24, 1966 (48 *N. J.* 94), the Supreme Court affirmed the Appellate Division's finding that the Commissioner of Education had jurisdiction to decide the subject controversy and went on to set down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

> "* * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational stand-

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ards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

Following the Court's remand to the Commissioner, Council moved to dismiss the appeal on the ground that the Board, during the pendency of this litigation, had received additional State Aid by reason of the enactment of *Chapter* 31, *P. L.* 1966, the sales tax law, in an amount greater than that by which the budget had been reduced by Council. The Board's budget having been made whole thereby, Council argued, the appeal should be dismissed.

The Board opposed the motion to dismiss, contending that the issue was not rendered moot by the mere fact of the receipt of additional monies. It argued that no valid decision on the appeal could be reached without a full hearing of the facts related to the pressing needs of the school district and a factual determination as to whether or not the Board has been deprived by respondent of funds which are necessary to the operation of a thorough and efficient school system.

On March 7, 1967, the Commissioner denied the motion to dismiss, finding that genuine issues of material fact exist in this matter and that petitioner has a right to be heard on them. Accordingly, a hearing was held before the Assistant Commissioner in charge of the Division of Controversies and Disputes on May 2, 1967, at the State Department of Education, Trenton.

The testimony discloses that following the second defeat of the budget on February 23, 1966, Council met on March 4, 1966, and adopted a resolution (Exhibit R-1), relevant excerpts of which read as follows:

"* * * we recommend the following accounts be reduced:

"1. Instruction—$110,000 by reducing number of new teachers to be hired, eliminate additional guidance personnel, eliminate noon-time cafeteria supervisor, reduce proposed increases for non-teaching personnel, eliminate additional secretary in guidance.

"2. Plant operations and maintenance—$20,000 by cutting telephone service increases, cut from four to two, number of added maintenance people, reduce amount budgeted for upkeep of grounds, repair of buildings, replacement of equipment.

"3. Student Body Activities—$5,000 cut increased coaching, varsity supplies, etc.

"4. Capital Outlay—$60,000 Reduce amount of new equipment purchased, incinerators, etc.

"We feel that the reduced budget is adequate for a good school operation.

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We recommend that no reductions be made in teachers salaries, textbooks, supplies, library books, transportation, teachers benefits, and recreational activities."

On December 21, 1966, during preparation of the 1967-68 budget to be submitted at the annual school election in February 1967, the Board adopted a resolution (Exhibit P-5) setting forth the line item reductions to be made in the current year's operations as a result of the funds eliminated by Council, without prejudice to the subject appeal, as follows:

Account and Number	*Reduction*
Current Expense Account	
213 Salaries of teachers	$109,500
220 Textbooks	5,000
230-a Library books	10,000
410-a-3 School nurses	5,500
610 Custodial services	5,000
	$135,000
Capital Outlay Account	
1220-c Improvements to sites	$7,500
1240-a Instructional equipment	45,000
1240-f Equipment for plant operation	7,500
	$60,000

At the hearing Council enlarged upon the recommendations set forth in its earlier resolution quoted *supra*, suggesting specific economies which will be enumerated and considered under each of four item headings. It is to be noted that the Board did not follow the suggestions of Council in all respects when it enumerated the line items to which reductions were to be applied in its resolution of December 21, 1966, recited *ante*.

Item 1—Instruction. Council suggests the following line item reductions:

213	$72,000	Additional teachers
214-b	12,500	Additional guidance personnel
211 & 212	10,000	Salaries of principals and supervisors
215-c	4,000	Salaries of secretaries and clerks
250-d	12,000	Employment of cafeteria supervisors
	$110,500 (rounded off to $110,000)	

The testimony reveals that the Board contemplated employment of 31 additional teachers in order (1) to reduce the teacher load in the English department of the high school from 134 to 100 pupils per teacher; (2) to reduce class sizes in grades 3, 4, 5 and 6 where classes have as many as 33 pupils; and (3) to provide for an expected increase in enrollment which, in fact, amounted to 536 more pupils than in the prior year. Instead of 31 new teachers the Board employed an additional 24.

The Board estimates that the $72,000 reduction suggested by Council represents ten teachers whom it could not employ this year and, as a result,

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its hoped-for improvement in class size and pupil-teacher ratio has not been accomplished. Council contends, however, that an additional 536 pupils would require only 21 teachers in order to provide a satisfactory pupil-teacher ratio. It argues that the addition of 24 teachers enabled the Board not only to maintain but to reduce, at least in some degree, its average class size.

For all practical purposes this issue of additional teachers has become moot. It is obvious that the reinstatement of $72,000 for the employment of seven more teachers at this posture cannot affect the teacher-pupil ratio which has existed during this school year. Whatever improvement is made in this area must wait upon the 1967-68 school year. In that connection the Commissioner notes that although the budget for 1967-68 was twice rejected by the voters also, Council chose not to fix the appropriations. As a result the Commissioner made the final determination under *R. S.* 18:7–83 and certified the full amount for current expenses requested by the Board. Presumably the Board has budgeted sufficient funds for the next school year to provide the number of teachers needed to establish the ratios of teachers and pupils it deems desirable.

A similar situation exists with respect to the other reductions suggested by Council under Item 1. Under line item 214-b the Board requested an additional $43,919.86 in the guidance personnel account to make possible an increase in its staff from 13 to 16 counselors. The testimony reveals that such an increase in guidance personnel has, in fact, been made, apparently with funds diverted from other accounts. The same is true for line items 211, 212, 215-c and 250-d. The planned salary increases for non-teaching personnel and for secretaries and clerks have been in effect during this school year. Similarly, funds were used from other accounts to employ the cafeteria supervisors as contemplated in the original budget.

The Commissioner finds no ground for interfering with the determination of Council to eliminate $110,000 from the budget under this item. As has been stated the issue is moot for all practical purposes and the Board has found ways to accomplish most of its proposals under the Instruction account in the budget despite the reduced appropriations. While this has had to be achieved by use of funds from other accounts there has been no showing that such diversion resulted in an impairment to the educational program to a degree requiring the intervention of the Commissioner. The deletion of $110,000 made by Council under Item 1 will, therefore, not be disturbed.

Item 2—Plant operation and maintenance. Council suggests line item reductions in this area as follows:

640-d	$5,000	Telephone service
710-a and b	9,000	Additional maintenance men
720-a	3,000	Upkeep of grounds
720-b	2,500	Repair of buildings
720-c	500	Repair of equipment
	$20,000	

It appears that the proposed telephone service improvement has been accomplished and no detailed testimony was offered on this item.

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The testimony shows that the Board proposed to hire four additional maintenance employees which would have increased its staff from five to nine men. Council suggested that only two new employees are needed. Similarly, Council considered the increases requested for upkeep of grounds, repair of buildings, and replacement of equipment to be excessive and suggested the economies detailed above. The Board's budget for these purposes reveals the following (Exhibit P-4):

Line Item	Expended 1964-65	Appropriated 1965-66	Requested 1966-67
720-a Upkeep of grounds	$7,748	$1,300	$20,570
720-b Repair of buildings	26,081	10,000	36,680
720-c Repair of equipment	10,730	10,252	14,610

The Board contends that it is forced to operate its school plant on an emergency maintenance basis and to do a proper job it needs additional staff and equipment. It cites an inadequate parking area at the Frost School; cracks in paved areas and settlement of the multi-purpose room floor in the Bowne School; leaks in the roof of the Hammarskjold School; and chronic breakdowns in the heating system in the administration building as examples of needed repairs. The Board points also to the need to replace some of its seven vehicles, the newest of which is a 1958 model, which it contends need repairs constantly. Finally, it calls attention to the report of a survey made by a consulting firm in July 1966 which found the school district's maintenance services generally inadequate.

Despite the Board's testimony of its needs for additional appropriations in this area, it has not established sufficient grounds for the Commissioner's intervention. Even the assumption that Council's curtailment of funds for maintenance is "penny-wise and pound-foolish" as the Board suggests, does not establish the impossibility of maintaining an adequate school program without the curtailed funds, which is the only basis upon which the Commissioner can interfere. Desirable as increased maintenance services may appear, there is not sufficient proof herein that they are so essential to the operation of a thorough and efficient school system that the Commissioner is compelled to override Council's determination. Therefore, the curtailment of $20,000 made by Council will stand.

Item 3—Student body activities. Council recommends a reduction of $5,000 in this account. The Board did not contest this item and it will remain unchanged.

Item 4—Capital outlay. Council recommends elimination of $60,000 in this account. It made no detailed specification of items to be eliminated but concurred in the Board's decision of December 21, 1966, that reductions be made as follows:

1220-c	$7,500	Improvement to sites
1240-c	45,000	Instructional equipment
1240-f	7,500	Equipment for operation of plant
	$60,000	

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The Board says that the elimination of $7,500 in the 1220-c item has forced the abandonment of such needed capital improvements as surfacing and increasing the size of parking areas. The Commissioner entertains no doubt that larger and better parking areas are eminently desirable. He cannot find, however, that they are absolutely essential to the maintenance of the school system. He is constrained, therefore, to permit Council's elimination of funds in this account to stand.

The main thrust of the Board's appeal is directed toward restoration of funds for the purchase of new instructional equipment for all of the schools. It was testified that prior to the preparation of the budget, the principals submitted requests for equipment purchases aggregating over $184,000. After considering these requests the Board budgeted $95,000 for this purpose. It contends that Council's further suggested cut to $45,000 is unreasonable and will prevent the purchase of equipment necessary to a sound educational program.

Witnesses for the Board averred that there is a need for audio-visual equipment such as film, film strip, and overhead projectors; maps and globes; science laboratory apparatus; kindergarten materials; library shelving, charging desks, study carrels, etc.; and industrial arts and home economics equipment. Introduced as Exhibit P-6 was an inventory of audio-visual equipment which showed that the school district owns 43 film strip, 29 film, and 14 overhead projectors and 57 projection screens. The Superintendent testified further that the lack of complete unit shops in the high school makes it impossible to offer a proper sequence of courses in industrial arts in the eleventh and twelfth grades; that the home economics facilities have never been fully equipped; that new business education machines are needed; that two additional science laboratories are needed in the high school; and that the request for library equipment alone amounted to $72,000. According to the testimony, needs for instructional equipment have never been satisfied, and it will be necessary to appropriate large sums for this purpose for several years in order to make up the deficiencies in this area.

The Commissioner has not only considered this testimony carefully, but he has examined other data and reports made to him by this school district. As a result of this study, he concludes that there can be no question that the Board's request for equipment is not excessive in terms of current educational standards and that its purchase would offer worthwhile and important opportunities for learning to the pupils of the district. The Commissioner cannot find, however, that lack of this equipment will so impair the school program that minimum standards of education mandated for a thorough and efficient program cannot be maintained. It is possible and probable that the quality of the program sought by the Board and the staff and many of the citizens of the community will not be achievable by reason of the curtailed budget. The Commissioner's authority to intervene and override Council's determination is limited, however, to conditions under which the rights of children to an adequate school program are threatened. *Cf. Board of Education of Morris Township* v. *Township Council of Morris Township*, decided by the Commissioner, May 2, 1967. There is no such showing here. Undoubtedly the school will not be able to offer all the opportunities it could have, had the citizens

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approved its budget or had Council made no reductions. It cannot be said, however, that during the current year the district has failed to maintain an adequate school program under the appropriations fixed by Council. That being so, the Commissioner is without power to intervene.

There remains only the amount of $7,500 in line item 1240-f. The President of the Board testified that the Board intended to construct incinerators at three schools where the local board of health had objected to the method employed to dispose of waste materials. The Commissioner finds that there is insufficient testimony in the record with respect to this problem upon which he can form a valid judgment. In any case, this problem appears to lie close to the bounds of the Council's functions, involving as it does the actions of another agency of municipal government. Under such circumstances the Commissioner will defer to Council's judgment as to the necessity for this improvement and will not interfere.

Counsel for the Council renews the argument made in his earlier motion to dismiss, with respect to additional State Aid received by the school district from sales tax monies. He argues that receipt of these unanticipated funds made the Board's budget whole, despite the fact that the monies were transferred to the capital outlay account by authorization of the voters, a procedure which he contends was improper. The Commissioner recognizes the pertinence of Council's argument but finds no necessity to reach this question, having already determined that there is no ground for setting aside the determination of appropriations previously made by Council.

In summation, the Commissioner wishes to observe that he finds no excess funds in the Board's budget which he would curtail in the exercise of his own independent judgment. Were the Commissioner determining the school appropriations initially under *R. S.* 18:7–83 he would certify the entire amount requested by the Board in the interest of raising the standards of education offered to the children and youth of East Brunswick. He is limited herein, however, to a review of Council's action. In that context he is constrained to find that the Board can maintain an adequate educational program under the certification made by the Council and has, in fact, done so. The proofs offered by the Board fail to support the contrary conclusion which they have urged in this case.

From his review of the testimony and evidence offered, the Commissioner concludes (1) that there has been no clear showing of arbitrary or capricious action by the East Brunswick Township Council with respect to its certification of the amount necessary for school purposes for the school year 1966-67; and (2) that the Council's reduction of $135,000 in the current expense account and $60,000 in the capital outlay account from the amounts requested by the Board, although significant, will still produce sufficient funds to maintain the required adequate educational program in the school district.

The petition is dismissed.

ACTING COMMISSIONER OF EDUCATION.

June 12, 1967.

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XLV

TEACHER NOT ENTITLED TO COST OF LEGAL SERVICES EXCEPT AS PROVIDED BY STATUTES

JEROME B. KING,

Petitioner,

v.

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

Respondent.

For the Petitioner, Bracken and Walsh (Joseph F. Walsh, Esq., of Counsel)

For the Respondent, Jacob Fox, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a principal in respondent's schools, seeks an order from the Commissioner of Education directing respondent to reimburse him for certain legal expenses which he alleges were incurred by reason of actions arising out of the discharge of his duties as an employee of the Newark Board of Education. Respondent denies that any such obligation is imposed upon it, by law or policy.

A hearing in this matter was held by the Assistant Commissioner in charge of Controversies and Disputes on October 27, 1966, at the State Department of Education, Trenton. Original and supplemental briefs were subsequently filed by counsel.

Petitioner asserts that a series of events beginning in March 1963 necessarily required him to retain counsel in his own defense in both criminal and civil proceedings and threats of proceedings. All of these events are related, in one way or another, with petitioner's relations with a teacher assigned to his school, and with events associated with the filing, certification, and hearing of charges against this teacher pursuant to the Tenure Employees Hearing Act. See *In the Matter of the Tenure Hearing of Frank C. Marmo*, decided by the Commissioner July 25, 1966. The Commissioner finds it unnecessary to recite the full details of these events, or their precise relation to the *Marmo* matter. Suffice it that the alleged relationship has been shown to the extent that the Commissioner is satisfied that any charges which petitioner was required to answer and defend arose out of or in the course of his employment. But having so held, it becomes necessary to examine now individually, each of the occasions in which petitioner claims he needed the legal assistance, for which he seeks reimbursement of costs.

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It has been stipulated that prior to March 21, 1963, certain events occurred in which there was no formal legal action, or in which petitioner was represented by the Board attorney. The first of these events occurred when two complaints were filed in September and December 1962 before the Division of Civil Rights (then a division of the New Jersey Department of Education) in which both petitioner and respondent, among others, were named as respondents. With respect to both complaints, the Division found no basis for further action. The second incident involved the service of a summons upon petitioner to answer an informal complaint made by Marmo against him in the Municipal Court. A pre-complaint hearing, in which petitioner was represented by the Board's attorney, resulted in dismissal of the complaint. The third event was another informal complaint in Municipal Court in which petitioner was accused of striking a pupil. At the first of the hearings on this complaint, petitioner was not represented by counsel. However, the Board's attorney was present as an observer and urged to the Court that because petitioner was absent, the hearing be continued. At the second hearing, a week later, petitioner was represented by his own private counsel. The complaint was dismissed. Throughout all these events, and in other matters, petitioner consulted and was advised by his own privately retained counsel.

On March 21, 1963, the respondent Board met to consider formal charges made to it against petitioner by Marmo and a group of parents. This meeting was not a hearing, but was called pursuant to the provisions of the Tenure Employees Hearing Act to determine whether the charges and the evidence in support thereof would be sufficient, if true in fact, to warrant dismissal or reduction in the salary of petitioner. *Cf. R. S.* 18:3–25. However, petitioner was represented at the meeting by his own counsel, who was permitted to offer certain motions to the Board. After considering each of the charges and the evidence in support thereof, respondent found the charges insufficient to warrant certifying them to the Commissioner.

Shortly thereafter, petitioner became aware that the Essex County Grand Jury was investigating certain allegations made against him, and on the advice and with the assistance of his own attorney, he addressed a letter to the Essex County Prosecutor concerning the reported investigation.

In April 1963, petitioner was named as defendant in a libel and slander suit filed by Marmo as a result of statements allegedly made by petitioner to the Board of Education. Counsel for the Board offered to act in petitioner's behalf to move to dismiss the suit. However, counsel specifically pointed out that his offer did not constitute "any indication that the Board is accepting any responsibility in connection with these libel and slander cases." Counsel for the Board did so move, and the suit was, in fact, dismissed. Petitioner, however, had also consulted his own counsel with respect to the suit.

Finally, petitioner consulted with his own private counsel during the proceedings before the Commissioner in the *Marmo* tenure hearing, at which he appeared as a witness. Petitioner testified that he felt a need for such legal counsel in the face of continuing fear of other civil suits against him.

Petitioner contends that he is legally entitled to the reimbursement he seeks, and that in any event common law and public policy requires that he at

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least be reimbursed for expenses incurred in the performance of his duties. He relies, in the first instance, upon *R. S.* 18:5–50.4, and in addition, upon the retrospective application of *Chapter* 205, *Laws of* 1965, which repealed both *R. S.* 18:5–50.2 and 50.3, as well as *R. S.* 18:5–50.4. *R. S.* 18:5–50.4 read, before repeal, as follows:

> "It shall be the duty of each board of education in any school district to save harmless and protect any person holding office, position or employment under the jurisdiction of said board from financial loss arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to any person or damage to property, within or without the school building; provided, such person at the time of the accident, injury or damage was acting in the discharge of his duties within the scope of his office, position or employment and/or under the direction of said board of education * * *."

Petitioner urges not only that the provisions of this statute clearly apply to the damages he has suffered arising out of "any claim," but also that each of the various charges filed against him constitutes an alleged negligent act resulting either in bodily injury or in damage to the property of the person. The Commissioner is of the opinion that the statute cannot be so broadly construed. The statute, on its face, clearly limits its protection to claims, demands, suits or judgments by reason of negligence or other acts resulting in *accidental bodily injury to any person or damage to property*. The various charges made against petitioner alleged *willful* acts. With respect to the expense incurred in seeking legal advice and assistance in anticipation of *possible* legal action against him (for example, in connection with a directive issued by the Superintendent that he prepare and file charges against Marmo, or in connection with his giving testimony in the *Marmo* hearing, or as a result of the charges filed against him but not certified by respondent for formal hearing), it cannot be said that there was any "claim" resulting from accidental bodily injury or property damage. Whether protection might have been required under this statute or under *R. S.* 18:5–50.2 (which required legal defense of board employees) in the libel and slander suit against petitioner is academic, since petitioner was, in fact, represented by the Board's attorney without cost. The Commissioner holds, therefore, that petitioner is not entitled to the "save harmless" protection of *R. S.* 18:5–50.4.

On December 21, 1965, during the pendency of the action herein, *Chapter* 205, *Laws of* 1965, was approved and became effective. This Act reads as follows:

> "18:5–50.4a
>
> Whenever any civil action has been brought against any person holding any office, position or employment under the jurisdiction of any board of education of this State for any act or omission arising out of and in the course of the performance of the duties of such office, position or employment, 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; and said board of education may

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arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

"18:5–50.4b

Should any criminal action be instituted against any employee for any such act or omission and should such proceeding be dismissed or result in final disposition in favor of such employee, 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.

"18:5–50.4c

Sections 18:5–50.2 and 18:5–50.3 of the Revised Statutes and chapter 311 of the laws of 1938 (c. 18:5–50.4) are repealed."

Petitioner contends that even if he is not protected under the repealed sections, the broader protection of *Chapter* 205 is now available to him. He contends that respondent is now responsible for any proceedings against an employee, either criminal or civil, for actions arising out of the conduct of his employment. Such responsibility, petitioner argues, covers the claims he is making in the petition herein. Before the Commissioner can deal with the broad scope of this contention, he must first deal with the essential question of the retrospective effect of *Chapter* 205, since all of the matters for which petitioner seeks reimbursement, with two exceptions, were begun and completed before the effctive date of this *Chapter*. The two exceptions are the *Marmo* hearings, which were still in progress when the petition herein was filed, and this petition itself.

Respondent concedes, and the Commissioner agrees, that any rights which petitioner may have had under *R. S.* 18:5–50.4 were not abated by its repeal. On the other hand, the Commissioner does not agree with petitioner's contention that *Chapter* 205 has a retrospective effect, and thereby accords him rights which he did not have under *R. S.* 18:5–50.4. *Chapter* 205 is not a clarification of the statutes it repealed, but represents a plain legislative intent to bestow broader protection on school district employees than previously obtained. For example, the "save harmless" protection of *R. S.* 18:5–50.4 extended, as has already been noted, only to losses "by reason of alleged negligence or other act resulting in *accidental bodily injury to any person or damage to property* * * *." (Emphasis supplied.) *Chapter* 205 contains no such limitation. It requires the board of education to save employees harmless in "any civil action * * * from any financial loss resulting therefrom * * *." *Chapter* 205 contains no language, express or reasonably to be implied, that its effect was intended to be retrospective. In the case of *Nichols* v. *Board of Education of Jersey City*, 1950-51 *S. L. D.* 68, affirmed State Board of Education 69, affirmed 9 *N. J.* 241 (1952), petitioner sought, retroactively, the benefits of an amendment to *R. S.* 18:13–19 for establishment of her tenure rights to a position abolished in 1949. The New Jersey Supreme Court said, at page 248:

"The petitioner contends that *L.* 1951, *c.* 292, *sec.* 1, amending *R. S.* 18:13–19, *supra,* should be construed as merely a curative statute and therefore be accorded retroactive operation. Such a construction is not permissible here.

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"Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them. *Kopczynski* v. *County of Camden*, 2 *N. J.* 419, 424 (1949). In the foregoing construction of *R. S.* 18:13–19 as amended by *L.* 1942, *c.* 269, *sec.* 1, the reason for the omission of the office of assistant superintendent from the statutory provision has been demonstrated. In addition, the 1951 enactment provides tenure security where an office is abolished, as well as where the number of those persons holding an office of the designated category is reduced; it adds to the existing reason for reduction (and now abolition of office) namely natural diminution of pupils, the additional reasons of 'economy, a change in the administrative or supervisory organization of the district, or other good cause.' These differences between the prior provision and the 1951 act are so great as to indicate not clarification of the existing statute, but an entirely new legislative scheme, one of far greater scope. The language of the 1951 amendment is clear and unambiguous and makes no provision for retrospective operation."

See also *Regan* v. *State Board of Education*, 109 *N. J. L.* 1, 5 (*Sup. Ct.* 1932), affirmed 112 *N. J. L.* 196 (*E. & A.* 1934).

A clear distinction must be made here between the prospective effect of *Chapter* 205, which provides new remedies, as opposed to the retrospective effect which may be given to a statute which provides a new procedure to deal with an old remedy. Thus, in *Hoek* v. *Board of Education of Asbury Park*, 1959-60 *S. L. D.* 167, reversed State Board of Education 1961-62 *S. L. D.* 211, affirmed 75 *N. J. Super.* 182 (*App. Div.* 1962), upon which petitioner relies, the Appellate Division held that Hoek was entitled to the procedural changes effected in *R. S.* 18:5–51 by the enactment of the Tenure Employees Hearing Act (*Chapter* 136, *Laws of* 1960), and ordered a new hearing before the Commissioner pursuant to the terms of the Act. In so ruling, the Court said, at page 191:

"As was said in *Pennsylvania Greyhound Lines, Inc.* v. *Rosenthal*, 14 *N. J.* 372, 381 (1954), a remedial and procedural statute is ordinarily applicable to procedural steps in pending actions, absent a clear indication of a legislative intent *contra*. Such a statute is given retrospective effect insofar as it provides a change in the form of remedy or provides a new remedy for an existing wrong. *Cf. City of Wildwood* v. *Neiman*, 44 *N. J. Super.* 209, 214 (1957), where we observed that our courts have consistently held that where a statute deals with procedure only, it applies to all actions and proceedings—those which have accrued or are pending, as well as those yet to be brought."

See also 82 *C. J. S.* § 421, *p.* 996; *Neel* v. *Ball*, 6 *N. J.* 546, 551 (1951).

Concerning the two matters which were not completed at the effective date of *Chapter* 205, the Commissioner holds that petitioner has no right to reimbursement. Any expense petitioner incurred for legal advice on his testifying as a witness at the *Marmo* hearings was at his own instance, and did not arise from any action, either civil or criminal, against petitioner. The instant matter certainly does not fall within the protection of *Chapter* 205, since it is an action against the Board, not petitioner.

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Nor does the Commissioner find that common law or public policy requires respondent to reimburse petitioner or defend or save him harmless except as specifically required by law. Whether, as petitioner contends, the legal assistance he received from respondent was primarily in protection of its own interests has not been demonstrated. The fact remains that no action or threat of action has prevailed against him. That petitioner chose, of his own volition, to seek advice of counsel as to his own course of action in several of the incidents herein cannot become an obligation of respondent. Litigation and fear of litigation is a hazard of existence in a society of law. The Legislature, first in *R. S.* 18:5–50.2, 50.3 and 50.4, and later in *Chapter* 205, has given public school officers and employees the degree of protection against that hazard which it deems necessary and desirable. The Commissioner can find no reason or authority to grant more.

The Commissioner finds and determines, therefore, that respondent is not obligated under law to reimburse petitioner for legal expenses incurred in the situations set forth herein. The petition is accordingly dismissed.

ACTING COMMISSIONER OF EDUCATION.

June 21, 1967.

Pending before State Board of Education.

XLVI

BUDGET CUTS WILL BE RESTORED IF NEEDED TO PROVIDE THOROUGH AND EFFICIENT PUBLIC SCHOOL SYSTEM

BOARD OF EDUCATION OF THE CITY OF TRENTON,
Petitioner,

v.

CITY COUNCIL OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

For the Petitioner, McLaughlin and Abbotts (James J. McLaughlin, Esq., of Counsel)

For the Respondent, Joseph Merlino, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," certifying to the Mercer County Board of Taxation a lesser amount of appropriations for school purposes for the 1967-68 school year than the amount certified to the Council by the Board of School Estimate. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on May 17, 18, and 22, 1967, at the State Department of Education, Trenton.

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On January 31, 1967, the Board adopted a proposed budget for the 1967-68 school year calling for a local tax levy of $7,828,734.85. The budget was delivered to the Board of School Estimate which, on February 15, 1967, fixed the amount to be raised at $7,503,734.85, a reduction of $325,000, and submitted an appropriate certification to the Council. The Council met thereafter on March 7 and adopted a resolution fixing the amount to be raised for school purposes at $7,004,734.85, a further reduction of $499,000 or a total of $824,000 less than requested by the Board. Subsequently, the Council certified the amount of $7,004,734.85 to the Mercer County Board of Taxation.

The Board contends that the Council's reduction will deprive the pupils of necessary school facilities, teachers and other educational services and materials to such an extent that the quality of public education in the district will suffer seriously. The Board also alleges that Council acted arbitrarily, capriciously, unreasonably and without thorough consideration of the needs of the school system. It requests the Commissioner to restore the $499,000 reduced by the Council or as much thereof as in his judgment is necessary to provide a thorough and efficient system of free public schools.

Council denies that it acted improperly and supports its action by noting that the amount it certified represents an increase of $651,091.63 over the sum raised for the current school year. Council expresses its belief that such an increase, coupled with the fact of decreasing enrollment, will provide more than sufficient moneys to provide a thorough and efficient public school program in the district.

The principles by which municipal governing bodies are to be guided when it becomes their responsibility to fix the amount of appropriations to be raised locally for school purposes, were laid down by the New Jersey Supreme Court in the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966). Although this case involved a school district organized under Chapter 7 of Title 18 in which the budget had been rejected twice by the voters, the Court-enunciated principles are equally applicable to a Chapter 6 district such as the one herein:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

> "* * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness

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but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

The Commissioner finds no merit in the Board's allegation that Council acted arbitrarily and capriciously. It is clear from the testimony that a series of conferences took place between the Council and the Board and between individual members of both bodies between February 15, when the Board of School Estimate made its certification to Council, and March 7, when the Council adopted the resolution which reduced the school appropriations by $499,000. The record also shows that there were subsequent further meetings and discussions up until March 28, 1967, when the action of Council became final with the adoption of the municipal budget. It is clear that members of the Board feel that the members of Council did not give adequate or serious enough consideration to the problems of the school district. The evidence, however, fails to establish the kind of hasty, biased determination on the part of Council, made with little or no consultation with or information from the Board such as the Commissioner condemned in *Board of Education of National Park* v. *Borough Council of National Park*, decided April 10, 1967. On the contrary, the Board's witnesses admitted that they spent a great deal of time on several occasions answering questions from members of Council and that Council had inquired into the budget in great detail. Under such circumstance the Commissioner finds that petitioner's charge of arbitrary and capricious conduct is not supported by the evidence.

In conjunction with its determination to reduce the school budget by $499,000, Council sent notice to the Board by letter (Exhibit P-2) dated February 20, 1967. As part of this communication, Council suggested particular savings which it believed could be effected as follows:

"Mindful of the fact that the Board of Education can allot the School Budget as it deems advisable, City Council felt that in order to be helpful, the reductions could be affected (sic) in the following budget items:

21 additional teachers @ $6,500	$136,500
1 additional bedside teacher	6,500
1 additional librarian	6,500
8 additional secretaries @ $3,300	26,400
1 additional physician	2,250
annual dental examinations	5,020
new custodial positions	10,650
allotment—Central High Athletics	5,000

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allotment to Junior High Schools (for athletic supplies and expenses)	1,500
allotment to Junior High Schools for football	21,000
turnover in salary savings	100,000
maintenance in summer help	50,000
interior painting	12,575
new and replacement Capital Outlay	115,105
Total	$499,000"

Item 1—Twenty-one Additional Teaching Positions. Much confusion seems to have attached to the Board's request for 21 new teaching positions. Council contends that the only information available to it was that these positions were needed to staff a new addition to the Grant School. But, it avers, the Board had already received approval for these positions in the current year's budget. Council questions why 21 more teachers are needed for the Grant School when the monies for said positions were already provided.

The Board admits that 20 new positions were approved to staff the Grant School addition in September 1966. The new facilities were not completed and will not be ready until September 1967. Only 14½ of these positions were filled, however, the balance of the funds remaining in surplus. Of the 14½ positions, five teachers were assigned to teach pupils ordinarily enrolled in Grant School but temporarily housed in emergency classrooms, four taught in portable buildings which the school district acquired, and five and one-half were used to reduce oversized classes in other schools. The Board proposes to use the 21 additional teachers sought for next year as follows: 12 to Grant School, which, with the five acquired this year, will staff the 17 new rooms in that building; five assigned to special classes; one to Cadwalader School to reduce an oversize class; two to Junior High School No. 1 where six new rooms will be opened to house pupils transferred from Junior High School No. 5 to reduce overcrowding there; and one to Junior High School No. 2 to release a staff member for guidance services similar to those provided in the other junior high schools.

It is apparent that the Board's use of this year's appropriations for 20 new teachers and the reason for 21 additional new positions next year was never made clear or satisfactorily explained to Council. Council's decision to reduce the budget by $136,500 for 21 new teachers was based on its mistaken belief that the Board had already received funds for this purpose, had diverted them to other uses, and now wanted to duplicate this appropriation.

The Commissioner concludes that 21 new teaching positions and the $136,500 needed for this purpose should be reinstated in the budget. Certainly the 12 teachers, in addition to the five already employed, needed to staff the new facilities of the Grant School must be provided. The testimony also shows that there is a need for additional teachers of classes for children with special needs to comply with the requirements of *Chapter* 29, *Laws of* 1966. It is also clear from the testimony that there are many oversized classes in the Trenton schools which need to be reduced if adequate educational opportunity is to be provided for the pupils. The Commissioner finds, therefore, that the employment of 21 additional teachers is essential to the

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maintenance of a thorough and efficient educational program in the Trenton public schools and he directs, therefore, that the amount of $136,500 be reinstated in the school budget for this purpose.

Item 2—One Additional Bedside Teacher. Petitioner presently employs five teachers who give home instruction to pupils who are unable to attend school. The evidence shows that there are at least 50 pupils now eligible for such instruction who are not receiving it because of lack of teachers. The Commissioner finds, therefore, that the addition of this position is essential and the $6,500 eliminated by Council must be reinstated.

Item 3—One Additional Librarian. Eight librarians are currently employed to serve 18 elementary schools. The Board has sought to remedy this lack by gradually increasing the staff of librarians and has proposed the addition of one such employee next year. The Commissioner holds that adequate library facilities and services are essential elements of a minimum educational program for the Trenton schools. The additional librarian proposed is a proper and necessary step in that direction and the amount of $6,500 deleted by Council for this item must be restored.

Item 4—Eight Additional Secretaries. One secretary is currently employed for each elementary school. The Superintendent's original request for 12 additional secretaries was pared by the Board to eight. Of these, it proposes to use four to institute central attendance accounting and thereby relieve teachers of keeping individual classroom registers. The other four are to be assigned to "the most critical areas where help is needed."

The Commissioner does not doubt that the school staff could use additional secretarial personnel and that the teachers would like to be relieved of maintaining pupil accounting records. He cannot find, however, that the employment of eight additional secretaries is essential to the maintenance of minimum educational standards in petitioner's school system. The deletion of $26,400 for this purpose will, therefore, not be disturbed.

Item 5—One Physician. Petitioner now employs five physicians and seeks to add a sixth. The Superintendent testified that the school district has, in fact, been using a sixth physician and paying him from surplus funds. The Board seeks now to include this expenditure as an appropriate budgetary item. The Board's budget (Exhibit P-1) estimates that the current enrollment will decrease by 232 pupils next year. In the light of this fact, Council contends there is no reason to increase the health staff. The Commissioner must concur. Desirable as the services of an additional physician might be, the Commissioner cannot find in the testimony and evidence that the Board has demonstrated the necessity for this position. He is constrained, therefore, not to interfere with the recommendation of Council with respect to this item. The deletion of $2,250 for this purpose will, therefore, not be disturbed.

Item 6—Annual Dental Examinations. The Board testified that it has been conducting dental examinations of its pupils for 35 years and that the $5,020 budgeted for this purpose is the same amount approved for this year. While the Commissioner finds this service to be highly desirable and its elimination after so many years to be deplored, he can find no ground on which he can interfere with the determination made by Council. The Board offered no

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evidence sufficient to establish the absolute necessity of this program and Council's deletion of $5,020 for this item, therefore, cannot be disturbed.

Item 7—New Custodial Positions. The Board contends that new custodial positions are needed to take care of additional facilities to become operative next year. It plans to employ one custodian for a new cafeteria and swimming pool at Junior High School No. 1, and one full-time and three part-time janitors to take care of the new facilities at the Grant School.

The Commissioner can find no basis for the elimination of these jobs nor did Council offer any. It appears obvious that the operation of additional new facilities will require additional custodial services. The Commissioner finds, therefore, that the positions proposed by the Board are essential to the adequate operation of the schools and the amount of $10,650 deleted by Council for this item will be reinstated.

Items 8, 9 and 10—Athletics. The Board's budget contains the following requested increases:

	Expenditures 1965-66	*Budget* 1966-67	*Budget* 1967-68	*Increase* 1967-68 *Over* 1966-67
Allotment for Central High Athletics	----------	$5,000	$10,000	$5,000
Allotment to Junior High Schools for Athletic Supplies and Expense	$2,376.96	3,750	5,250	1,500
Allotment for Junior High School Football Program	2,051.99	4,000	25,000	21,000
Total Increase				$27,500

The Superintendent testified that the athletic program has never received adequate financial support from budgeted funds. In his opinion, the increase of $27,500 requested for the three items above represents a step in the direction of a more complete program and the assumption of financial responsibility therefor by the Board of Education. Council takes the position that the increases are unnecessary at this time.

The Commissioner finds no ground for intervention with respect to these three items. However desirable expanded athletic activities may appear, there is no showing that the present program is inadequate or that the increased amount of $27,500 requested is essential to the maintenance of the school program.

Item 11—Turnover in Salary Savings. The Board calculates the teacher salary account on the basis of the salary and appropriate increments for each member of the current staff plus new positions to be added. This assumes that all members of the present staff will return for the ensuing year. Customarily, however, there are replacements for teachers who leave the district for various reasons. This practice results in a saving to the Board for the reason that replacements are usually employed at a lower beginning salary than that paid to the departing employee. The Board testified that it is aware

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that its teacher turnover produces a surplus but that as such it constitutes its only contingency fund. Whatever surplus is realized, it contends, it applies to a reduction of its budget in subsequent years and points to the fact that it appropriated $145,000 from surplus to reduce the current year's budget and a like amount for 1967-68. The Board urges that such a contingency fund is essential in order to meet unanticipated expenditures and the deletion of $100,000 will leave it no operating margin at all.

Council maintains that such a surplus is unnecessary when the statutes afford the Board a means by which it can obtain an emergency appropriation from Council if and when needed. *Cf. R. S.* 18:6–55, 56, and 57. The Board admits that such a possibility exists in the law but contends that past experience has proved it too cumbersome, slow and unwieldy to afford realistic and practical relief.

From his study of this item the Commissioner concludes that Council's reduction of $100,000 is overly severe. Examination of past practice indicates that the Board has not maintained large surpluses and that it has appropriated whatever balances accrued to subsequent years' budgets. The necessity for a reasonable operating margin or contingency fund can hardly be questioned. In the operation of a $12 million enterprise such as that herein, an operating surplus of $100,000 is not unreasonable. Furthermore, the long-experienced Secretary to the Board expressed doubt that teacher turnover would produce the amount estimated by Council on which it based this reduction. After considering all of these facts the Commissioner concludes that Council's reduction of $100,000 on this item could seriously, and adversely, hamper the proper operation of the school system. He directs, therefore, that this amount be reduced by $50,000 and that an amount of $50,000 be reinstated in the school budget.

Items 12 and 13—Maintenance and Interior Painting. Witnesses for the Board testified at some length with respect to the need for repairs and for proper maintenance of the various buildings and grounds. They alleged that if Council's cut in the appropriations for this purpose remains, it will not be possible to employ extra mechanics during the summer to make needed plumbing, heating and electrical repairs or to do scheduled interior painting. The Board claims that it has already reduced its maintenance requests to the minimum and any further cuts cannot be made if its plant is to be adequately maintained.

The Commissioner does not question the desirability of the maintenance programs proposed by the Board. It is also possible that Council's curtailment of these proposals may prove to be "penny wise and pound foolish." Nevertheless, the Commissioner is constrained from substituting his judgment for that of Council absent a clear showing that the education of the children of the district will be so adversely affected that the Commissioner's intervention is required. No such showing has been made with respect to these items and Council's reduction of the amount of $62,575 will, therefore, remain undisturbed.

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Item 14—Capital Outlay. The budget proposed by the Board for the capital outlay account shows the following: (Exhibit P-1, page H-1)

	Expenditures 1965-66	*Budget* 1966-67	*Budget* 1967-68
Remodeling—Building			$125,000.00
Instructional Equipment	$60,422.36	$55,962.47	125,900.58
Non-instructional Equipment	2,811.49	4,594.60	5,595.00
Totals	$63,233.85	$60,557.07	$256,495.58

The Superintendent testified that much of the equipment in the schools is antiquated and needs to be replaced by new and modern teaching materials and apparatus. He testified further that the requests of the staffs in the various schools amounted to three times the expenditure proposed by the Board in its budget.

The Commissioner has no doubt that the educational program would be strengthened and improved by the acquisition of the items detailed by the Board in its budget and that the staff would make excellent use of such equipment to the educational advantage of the pupils of the district. He concurs with the Superintendent that the provision of such equipment is an essential requisite to the improvement of the educational standards of the school district. It has not been shown herein, however, that Council's reduction in this account will prevent the maintenance of an adequate school program. If Council's reduction of this item is allowed to stand, the Board will still have more than twice as much to expend for equipment next year than was available either this year or last. Under these circumstances the Commissioner finds no ground to intervene, and he is constrained not to disturb Council's determination to reduce the capital outlay account by $115,105.

In summary, the Commissioner finds and determines that the Board has not sustained its burden of a clear showing that the reduction made by Council with respect to suggested economies in Items 4, 5, 6, 8, 9, 10, 12, 13 and 14 will prevent compliance with mandatory legislative and administrative requirements or make it impossible to meet minimum educational standards for the school district. Absent such a showing, the Commissioner is without authority to intervene and is constrained from interferring with the determination of Council. The Commissioner further finds and determines that with respect to Items 1, 2, 3, 7 and 11, Council, through misunderstanding, inadequate information or other cause, suggested economies and ordered reductions in the appropriations which, if permitted to stand, will result in insufficient funds to provide a thorough and efficient system of public schools for the City of Trenton. The Commissioner directs, therefore, that there be added to the certification previously made by the Council to the Mercer County Board of Taxation an amount of $210,150 comprising $136,500 for 21 additional teachers, $6,500 for one additional bedside teacher, $6,500 for one additional librarian, $10,650 for new custodial positions, and $50,000 in turnover in salary savings.

ACTING COMMISSIONER OF EDUCATION.

June 27, 1967.

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XLVII

CHARGES AGAINST TEACHER RENDERED MOOT BY RETIREMENT

IN THE MATTER OF THE TENURE HEARING OF JEAN WAESPI, GREATER EGG HARBOR REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY

COMMISSIONER OF EDUCATION

ORDER OF DISMISSAL

The Board of Education of the Greater Egg Harbor Regional High School District having on December 2, 1966, certified charges against Jean Waespi to the Commissioner of Education pursuant to the Tenure Employees Hearing Act; and the said Jean Waespi, after due notice, having failed to file an answer to said charges; and Emil Waespi, the husband of said Jean Waespi, having notified the Commissioner of his wife's incapacity to defend against the charges made against her, and having asked that the hearing and determination of the charges be held in abeyance; and it now appearing, upon information from the Teachers Pension and Annuity Fund, that said Jean Waespi has been retired from her employment as a teacher for reasons of disability; and it further appearing, by virtue of such retirement, that Jean Waespi is no longer an employee of the Board of Education of the Greater Egg Harbor Regional High School District; and it further appearing that the charges herein have been rendered moot; now therefore, for good cause appearing,

IT IS ORDERED, on this 27th day of June 1967, that the charges certified against Jean Waespi by the Board of Education of the Greater Egg Harbor Regional High School District be and hereby are dismissed, without prejudice.

ACTING COMMISSIONER OF EDUCATION.

June 27, 1967.

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XLVIII

FIREMAN MAY BE DISMISSED FOR FAILURE TO OBSERVE PROPER SAFETY PROCEDURES

IN THE MATTER OF THE TENURE HEARING OF HERBERT L. WESTCOTT, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY

For the Complainant, Joseph G. Barbieri, Esq.

For the Respondent, *Pro Se.*

COMMISSIONER OF EDUCATION

DECISION

Charges filed against respondent, a fireman in the Elizabeth schools, were certified to the Commissioner of Education by resolution of complainant Board of Education on March 9, 1967, pursuant to *R. S.* 18:3–25. The charges, which were filed by the supervisor of janitors in the Elizabeth schools, allege that respondent knowingly violated certain prescribed boiler operation procedures, thereby creating unsafe conditions in the boiler and heating system of the school and resulting in damages thereto.

A hearing on the charges was held on April 27, 1967, at the office of the Union County Superintendent of Schools, Elizabeth, by a hearing examiner appointed by the Commissioner of Education for that purpose. The report of the hearing examiner is as follows:

Respondent was assigned as fireman at Grover Cleveland Junior High School No. 1, where he has been employed for six years. On the evening of December 26, 1966, respondent went on duty at eleven o'clock. At about four o'clock on the following morning, the alarm bell indicating boiler operation trouble sounded. Respondent determined that the burner was not firing and made three or four unsuccessful attempts to "light off" the burner, using the electrical controls. He read the water level in the gauge and discovered that there was "better than a good half a glass," indicating to him that there was enough water in the boiler. He then by-passed an electrical control valve (solenoid valve) which is designed to prevent the operation of the boiler on insufficient water, and fired the boiler without further difficulty. The by-passing is accomplished by disconnecting the oil-feed line above the solenoid valve and reconnecting it below the valve, so that the safety control is rendered ineffective in shutting off the supply of fuel to the burner when the water in the boiler falls below a safe level. Respondent conceded that he knew that the by-passing was an emergency measure which can be used only when there is absolute assurance that there is a safe water level. He further conceded that he knew that only by "blowing down" the water gauge can a "true" water level reading be obtained. Blowing down the gauge on this particular boiler installation cannot be done satisfactorily by one man, however, and since

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respondent was alone and the night was cold, he felt that the gauge gave him sufficient assurance that there was enough water in the boiler to warrant by-passing the control valve. He testified that he would do it again under like circumstances, as he had done on three previous occasions. He testified further that he did not light the second boiler because it would have taken too long to get sufficient steam pressure to heat the building.

When respondent was relieved at seven o'clock, he told the day fireman of the difficulty he had encountered, and of by-passing the safety valve. The day fireman immediately cut down the oil pressure on the boiler, and started the second boiler. When it was procedurally safe to do so, the first boiler was shut off and allowed to cool. Inspection by the day fireman, and later by the supervisor of janitors and the supervisor of maintenance, revealed to them that the boiler had been operated on insufficient water. Further inspection revealed that the boiler tubes had been damaged and were leaking. The cost of damage repairs amounted to $539.00. The day fireman and the two supervisors testified that the reason the oil burner went out at four o'clock in the morning was due to the fact that the safety valve had properly functioned to prevent the boiler from operating at an unsafe water level. They were positive in their assertion that the by-passing technique utilized by respondent should be employed only in extreme emergencies and then only after the water column had been "blown down" to give positive assurance that the water level reading was a true reading, and after all other safety factors had been checked. Such an emergency, in the judgment of complainant's witnesses, did not exist, and the required precautionary procedures were not followed.

From the testimony the hearing examiner concludes that respondent's action was not simply an error in judgment, but a conscious violation of prescribed safety practices in boiler operation. Costly as the repairs were, the damage could have been greater, and the hazard to pupils, had an explosion occurred while school was in session, is incalculable. The hearing examiner therefore recommends (1) that respondent be dismissed from his assignment as fireman and be assigned to the classification of janitor; (2) that his pay scale be in accordance with the classification of janitor; and (3) that he suffer loss of pay for ten days during which he was suspended immediately following the incidents which brought about the charges herein.

* * * * * * *

The Commissioner has carefully considered the findings, conclusions, and recommendations of the hearing examiner as set forth, and concurs therein. He holds that by his conduct respondent Herbert Westcott has forfeited his right to employment as a fireman in the Elizabeth schools, and directs that he no longer be employed in such capacity. He affirms the ten days' suspension without pay previously imposed by the Board of Education, and further affirms the employment of respondent in the classification of janitor and subject to the pay scale for that position.

ACTING COMMISSIONER OF EDUCATION.

June 27, 1967.

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XLIX

BOARD NOT REQUIRED TO AFFORD FORMAL HEARING ON QUESTION ARISING UNDER COMPULSORY ATTENDANCE LAW

DANA HAGER,

Petitioner,

v.

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

Respondent.

For the Petitioner, Rubin and Lerner (Frank J. Rubin, Esq., of Counsel)

For the Respondent, Rosenhouse and Cutler (Nathan Rosenhouse, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner is a child of compulsory school age who is domiciled with her parents in the school district administered by respondent. Respondent brought charges against her parents in Municipal Court under the compulsory attendance laws, *R. S.* 18:14–14, 14–39, for failure to cause petitioner to attend school. Petitioner and her parents then instituted the present action alleging that she is receiving equivalent instruction at home and that they are entitled to a hearing either before the respondent Board of Education or the Commissioner of Education to establish the merits of that allegation. The material facts are undisputed and the issue is submitted on briefs of counsel.

Petitioner last attended the public schools of the district on February 13, 1966. She alleges that at about that time she experienced "a pounding sensation in her ears." There followed a series of meetings between petitioner's parents and members of the school staff, as a result of which petitioner was required to undergo a battery of psychological and intelligence tests administered by the school psychologist. The tests revealed that petitioner is an exceptionally able child, and there was some contemplation of placing her in a private school. However, petitioner was not so placed and when she did not return to school, respondent, as noted above, filed a complaint in Municipal Court on October 28, 1966, charging violation by her parents of the compulsory education statutes. On November 27, 1966, respondent offered petitioner's parents an opportunity to appear before it and present evidence with respect to any physical or mental reasons why petitioner could not attend or benefit from instruction at school, pursuant to *R. S.* 18:14–14. The parents declined to proceed on the basis of this single, limited issue and insisted that they be heard also on the question of whether the child was receiving "equivalent instruction elsewhere." Respondent refused to accede to this demand,

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taking the position that the question of equivalent instruction is properly a matter to be heard by the Municipal Court as part of the parents' defense to the complaint before that tribunal. Subsequently the subject appeal was brought before the Commissioner of Education and the proceedings in Municipal Court were stayed pending the determination of the issue herein.

The following excerpt from the statutes governing school attendance is relevant to this matter: (*R. S.* 18:14–14)

> "Every parent, guardian or other person having custody and control of a child between the ages of 6 and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school. * * *"

Petitioner's parents contend that the statute imposes a duty on the Board of Education to hear and determine whether or not their daughter is receiving equivalent instruction elsewhere. As parents, they acknowledge their responsibility under the law to cause their child to be educated (1) at public school; (2) at an equivalent private day school; or (3) to receive equivalent instruction elsewhere. They seek an opportunity to establish that their daughter is properly receiving her education under the third alternative and they contend that the appropriate forum to receive and evaluate their proofs in this respect is either the local Board of Education or the Commissioner of Education, not the Municipal Court. The parents contend that the judicial forum does not provide for a fair determination of the issues, nor should they be exposed to quasi-criminal proceedings in order to establish that equivalent instruction is being furnished to their child. In their opinion, the educational expertise of the Board of Education or the Commissioner should first be brought to bear to determine whether equal education is being provided. If the educational forum makes a finding of lack of equivalency then, they argue, the judicial and penal sanctions are available for enforcing compliance.

Respondent denies any duty to hear proofs of equivalency of instruction and maintains that had the Legislature so intended it would have clearly so stated in the statute. Its duty, with respect to excusing children from the requirements of school attendance, respondent asserts, is limited to determining the mental and physical capacity of a child to benefit from school attendance. Respondent maintains that its remedy for non-school attendance, as provided by statute, is a complaint lodged against the parents under *R. S.* 18:14–39, and that the question of equivalent education may then be appropriately raised as a defense in the Municipal Court proceedings. Respondent does not dispute that *R. S.* 18:14–14 does not expressly prohibit the Board from hearing the issue of instructional equivalency and accepts that such an inquiry would come within the scope of its general authority. The Commissioner sees no need to pass upon the validity of that latter position since, in this case, the Board has preferred to impose the duty upon the parents to justify petitioner's nonattendance at school before a court of competent jurisdiction. In summary, the Board of Education argues that to require it to conduct an inquiry with respect to equivalency of instruction is contrary to

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the statutory scheme, would serve no useful purpose, and would usurp the jurisdiction of the Municipal Court.

Counsel have stipulated that the sole issue the Commissioner is asked to decide in this case is whether *R. S.* 18:14–14 imposes upon the Board of Education a mandatory duty to provide a hearing to petitioner's parents on the question of whether petitioner is receiving equivalent instruction elsewhere than at school.

The Commissioner, at the outset, sees no need to consider petitioner's contention that a Board of Education is in a better position than the Municipal Court to determine whether the education a child is receiving at home is equivalent to that which he or she would get in the public school. Irrespective of any such opinion is the fact the law requires disputes of that nature to be adjudicated in the judicial forum. The proceeding which petitioner urges is simply not in conformity with the express legislative scheme for the enforcement of school attendance. Moreover, the Commissioner certainly cannot agree that the judicial forum precludes opportunity for a fair hearing. Quite aside from the illogic of that position is the fact that the burden of proof in a quasi-criminal proceeding is "beyond a reasonable doubt" (see *State* v. *Cestone,* 38 *N. J. Super.* 139, 148 (*App. Div.* 1955).) a burden which would not have to be carried by the authorities in an administrative proceeding.

Moreover, even assuming, *arguendo,* that respondent grants petitioner's wish to be heard on the issue of educational equivalency or is directed by the Commissioner to do so, and that the Board finds that her instruction at home is not equivalent to that given at school, the Board would have no power to enforce compliance in accordance with its finding and it would have engaged in an exercise in futility. Its only responsible course would then be to institute an action in Municipal Court such as the one now pending to compel petitioner's attendance at school. In such case the Municipal Court would not be bound by the Board's proceedings nor would it review the Board's finding as an appellate tribunal. The judicial proceedings would be addressed to the complaint before it, would require a hearing *de novo* and would involve a determination completely independent of the Board's finding. Such is the legislative plan as set forth in the statutes.

The Commissioner finds and determines, therefore, that the Franklin Township Board of Education is not obligated to accord to petitioner or her parents a hearing on the issue of whether or not she is receiving equivalent education elsewhere than at school. The petition is dismissed.

COMMISSIONER OF EDUCATION.

July 17, 1967.

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L

WHERE BUDGET CUT IS NOT ARBITRARY AND APPROPRIATION IS ADEQUATE, COMMISSIONER WILL NOT INTERVENE

BOARD OF EDUCATION OF THE TOWNSHIP OF RARITAN,
Petitioner,

v.

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF RARITAN, MONMOUTH COUNTY,
Respondent.

For the Petitioner, Arthur Dennis Loring, Esq.

For the Respondent, Howard A. Roberts, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Committee," taken pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on May 31, 1967, at the State Department of Education, Trenton.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $1,508,503 for current expenses and $149,997 for capital outlay for the ensuing year. The items were resubmitted in the same amounts on February 28, 1967, at a second referendum pursuant to *R. S.* 18:7–81 and again failed of approval. The budget was then sent to the Committee pursuant to *R. S.* 18:7–82 for its determination of the amount of funds required to maintain a thorough and efficient local school program.

On March 6, 1967, the Board met in consultation with the Committee to discuss the school budget. The Committee met thereafter and adopted a resolution certifying the amount of the tax levy for current expenses at $1,436,279, a reduction of $72,224, and the tax levy for capital outlay at $99,997, a reduction of $50,000. The Board contends that the Committee's action was arbitrary and capricious and the amount certified is insufficient to provide an adequate system of education for the pupils of the school district. The Board appeals to the Commissioner to restore the funds deleted by the Committee.

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In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

> "* * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

Counsel for respondent moved to dismiss the appeal herein on the grounds (1) that the relief sought by petitioner is untimely for the reason that the tax levy has been certified to the Monmouth County Tax Board and cannot now be amended and (2) that petitioner had not carried the burden of proving that respondent's action to reduce the school appropriations was arbitrary, capricious or unreasonable. Decision on both motions was reserved and will be incorporated herein in this adjudication of the merits of the appeal.

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In its Answer respondent suggests the following reductions and economies in the Board's budget:

Item	*Reduction*	
A. Eliminate new clerical positions	$12,744	
B. Eliminate Federal aid coordinator	7,480	
C. Reduce library materials	5,000	
D. Reduce teaching supplies	5,000	
E. Eliminate six new teaching positions	42,000	
Total current expenses		$72,224
F. Reduce new equipment	8,000	
G. Reduce site improvement work	42,000	
Total capital outlay		$50,000

A—New Clerical Positions, $12,744. It is not entirely clear from the testimony whether the Board's budget contemplates three or four new clerical positions. During the current year two new clerks were added although no provision had been made in the budget for such an expenditure. One clerk's services are shared by the Superintendent's office and the child study team and the other assists the librarian. The Board seeks to incorporate these positions in the budget and to eliminate the sharing by employing one more clerk. Request has also been made for an additional clerk in the Secretary's office. Council contends these positions are not essential.

The Commissioner recognizes the important services that clerical employees perform in a school system, particularly in relieving professional employees of routine tasks. There is no doubt that the school system could make good use of additional clerks in the areas proposed and that professional services could be made more efficient and effective thereby. Were the Commissioner in a position to exercise independent judgment, he would endorse the desirability of the proposed clerical services. He is constrained, however, not to override the Committee's determination unless it is clearly shown that an inadequate school system will result. The Commissioner cannot find such a showing herein with respect to this item and it will, therefore, not be disturbed.

B—Federal Aid Coordinator, $7,480. Although not provided for in the current year's budget, the Board employed an additional staff member beginning September 1966 to develop projects, apply for their funding, and coordinate the school district's participation in the various Federal aid programs. It seeks to continue this position and to incorporate its cost in next year's budget. The Committee suggests its deletion as a possible economy.

School administrators are finding it difficult to devote the amount of time required to be spent on detailed procedures in connection with the various grants now available through Federal funding. The delegation of this task to a staff member has probably helped the school district to realize funds for the support of programs which would have been unavailable otherwise. The position is undoubtedly highly desirable from the Board's point of view. It has not been shown, however, that it is essential to the maintenance of an

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adequate school program. Absent such a showing, the Commissioner must decline to intervene and the Committee's deletion of $7,480 will stand.

C—Library Materials, $5,000, and D—Teaching Supplies, $5,000.

The Board's budget statement supplies the following data:

	Expenditures 1965-66	*Appropriations* 1966-67	*Proposed* 1967-68
Textbooks	$19,951.65	$48,697	$56,803
Library Materials	22,200.65	21,703	36,636
Teaching Supplies	54,678.61	67,368	77,514
	$96,830.91	$137,768	$170,953

The Board defends its increases in these appropriations on the grounds of increasing enrollment and the need "to catch up." It maintains that it has made less than adequate appropriations in these accounts in past years and it needs to provide more and better materials of instruction. The Committee suggests a total reduction of $10,000 from the amount requested for these purposes.

Adequate materials for instruction must be supplied to insure a proper educational program. The figures above indicate that the Board's expenditures in this respect have not been sufficient in the past. The expenditure for this purpose in 1965-66 was only $18.00 per pupil, which is far below the average for New Jersey school districts. The current year's appropriations permitted $24.00 per child and the Board asks for approximately $27.50 per pupil next year. The Committee's deletion of $10,000 will reduce the unit cost to about $26.00.

While the Commissioner does not believe this amount to be any more than adequate and he would wish to use the full amount retained for this purpose, he cannot find the reduction made by the Committee to be so unreasonable that he can set it aside. Even with an anticipated increase in enrollment, the school district will have an adequate amount in this account and will be able to spend more per child for instructional materials than it has in the past two years. Under such circumstance, the Commissioner is without power to interfere with the Committee's reduction of $10,000.

E—Six New Teaching Positions, $42,000. In its budget the Board contemplates the employment of 12 additional teachers: four in the elementary grades, five in the high school, and three for special subject areas. Its witnesses contend that this represents an under-estimation and that they now realize they will need ten new teachers instead of four in the elementary schools. The Committee avers, however, that the Board budgeted for 258 teachers in 1966-67 for 6,303 pupils but only employed 250. The Board's estimated enrollment for 1967-68 is 6,200 pupils. The Committee finds no reason, therefore, why 12 additional teachers are needed for fewer pupils.

Actual enrollment in 1965-66 was 5,401 pupils. For the current year the Board estimated an increase to 6,305 pupils but in actuality realized in round numbers only 5,700, an overestimation of 600 children. For 1967-68 it is figuring on an enrollment of 6,200 which is 100 less than its estimation for

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the current year but 500 more than it actually enrolled. The Board offers this explanation for the fact that fewer teachers were hired this year than proposed and why additional positions are needed for next year.

The Board also points out that it is in process of erecting a new school comprising 12 classrooms and additions to other schools which will produce 34 classrooms. Completion of these 46 new classrooms will permit the elimination of curtailed-session classes in the first three grades and a general slight reduction of class size. The Board contends that if the new teaching positions are not provided it will have empty classrooms with no teachers, and classes will remain large.

The elimination of curtailed sessions and the reduction of class size are accomplishments to be commended. From the testimony, however, it appears that these worthy goals can be achieved within the appropriations made by the Committee. The Board now has sufficient teachers to eliminate its double sessions and needs only the completion of the additional classroom space. The completion time, however, is conjectural. Various dates from the middle of November 1967, until sometime in February 1968 are reported. It appears reasonable to assume that the additional elementary teachers will not be able to be employed until an appreciable part of the school year has passed and that complete funds for these salaries will therefore not be needed.

In the light of all the testimony on this issue, the Commissioner concludes that the Committee's suggested reduction of the twelve new teaching positions to six must be allowed to stand.

F—New Equipment, $8,000. The Board's budget statement gives the following information with respect to new equipment under capital outlay:

Expenditures	*Appropriations*	*Proposed*
1965-66	1966-67	1967-68
$14,512.60	$36,177	$56,964

Witnesses for the Board testified that such items as classroom furniture, typewriters, band instruments, etc., are included in the new equipment proposed to be purchased. This budget item provides also for the purchase of three additional buses. The Committee recommends that this account be reduced by $8,000.

The testimony with respect to this item indicates that the equipment proposed to be purchased would be desirable and would improve the educational opportunities afforded to the pupils. The evidence falls short, however, of establishing its essentiality to the maintenance of an adequate school program. The Committee's reduction of $8,000 will, therefore, not be disturbed.

G—Site Improvement Work, $42,000. The Board's budget proposed appropriations of $58,668 for site improvements at each of the elementary schools but with the major outlay at the high school building. There the Board hopes to control soil erosion problems which it says are threatening the football field and to eliminate sand conditions which cause damage both to the exterior and interior of the building. If sufficient funds are available

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the Board also plans the construction of a track and the erection of a fence at the high school site. The Committee reduced this account by $42,000.

The testimony indicates that the need for the proposed site improvements is a problem of long standing which grows more serious and may well be more costly each year. It may also be true that further postponement of these improvements is "penny wise and pound foolish." However that may be, the Commissioner finds no ground on which to order the Committee's reduction to be reinstated in order that a thorough and efficient school system may be maintained. This is a major capital improvement, the cost of which might more properly be spread over a number of years by means of a bond issue instead of being raised in a single year's tax levy. This method of financing the improvement is available to the Board and might be more acceptable to the community than raising the total amount in one year. In any case, the Commissioner must decline to intervene with respect to this item.

In addition to reviewing the several economies suggested by the Committee, the Commissioner has considered the Board's budget in its entirety and the testimony with respect to it. He is aware that this school district has faced extremely difficult problems of financing an adequate school program and he commends the Board for notable progress which has been made in raising educational standards. That much remains to be done is evident. To cite only two examples, the teacher-pupil ratio is too high and the capital improvement program at the various school sites is badly needed. The Commissioner notes further that the Board will end this current school year with a surplus estimated at $95,000. It may be that some of the curtailments made by the Committee may be able to be realized by use of this surplus.

In this case, as in many others in which school budgets are rejected by the voters, it appears to the Commissioner that the Board's aspirations for its educational program have run ahead of the community's understanding of a desirable school program and its willingness to provide the necessary financial support. The Board's task then is to raise the sights of the community and meanwhile to provide the best school program possible with the funds made available. Only if those funds are so inadequate that minimum educational standards for a thorough and efficient system of schools cannot be maintained in the district, may the Commissioner intervene and override the determination of the school appropriations made by the Committee. In the instant matter, the Commissioner is convinced that the Board's budget requests are in no way excessive and would be eminently desirable in raising the educational standards of the school district. The Commissioner cannot conclude, however, that the reduced appropriations certified by the Committee will so seriously impair the school program that a thorough and efficient system of free public schools cannot be maintained in the Raritan Township school district. He is constrained, therefore, from interfering with or modifying the determination made by the Committee.

The petition is therefore dismissed.

COMMISSIONER OF EDUCATION.

July 17, 1967.

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LI

ILLEGALLY DISMISSED TEACHER ENTITLED TO COMPENSATION FOR PERIOD OF DISMISSAL

CELINA G. DAVID,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY,

Respondent.

For the Petitioner, Hart, Mandis, Rathe & Woodcock (Joseph C. Woodcock, Jr., Esq., of Counsel)

For the Respondent, Bauer, Bogosian & Whyte (Eznick Bogosian, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner is a teacher who was dismissed by respondent at the end of the school year in June 1964. She appealed pursuant to *R. S.* 18:3–4, and her right to reinstatement and to compensation for the period of her illegal dismissal was upheld by the Commissioner of Education in a decision promulgated on April 22, 1965. Subsequent appeals by respondent to the State Board of Education and to the Appellate Division of Superior Court resulted in affirmance of the decision of the Commissioner. The Court's decision was handed down on September 28, 1966. Thereafter, on October 5, 1966, petitioner made application in writing for compensation pursuant to *R. S.* 18:5–49.1. Petitioner and respondent have since been unable to reach an agreement on the amount of money due petitioner and now ask the Commissioner to decide that controversy. Oral argument was heard by the Assistant Commissioner in charge of the Division of Controversies and Disputes on May 16, 1967, at the Bergen County Court House, Hackensack. Briefs of counsel have also been submitted.

The statute applicable to the issues raised herein is *R. S.* 18:5–49.1, which reads as follows:

> "Whenever any person holding office, position or employment with a local board of education or with the State Board of Education shall be illegally dismissed or suspended from his office, position or employment, and such dismissal or suspension shall upon appeal be decided to have been without good cause, the said person shall be entitled to compensation for the period covered by the illegal dismissal or suspension; *provided,* that a written application therefor shall be filed with the local board of education

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or with the State Board of Education, as the case may be, within thirty days after such judicial determination."

Two issues are raised in this case:

1. What is the meaning of the term "compensation" as used in *R. S.* 18:5–49.1?

2. If petitioner limits her claim to the year 1964-65, should earnings subsequent thereto be applied to mitigate her claim?

Petitioner contends that the word "compensation" implies that she is to be made whole to the extent that an award of money can do so. She argues that had the Legislature intended to limit recovery for an illegal dismissal merely to wages lost, it would have used the word "salary" instead of "compensation" in the statute. The use of the term "compensation" instead of "salary," petitioner alleges, indicates (1) that the rule of mitigation of damages should apply, and (2) that in measuring the damages the recovery should not be limited to salary but to all damages that necessarily follow the unlawful action. Petitioner finds in the statute a clear legislative intention to entitle a wrongfully dismissed employee to compensatory damages. Such damages, she claims, should place her as nearly as possible in the same position she would have been in had she not been removed illegally from her employment in respondent's school system. If she had not been so removed, petitioner argues, she would not have (1) lost a full year's salary, (2) suffered personal embarrassment and injury to her professional reputation, and (3) needed to pay fees and expenses to engage counsel to obtain vindication. Petitioner claims that unless all of these elements are taken into account, she will not be justly compensated for respondent's tortious act.

Petitioner finds further support for her claim for compensatory damages in other language of the statute. She points out that eligibility for compensation follows upon an "appeal" in which there is a "judicial determination" that the dismissal was illegal. Such terms, she maintains, connote litigation and indicate a legislative intention not only that the aggrieved employee initiate the steps necessary to bring about an appeal and a judicial determination, but that the employee also be reimbursed for the cost of determining the validity of the dismissal. Finally, she points out that she does not seek legal fees but damages which compensate her for the cost of vindicating her rights.

Respondent Board of Education admits its obligation under the statute to pay petitioner the salary she would have been paid, mitigated by whatever amounts she earned or could have earned during the period of her wrongful dismissal. With respect to mitigation, respondent contends that petitioner's earnings for not only the year 1964-65 should be applied but also for subsequent years until the final determination of the validity of her dismissal. Respondent denies any obligation to pay interest, legal fees, expenses, or damages of any kind and finds no authority in the status for the award of such damages. Finally, respondent claims a right to examine petitioner with respect to the efforts she made to find employment during the 1964-65 school year in order to establish the amount she could have earned to be applied in mitigation.

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It is clear that petitioner is entitled to her salary for the year 1964-65, less what she earned or could reasonably have earned during that period. *Miele* v. *McGuire*, 31 *N. J.* 339 (1960); *Mastrobattista* v. *Essex Co. Park Commission*, 46 *N. J.* 138 (1965); *Lowenstein* v. *Newark Board of Education*, 35 N. J. 94 (1961); *Mullen* v. *Jefferson Twp. Board of Education*, 81 *N. J. Super.* 151 (*App. Div.* 1963) Counsel for petitioner represents that petitioner was not employed during the 1964-65 school year for the reason that her dismissal occurred during the summer when the school districts had completed their hiring for the ensuing year and there were no vacancies for which petitioner could qualify or apply, and that she earned nothing during that period. In the interest of disposing of this prolonged litigation without further proceedings, the Commissioner will accept counsel's representation without the necessity of examining petitioner with respect to her efforts to find employment in the 1964-65 school year. It is well known that boards of education generally employ staff during the spring of each year and attempt to have all vacancies filled before the summer recess begins. The possibility of petitioner's finding an opening for which she could qualify after receipt of her notice of dismissal on July 16, 1964, was remote at best. In the Commissioner's judgment, examination of petitioner on this question of her efforts to find work would only serve to prolong this matter further. The Commissioner finds, therefore, that petitioner is entitled to the salary she would have earned during the 1964-65 school year had her employment in respondent's schools not been interrupted. He further finds that there are no earnings to be applied in mitigation for that period.

Respondent's claim that its obligation for unpaid salary should be mitigated by petitioner's earnings in the 1965-66 school year cannot be supported. Due to the fact that respondent appealed from the Commissioner's decision dated April 22, 1965, that it had dismissed petitioner illegally, this matter was not finally determined until September 28, 1966, when the Superior Court's affirmation was promulgated. Petitioner meanwhile had made application and was employed in another school district beginning in September 1965. Had she relinquished her new position and returned to petitioner's employ, she would have been entitled to full pay for the entire period from dismissal to reinstatement, less earnings during that time. Petitioner makes no claim, however, for salary beyond the 1964-65 school year. Neither did she return to respondent's staff. It must be held, therefore, that petitioner abandoned her employment with respondent in favor of her new position and in so doing abandoned entitlement to salary after the 1964-65 school year. The circumstances herein are analogous to the situation which occurred in the *Mullen* case, *supra*. Petitioner having abandoned any claim to employment with respondent after the 1964-65 school year, respondent is not entitled to profit from mitigation of her subsequent earnings.

With respect to petitioner's further claim for compensatory damages, the Commissioner has already construed the meaning of the word "compensation" as used in *R. S.* 18:5–49.1 in the case of *Romanowski* v. *Jersey City Board of Education*, decided December 30, 1966, in which he said:

> "The use of the term 'compensation,' even in a broad sense, must be interpreted to mean 'earnings.' "

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See also *Mastrobattista* v. *Essex County Park Commission, supra.* The Commissioner holds, therefore, that claims for the payment of interest, of fees and other expenses, or of damages other than lost earnings, is not within the contemplation and meaning of the statute.

The Commissioner finds and determines that Celina David is entitled to be paid by the Cliffside Park Board of Education the full amount of salary which she would have been paid for the 1964-65 school year had her employment not been interrupted.

COMMISSIONER OF EDUCATION.

July 25, 1967.

LII

WHEN PARENT VOLUNTARILY WITHDRAWS CHILD FROM PUBLIC SCHOOL, BOARD OBLIGATION TO PROVIDE SPECIAL EDUCATION PROGRAM CEASES

IN THE MATTER OF "MF,"

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,
Respondent.

For the Petitioner, Jay J. Toplitt, Esq.

For the Respondent, Riker, Danzig, Scherer & Brown (Howard F. Casselman, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

This action is brought by the father of a ten-year-old boy, hereinafter referred to as "MF," alleging that the respondent has improperly classified his son and has failed to provide the special educational facilities properly suited to the boy's needs as required by *R. S.* 18:14–71.1 *et seq.* Respondent denies that it has failed in its duty to provide special educational facilities for MF in accordance with the laws of the State, and has moved to dismiss the petition on the grounds that it fails to state a proper cause for determination by the Commissioner, that it seeks relief which respondent is not required by law to give, and that petitioner has refused the special education services which respondent offered in accordance with law.

Counsel for respondent has filed a brief and affidavits in support of its Motion. Petitioner has filed a letter making the assertion, without further argument or defense, that there is a question of fact which requires that the matter must be heard in a plenary fashion.

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From the pleadings and from affidavits submitted in support of respondent's Motion, it appears that MF was originally enrolled in respondent's kindergarten class in September 1960 and attended the public schools of the district until September 1965. At that time, his parents voluntarily withdrew him from public school and enrolled him at a private school for brain-damaged children. Respondent's school psychologist, in an affidavit in support of the Motion to Dismiss, states that supplemental instruction was provided for MF during his first, second, and third grade years. In the spring of 1965, according to the affidavit, after considering MF's performance and the reports of a psychologist privately engaged by MF's parents, the school authorities decided that rather than advance him to fourth grade, his needs would be better met if he were placed in a class for educable children. It was this decision that led petitioner to withdraw MF from respondent's school and place him in a private school for brain-damaged children. The petition herein followed. Petitioner prays that the Commissioner require respondent either (1) to provide an educational program for MF equal to that now being received at the private school which he attends, or (2) to pay for the tuition and transportation expense for the educational program which MF now receives at the private school. Respondent's Motion, to repeat, is grounded upon its contentions (1) that the petition fails to state a proper cause for determination by the Commissioner; (2) that there is no requirement in law that respondent furnish an educational program "equal" to that provided in a private school; and (3) that petitioner has refused the special education program which respondent has provided for MF.

The Commissioner finds that there is no question of material fact in this matter which would require plenary hearing. Respondent's affidavits in support of its Motion, and the exhibits offered in its Answer, which were supplied to respondent by petitioner, palpably demonstrate that respondent's decision as to an appropriate program for MF was based upon the same considerations of fact which petitioner relies on in his complaint. However, whether respondent, rather than petitioner, reached the correct conclusion from those facts is not now a question for the Commissioner to decide. Petitioner, by his own volition, has elected to withdraw MF from the special education program provided by respondent, and in so doing has eliminated from consideration the correctness of respondent's action. In a case decided by the Commissioner on December 15, 1966, after full hearing, the factual situation was in all essential respects similar to the facts admitted for the purpose of the instant Motion. In that case, *In the Matter of "R"* v. *Board of Education of West Orange*, R was withdrawn from the West Orange schools before the school authorities could complete the placement of the pupil in a program which, in their judgment, would be suitable. Thus no proof could be shown "that such placement would not have been suitable and successful." In ruling upon petitioner's claims, which were effectively identical with those in the instant matter, the Commissioner said:

> "* * * In their natural anxiety over their daughter's progress they chose to seek special schooling elsewhere and in so doing they relieved respondent of any obligation with respect to their child's education. Parents have a right to elect to have their children educated in schools other than those provided at public expense but, in so choosing, they cannot, by unilateral

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action such as that herein, require the local school district to assume the costs of that choice. *Lange* v. *Hi-Nella Board of Education*, 1959-60 *S. L. D.* 65; *cf. Boorstein* v. *Fort Lee Board of Education* 1957-58 *S. L. D.* 50. Even were there no suitable facilities for R in respondent's schools, placement in an appropriate program in a nonpublic school at public expense could be accomplished only after concurrence and approval by respondent and the Commissioner of Education. *R. S.* 18:14–71.23(g) There is no showing that any such approval was ever sought or granted. It is clear that R was removed from public school and placed in private school on her parents' volition and with no involvement on the part of respondent. Under such circumstances the financial obligations incurred by that action devolve solely upon the parents and not upon the Board of Education."

Nor is there any obligation imposed upon respondent to provide a program "equal" to that offered in any private school. The duty of a board of education under the law (*R. S.* 18:14–71.22) is "to provide suitable facilities and programs of education for all the children who are classified as handicapped." Only when such *suitable* facilities or programs cannot be provided in publicly operated classes, may approval be sought to enroll a child in privately operated classes. *R. S.* 18:14–71.23 In the instant matter, the voluntary withdrawal of MF from the program offered by respondent has rendered it impossible to determine whether such a program is suitable for his special needs. *Cf. In the Matter of "M"* v. *Board of Education of the Township of Springfield*, dismissed by the Commissioner on respondent's Motion April 18, 1967.

There being no question of material fact regarding respondent's performance of its duties with respect to MF, and no issue which is presently justiciable before the Commissioner, respondent's Motion must be granted. The petition herein is accordingly dismissed.

COMMISSIONER OF EDUCATION.

July 28, 1967.

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LIII

VACANCY ON BOARD OCCURS WHEN INCUMBENT CEASES TO MEET RESIDENCY REQUIREMENT

ALMA KATHLEEN BECEIRO,

Petitioner,

v.

JOHN ANDERSON AND BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,

Respondents.

For the Petitioner, Klatsky & Himelman (Arthur P. Siegfried, Esq., of Counsel)

For Respondent Board, Doremus, Russell, Fasano & Nicosia (William L. Russell, Jr., Esq., of Counsel)

For Respondent Anderson, Arthur D. Loring, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner alleges that John Anderson is not a qualified member of the Board of Education of the school district of the Township of Holmdel of which she is a resident. She asks the Commissioner to determine affirmatively his lack of qualification and to remove him from his seat on the Board.

The determination of this matter, regrettably, has been unavoidably prolonged. After the issues were first joined, a series of hearing dates had to be postponed and it was not until more than a year after the petition was filed, that it was agreed to waive a hearing and submit the matter for the Commissioner's determination on a Motion of respondent to dismiss, Stipulations of Fact, and briefs.

Respondent Anderson moves to dismiss petitioner's appeal on the following grounds: (1) that he possesses all the qualifications for school board membership, and (2) that the issue raised by petitioner is moot. The Motion is accompanied by Stipulations of Fact signed by the attorneys for all three of the named parties and by briefs of counsel for petitioner and respondent Anderson. Beyond filing an Answer and entering into the Stipulations of Fact, the Holmdel Township Board of Education took no active part in this case. Hereinafter, therefore, John Anderson will be deemed to be the respondent and will be referred to as such. The following factual circumstances are stipulated.

Respondent took title to a home in Holmdel Township on October 13, 1959, and was subsequently elected to a seat in the Board of Education of

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that district. In 1965 he sold his home, purchased another building lot in the Township, and contracted for the construction of a residence on the acquired lot. On or about September 3, 1965, and during the erection of his new residence, respondent removed himself, his wife, and their three children to a furnished three-room bungalow owned by a relative and located in the municipality of Long Beach Township in Ocean County, for which they paid no rent or other occupancy charge. Respondent's household goods were placed in storage with the understanding that they were to be deliverd at the proper time to the new residence in Holmdel. Respondent's three children were enrolled in the Long Beach Island school system where the school records indicate that their registration and attendance was of a temporary nature. Construction of respondent's new residence in Holmdel proceeded during the period from September 1965 to September 1966. In September 1966, respondent and his family took possession of their new residence in Holmdel and have resided there since that time.

During this construction period, in February 1966, the Commissioner of Registration for the County of Monmouth determined that within the purview of *R. S.* 19:4–1, respondent did not actually reside in any election district of the Township of Holmdel. This determination was confirmed by Order of the Monmouth County Court directing the Commissioner of Registration to remove the registration records of respondent from the voting records of the Township of Holmdel.

The statutory basis for the issue herein is *R. S.* 18:7–11, which defines the qualifications of a member of a board of education. The relevant portion provides:

> "* * * Whenever a member shall cease to be a bona fide resident in the district, a vacancy in such office shall immediately exist and he shall not exercise any of the duties thereof."

In support of his Motion to dismiss, respondent argues that his residence was and is now in the Township of Holmdel. He contends that his absence from Holmdel and his sojourn in Long Beach was for the sole purpose of waiting completion of his new home. Respondent claims that his actual and intended residence was and is now in Holmdel, and he maintains, therefore, that he has been at all times covered by this petition a bona fide resident of the Township of Holmdel, and qualified to hold the office of member of the local board of education. Moreover, respondent argues, the issue raised herein is now rendered moot by the fact of his occupation of his new home in Holmdel since September 1966.

Petitioner concedes that respondent was duly elected to the Holmdel Township Board of Education. She maintains, however, that he ceased to be a bona fide resident of that district when he moved to Long Beach and that he thereupon lost his right to continue in his seat in the Board. Petitioner contends that respondent's lack of bona fide residence in Holmdel in 1965-66 has already been determined by the Monmouth County Court and the question is, therefore, *res adjudicata*.

The Commissioner agrees with petitioner that there is no necessity to go beyond the County Court's determination. In reaching the conclusion that

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respondent did not possess the residence qualifications to vote in the Township of Holmdel, the Court had an opportunity to hear and determine the facts. It can hardly be argued that a lesser degree of residence is required in order to hold public office than that needed in order to vote for a candidate for such office. This was noted by the State Board of Education in an early case involving residence of a board member. *O'Brien* v. *West New York Board of Education,* 1938 *S. L. D.* 33 In that case the State Board quoted a statement of a New York Court in the case of *People* v. *Platt,* 50 *Hun.* 454, affirmed 117 *N. Y.* 159 as follows:

> "It would be absurd to say that more permanence was required in the voter than in the local officer voted for. If, by statute, one must be a resident of a town in order to vote, and by statute, also one must be a resident of the town to hold office therein, then if residence in the voter's case means domicile, so it means, also in the case of the officers. The two subjects are cognate, and the word 'residence' is used with like meaning in respect to each.' "

In this case, the Monmouth County Court determined in February 1966, while respondent was domiciled in Long Beach Township, that he did not possess the residence qualifications to vote in the Township of Holmdel. It follows, therefore, that if respondent lacked the residence requirements to vote in Holmdel Township, he also failed to have the residence qualifications to hold the public office of member of the Board of Education of Holmdel Township and the Commissioner so finds.

Having reached this determination, the Commissioner finds no necessity to consider other questions raised and argued. Respondent's Motion to dismiss must be denied and the matter determined in favor of petitioner on the pleadings and facts as stipulated.

The Commissioner finds and determines, therefore, that John Anderson ceased to hold the qualifications for membership on the Holmdel Township Board of Education after September 1965, and that his seat thereon became vacant. The Commissioner finds further that John Anderson did not resume residence in the Township of Holmdel until September 1966, and he, therefore, does not now possess the two years' residence qualification required by *R. S.* 18:7–11 for board of education membership. The seat now held by Mr. Anderson is declared to be vacant. The Monmouth County Superintendent of Schools is directed, therefore, pursuant to *R. S.* 18:4–7(d), to appoint a qualified person to fill the vacant seat. The person so appointed shall serve until the organization meeting following the next annual school election in the district.

COMMISSIONER OF EDUCATION.

July 28, 1967.

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LIV

SINGLE, ISOLATED INSTANCE OF MISCONDUCT MAY NOT WARRANT DISMISSAL OF TENURE TEACHER

IN THE MATTER OF THE TENURE HEARING OF DAVID FULCOMER, HOLLAND TOWNSHIP, HUNTERDON COUNTY

Decided by the Commissioner, June 11, 1962.

Remanded by State Board of Education, December 4, 1963.

Decided by the Commissioner on Remand, November 13, 1964.

Affirmed by State Board of Education, March 2, 1966.

DECISION OF THE SUPERIOR COURT, APPELLATE DIVISION

Argued October 3, 1966, Supplemental Briefs submitted November 3, 1966 —Decided January 17, 1967.

Before Judges Sullivan, Kolovsky and Carton.

On Appeal from the Decision of the State Board of Education of New Jersey.

Mr. Joseph V. DeMasi argued the cause for Teacher-Appellant, David Fulcomer (*Mr. Boyd Harbourt* on the brief).

Mr. Cowles W. Herr argued the cause for Respondent, Holland Township Board of Education (*Messrs. Herr and Fisher*, attorneys).

Statement in lieu of brief filed by *Mrs. Marilyn Loftus Schauer*, Deputy Attorney General, who appeared on behalf of State Board of Education (*Mr. Arthur J. Sills*, Attorney General of New Jersey, attorney).

The opinion of the court was delivered by Carton, J. A. D.

The Board of Education of Holland Township dismissed David Fulcomer from his position as a tenure teacher in its school system for conduct unbecoming a teacher arising out of certain incidents which occurred on December 20, 1961. He appeals from the decision of the State Board of Education sustaining the Commissioner of Education which affirmed the dismissal.

THE PROCEEDINGS BEFORE THE SCHOOL TRIBUNALS

The parents of a pupil in the school system filed written charges against the teacher on January 29, 1961, charging acts of physical violence against their son. The alleged misconduct took place in a classroom presided over by the teacher.

In accordance with the provisions of the "Tenure Employees Hearing Act," the Township Board held a meeting at which it determined that such

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charges, and the evidence in support of such charges would be sufficient, if true in fact, to warrant dismissal of the teacher and then forwarded these charges to the Commissioner of Education with a certification as mandated by that act. (*N. J. S. A.* 18:3–25)

After a hearing on the charges, the Commissioner filed an opinion in which, after reviewing the evidence, he found that the teacher "improperly and unnecessarily did physical violence" to the person of the pupil in the classroom on the day in question. His opinion concluded that these acts constituted conduct unbecoming a teacher sufficient to warrant dismissal by the Township Board. The Commissioner made no finding or decision as to whether the penalty to be imposed should be dismissal of the teacher or a reduction in his salary, but referred the matter back to the Township Board for that determination.

When the Township Board regained the case, it held a meeting at which it adopted a resolution by a 6-2 vote to discharge the teacher. It does not appear that the members of the Board reviewed, or even had available, a transcript of the hearing before the Commissioner. During the course of the extended meeting, there was an acrimonious exchange of remarks between members of the Board and the teacher, in which members of the audience, including another teacher participated.

The teacher appealed the Commissioner's determination to the State Board of Education. The State Board affirmed the finding of the Commissioner that the conduct of the teacher constituted conduct "unbecoming a teacher." However, it concluded that there was not sufficient evidence in the record to determine whether outright dismissal from the system was warranted, or whether a lesser penalty would have sufficed. Consequently, the State Board remanded the matter to the Commissioner for a further hearing. The State Board said:

> "* * * At said hearing evidence shall be produced by all parties concerned showing David Fulcomer's record as a teacher prior to the incidents of December 21, 1961 [sic], evidence bearing upon the question as to whether Mr. Fulcomer's conduct amounted to deliberate premeditated action, motivation or provocation for such acts, and any other evidence which the Commissioner may deem relevant to the question of the penalty to be imposed. Evidence shall likewise be introduced at said hearing bearing upon the employment of Mr. Fulcomer subsequent to the above incidents and down to the present date. It is further recommended that upon completion of said hearing the Commissioner shall report to this Board his findings and decision as to the proper penalty. * * *"

The Commissioner did conduct a further hearing. He found that the testimony failed to disclose any significant basis of provocation as to the incidents upon which his first determination was reached. However, he did not make a specific report to the State Board of his findings and decision as to the proper penalty, nor did he make an independent finding or decision as to the proper penalty. Instead he merely concluded that the local Board had made a full and fair determination of the penalty and that its judgment that the teacher should be dismissed from his tenure position was not unreasonable, arbitrary or capricious.

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The Commissioner did not refer the matter a second time to the local Board for reconsideration of the penalty to be imposed in the light of the additional evidence on the second hearing. He expressed the thesis that the proper exercise of his function restricted him "from substituting his judgment for that of the members of the local Board" in matters which are within the exercise of their discretionary authority unless their determination is clearly unreasonable, arbitrary or otherwise unlawful.

The State Board of Education affirmed this decision of the Commissioner for the reasons set forth in his opinion. Hence this appeal.

We have reviewed the voluminous records of the various proceedings before the local Board of Education, the Commissioner and the State Board and we are satisfied that the evidence fully supports the finding that the teacher was guilty of conduct unbecoming a teacher, warranting disciplinary action.

However, in our opinion, the Commissioner erred in failing to render an independent decision as to the penalty to be imposed based on the evidence before him and in permitting the local Board to exercise this function. The Commissioner also erred in restricting his function to an appellate review as to whether the local Board's determination was clearly unreasonable, arbitrary or unlawful. This restricted interpretation of the duties imposed upon him by the Tenure Employees Hearing Act, we believe, resulted in prejudice to the rights of the appellant and requires that the matter be remanded to the Commissioner for decision as provided herein.

THE COMMISSIONER'S FUNCTION UNDER THE TENURE EMPLOYEES HEARING ACT

The Commissioner's referral of the matter back to the local Board to decide whether the teacher should be dismissed or his salary reduced was based upon the view of the Department of Education that the Tenure Employees Hearing Act neither directed nor authorized him to decide this issue. The Department's contention is that *N. J. S. A.* 18:3–29 and *R. S.* 18:6–20 contain provisions that no teacher shall be appointed, transferred, or dismissed except by a majority vote of the Board, and that *N. J. S. A.* 18:3–29 confers no specific authorization on the Commissioner to impose a penalty.

The Tenure Employees Hearing Act, viewed as a whole, does not bear this narrow interpretation of his function. The Legislative intent that the Commissioner shall hear and decide the entire controversy clearly appears from a brief review of its provisions and an examination of its historical background.

At the outset, the statute broadly ordains that all hearings on charges preferred against any employee of the Board of Education holding tenure of office, position or employment covered by Title 18, Education, of the Revised Statutes shall be conducted in accordance with this act. (*N. J. S. A.* 18:3–24) The Board of Education is authorized to make a preliminary determination that a written charge made in accordance with any provisions of Title 18 and the evidence in support of it would be sufficient in fact to warrant dismissal or a reduction in salary. (*N. J. S. A.* 18:3–25) In such event, the Board is

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directed to forward the charge to the Commissioner of Education, together with its certificate of such determination, and to serve a copy upon the employee. (*N. J. S. A.* 18:3–25) The Board may suspend the employee so charged, with or without pay, pending a determination. (*N. J. S. A.* 18:3–28)

Upon receipt of the charge and the Board's certification, the statute directs that the Commissioner, or a person appointed to act in his behalf, "shall conduct a hearing thereon within a 60 day period." Such hearing is required to be conducted in accordance with rules and regulations promulgated by him and approved by the State Board of Education. Authority is conferred upon him to dismiss the charges before such hearing "on the grounds that they are not sufficient to warrant dismissal or reduction in salary." (*N. J. S. A.* 18:3–29) Upon conducting such hearing, the Legislature directs that:

> "The Commissioner shall render a decision within 60 days after the close of the hearing on the charge against the employee." (*N. J. S. A.* 18:3–29)

The Tenure Employees Hearing Act thus establishes an entirely new and comprehensive procedure for the resolution of all controversies involving charges against *all* tenure employees not subject to Civil Service under Title 18. It is designed to replace the removal and disciplinary procedure relating to various classes of employees long in force under a variety of provisions of the New Jersey School Laws: *R. S.* 18:13–17 (teachers); *R. S.* 18:5–51 (secretary, district clerk, secretarial personnel); *R. S.* 18:5–67 (janitors); *R. S.* 18:6–27 (secretary, superintendent of schools, business manager, other officers, agents and employees); *R. S.* 18:7–58 (principals and teachers); *R. S.* 18:14–64.1 (nurses).

Formerly all phases of the hearing and decision making function were performed by the local Boards. The Commissioner reviewed such determinations on appeal pursuant to the general power conferred upon him to "decide * * * all controversies and disputes arising under the school laws." (*R. S.* 18:3–14)

Now the Commissioner conducts the initial hearing and makes the decision. Indicative of the intention to vest finality of decision on all aspects of the charges is the power given him to dismiss the charges before such hearing if he determines them to be insufficient in law. He is directed to render a decision on the charge within 60 days after the close of the hearing. A strict and precise timetable for the disposition of each stage of the proceeding represents Legislative recognition of the importance of a prompt resolution of such disputes.

There is nothing in the new act which suggests the local boards were intended to retain any part of the jurisdiction which they formerly exercised in such controversies other than a preliminary review of the charge and the required certification to the Commissioner. Their participation in such proceedings is specifically confined to that limited function. Thus the Legislature has transferred, from the local boards to the Commissioner, the duty of conducting the hearing and rendering a decision on the charge in the first instance. His jurisdiction in all such cases is no longer appellate but primary.

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The pivotal words of the statute are that the Commissioner shall "conduct a hearing" on the charge and "render a decision." The requirement of a hearing has been held to mean the hearing of evidence and argument and judgment thereon. See *In re Masiello*, 25 *N. J.* 590, 600 (1958).

The Legislative mandate to "render a decision * * * on the charge" implies a duty on his part to review the evidence and to resolve all issues necessary to a final determination. It means that the Commissioner must settle or determine the controversy by giving judgment. The imperative of "render[ing] a decision * * * on the charge" is not satisfied by a simple finding whether the charge is true in fact coupled with a statement of the maximum penalty such misconduct may warrant. To confine the Commissioner's function to this limited sphere would not only deprive him of a part of the decision-making function, it would also make his role a sterile one. The power to impose the penalty is necessary to make his hearing and decision meaningful. Common sense dictates that he must have and exercise the power to impose the penalty gauged by the evidence before him at the hearing.

On the other hand, nothing in the statute suggests that the local boards were intended to retain that power. It contains no express language to that effect, or language from which any such intention can fairly be implied. Indeed, the fact that the Legislature saw fit to confer upon the local boards the power to make a preliminary review of the sufficiency of the charge and to spell out the scope of that review negates any intention of conferring any additional power upon them in the process.

The following comment of Mr. Justice Francis in *In re Masiello*, *supra* at 605 concerning the authority conferred by *R. S.* 18:3–14 upon the Commissioner to decide controversies and disputes arising under the general school law is apposite:

> "The mandate of the Legislature is that the Commissioner 'shall decide * * * all controversies and disputes.' 'Decide' in such context means decision after hearing on the facts presented to him * * *."
>
> * * * * * * *
>
> "* * * On the other hand, if, as in this case, the hearing demanded by principles of fair play is had before him for the first time, then the obligation to 'decide' signifies a completely *de novo* and independent decision on the facts." (*Id.* at 606)

The Legislative history of the Tenure Employees Hearing Act confirms the Legislative intent that the Commissioner shall decide the entire controversy, including the extent of the penalty. See *Hoek* v. *Board of Educ. of Asbury Park*, 75 *N. J. Super.* 182, 190 (*App. Div.* 1962); *Statement attached to Senate Bill No.* 54 and *Assembly Bill* No. 104, which became *L.* 1960, *c.* 136; 32 *New Jersey Education Ass'n. Review*, *p.* 220 (1958-1959).

The main purposes of that law were two-fold. The first was to eliminate the vice which inhered in the former practice of the board's being at one and the same time investigator, prosecutor and judge. Under these conditions it was pointed out most decisions were eventually appealed to the Commissioner in any case.

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Referral of the case to the local board to impose the penalty when that board has already certified it to the Commissioner represents a reversion to the vice which the Legislature sought to eliminate from the former practice. Particularly is this true where the board itself prefers the charges or becomes an adversary on an appeal from the Commissioner's decision. The present case illustrates this problem. The Board here has been actively defending on appeal the appropriateness of a penalty which it found at the outset was warranted if the charges were true in fact, and later determined was justified on the basis of the Commissioner's findings. The appearance of some of the members of the Board as witnesses on the second hearing before the Commissioner further compounded this violation of the spirit of the law. See *Hoek* v. *Board of Educ. of Asbury Park, supra.* See also *Statements, supra,* attached to the Legislative Bills, which refer to the Board as deciding "to press the charges."

The second and no less important purpose was to remove the trial of such cases from the publicity attendant on the local hearing which "tears the community apart" and "disrupts the orderly conduct of local school affairs." See *Statements, supra.*

The piecemeal and convoluted procedure of having the local Board decide the penalty long after it has made the preliminary determination required by the statute causes an inevitable revival of the strife in the community where the teacher is employed. This is vividly illustrated in the present case. The local Board duly held a meeting on the charges and made the requisite certification to the Commissioner. The teacher was then suspended and the controversy removed to the calmer atmosphere of the Commissioner's hearing.

However, the referral of the matter back to the Township Board rekindled the smouldering fire of dissension among the members of the Board, the teaching staff, and the public. The record clearly shows that a meeting supposedly convened solely to determine the extent of the penalty to be imposed for the teacher's departure from decorum in a particular episode became the occasion for a heated debate as to the merits of his philosophy of education and school discipline and his general attitude toward the Board.

It can hardly be expected that a determination under such circumstances would be confined to the facts and findings of the Commissioner on the particular charges or that the penalty imposed would be reasonably commensurate with the offense found to have been committed.

Fulfillment of these statutory objectives can thus only be accomplished through a complete decision by the Commissioner of all issues involved in the dispute. The mere finding of guilt or innocence on the charge of unbecoming conduct, leaving to the local Board the important decision as to the penalty to be imposed, frustrates both objectives. Moreover, since the local Board did not see the witnesses or hear their testimony, their ability to fix a just penalty was seriously impaired. Indeed, as heretofore noted, it does not appear that the local board reviewed, or even had available, the transcript of the hearing before the Commissioner.

We cannot assume an intention by implication on the part of the Legislature to fragmentize the machinery in the unorthodox fashion suggested by the

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Department of Education. So to subdivide the decision-making power would make meaningless the provisions in the statute for the prompt disposition of the various phases of the proceeding. Moreover, it is incongruous for the local board to pass on one phase of the proceeding, and then at a later stage, to decide another phase of the same case based on yet another determination of another agency. Particularly is this true, where as here, the intermediate determination would be made by an administrative agency at a higher level. Similarly incongruous, is the exercise of one part of the decision-making power by the Commissioner and his retention of an appellate review of a coordinate phase of the same proceeding. We discern nothing in the statute which suggests that the Legislature intended to beget so exotic an administrative hybrid. *Harrison* v. *State Bd. of Education*, 134 *N. J. L.* 502 (*Sup. Ct.* 1946) is relied upon as approving the procedure adopted by the Department of Education in this case. That case, neither expressly nor inferentially, sanctions the propriety or regularity of splintering the administrative or judicial process in this fashion. See also, 2 *Davis Administrative Law Treatise, Ch.* 11 (1958).

The Commissioner's conclusion that the local boards retain the power to determine the penalty rests primarily upon his interpretation of *R. S.* 18:6–20 and *R. S.* 18:7–58. These companion sections of Chapter 6 and Chapter 7 of the School Law provide that no principal or teacher shall be appointed, transferred or dismissed, no policy fixed, and no course of study shall be adopted or altered, nor textbook selected except by a majority vote of the whole board.

The theory is that since the Legislature has not expressly repealed the portion of these provisions relating to the dismissal of teachers, their continued existence is incompatible with a Legislative intent under the newly adopted Tenure Employees Hearing Act that the Commissioner shall exercise this power. Not so. These provisions still have efficacy insofar as teachers under contract or non-tenure are concerned. Authority for the dismissal of these teachers, as well as for the performance of the other acts listed therein, must still be sought under these general provisions of the School Law.

It must also be remembered that the new legislation is much broader in its scope than the tenure provision formerly applicable to teachers. Dismissal of these additional categories of school employees given tenure protection under the various provisions referred to above was not authorized or affected by the provisions of *R. S.* 18:6–20 and *R. S.* 18:7–58 relating to teachers.

Mere failure of the Legislature to modify the particular statutory provisions requiring majority approval of certain actions (including employment, transfer and dismissal of a single category of employees) cannot justify the conclusion that the Legislature thereby intended to deny to the Commissioner the necessary power under another statute of broader scope applicable to all categories of employees.

Likewise, no special significance can be attached to the circumstance that the amendatory provisions of Chapter 137 (*L.* 1960) contain language parallel to that of the Teachers Tenure Act (*N. J. S. A.* 18:13–17 (1952)) to the effect that removal or reduction in salary may not be effected until after the charge

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has been examined into and found true in fact. The suggestion is that the Legislature has thereby indicated an intent to substitute the Commissioner for the local Board as the agency designated to perform the fact-finding function, confining the Commissioner's function to this aspect of the proceeding and leaving to the local boards the penalty fixing function.

The argument thus advanced ignores the overriding language of the Tenure Employees Hearing Act (*L.* 1960, *c.* 137), directing the Commissioner to "conduct a hearing" and " to render a decision * * * on the charge." The duty cast upon the Commissioner is not limited to an examination into the charge and a determination whether it is true in fact.

This argument is likewise flawed by the unwarranted assumption that the Tenure Employees Hearing Act must be interpreted solely in the light of the removal procedure previously applicable to teachers. Similar phraseology occurs in the amendatory provision relating to janitors; yet the earlier provision relating to this class of employees (*R. S.* 18:5–67), unlike *N. J. S. A.* 18:13–17, contains a specific grant of power of dismissal to the local boards. Such similarities and dissimilarities of language in the amendatory legislation (*L.* 1960, *c.* 137) and their amended counterparts in the School Law are merely incidental to the comprehensive treatment accorded by the Tenure Employees Hearing Act.

Nor can the administrative interpretation adopted by the Department of Education and acquiesced in by the parties give it added vitality or validity in determining the meaning of the statute. The Commissioner has concededly not promulgated rules and regulations as required by the statute for the conduct of the hearings. His determination was therefore not made pursuant to any formally established procedure. It represents no long-standing practical construction having wide public reliance. See 1 Davis Administrative Law Treatise, *Sec.* 5.06 (1958); 2 *Sutherland, Statutory Construction,* 3*d ed.* (1943).

THE TEACHER'S RIGHT TO AN INDEPENDENT DETERMINATION BASED ON ALL THE EVIDENCE

The Commissioner's restriction of his role to an appellate review as to whether the Board's decision after the earlier hearing was clearly unreasonable, arbitrary or unlawful further erodes the teacher's rights in such cases. The teacher is entitled to an independent determination as to the scope of the penalty based on all the evidence presented against him. What was said in *In re Masiello, supra* at 605, although used in a different context, applies with equal force to the Commissioner's function in this case:

> "When the Commissioner regained the record after all of the evidence of the parties had been compiled, what was his function? He took the view that it was to study the proof in order to decide whether the action of the Board of Examiners was arbitrary or capricious or whether it was the result of bias or prejudice. We cannot agree."

Cf. Board of Educ. of the Township of East Brunswick v. *The Town Council of the Township of East Brunswick,* 48 *N. J.* 94, 106 (1966).

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The Commissioner conducted the second hearing of the evidence at the direction of the State Board for the purpose of determining the appropriate penalty to be imposed under the circumstances. Neither he nor the local Board made any independent decision on all the evidence as to what that penalty should be. The local Board had before it the Commissioner's findings on the evidence in the first hearing. Neither then, nor ever, did it have the benefit of the evidence or the Commissioner's findings at the second hearing. On the other hand, the Commissioner rendered no affirmative decision of his own as to the penalty, but confined his review to a determination whether the Board's earlier decision was arbitrary or unlawful.

The teacher was thus denied an independent determination by either agency based on all the evidence as to what penalty should justifiably be imposed. Parenthetically, we note that a logical application of the Department's view that the local Board had power to fix the penalty would have compelled the Commissioner to refer the matter once again to the local Board to reconsider the nature of the penalty in the light of all the evidence at both hearings.

As the Commissioner's review of the record of what transpired at the meeting of the local Board demonstrates, the Board's determination that the teacher should be discharged was influenced considerably by its view of the teacher's general attitude and was not confined to a decision of the proper punishment for his conduct on the day in question.

The Commissioner's conclusion that the Board's action in dismissing the teacher was not unreasonable or arbitrary reflects an acceptance in some degree of the factors deemed relevant by the local Board in fixing the punishment. In his opinion after the second hearing the Commissioner stated that he accorded much weight to the meeting of the local Board following the earlier decision; that he was convinced from his study of that meeting that the Board gave "full consideration to all aspects of this matter and reached its determination to dismiss the teacher fairly and properly; that the Board was aware that the dismissal in this case might be unduly harsh or unwarranted." He said further:

> "* * * He is convinced that its members approached the matter with an open mind and finds reason to believe that a lesser penalty might have resulted had the teacher shown any disposition to cooperate. Faced with what was characterized as a 'belligerent' and 'defiant' attitude, the majority of the members decided that the teacher's usefulness to this school system was ended and that he could not be reinstated without harm to the school."

Earlier in his opinion the Commissioner commented extensively as to what the transcript of the meeting before the Township Board had disclosed concerning "the situation which existed with respect to this teacher in this school."

The teacher was entitled to an affirmative determination by the Commissioner on all the evidence relating to the extent of the penalty for his conduct. In our view, his rights were seriously prejudiced by the intrusion of such extraneous considerations into the determination of this issue.

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THE PENALTY WARRANTED BY THE TEACHER'S ACTIONS

The Commissioner's opinion on the first hearing summarizes the evidence as to the incidents which gave rise to the charges:

> "The testimony discloses that on the morning of December 20, 1961, while respondent was teaching an eighth grade arithmetic class, a girl's pocketbook was passed among several pupils until it came to rest beside the desk of Donald Yowell. The teacher, becoming aware of inattention and discovering its source, dropped his textbook on the first pupil's desk, went to Donald and laid hands upon him. When released, the boy went to the front of the room, was directed to resume his seat by the teacher, made as though to do so, but instead ran toward the door in the rear to leave the classroom. The teacher pursued the boy, again laid hands upon him, and both of them fell to the floor. The pupil escaped the teacher's hold, left the classroom, and reported to the principal, requesting permission to telephone his parents and go home. From the beginning of the incident until the pupil left the room, the teacher gave no commands to the pupil other than to resume his seat."

The Commissioner pointed out that there was a conflict in the testimony as to whether the teacher actually struck the pupil with his fist or hand, the exact hold which he had on the boy and whether he "tackled" the pupil in the rear of the classroom as charged by the pupil, or grabbed the pupil as they caromed off the furniture as contended by the teacher. The Commissioner found these differences immaterial for purposes of determining whether Fulcomer's acts constituted conduct unbecoming a teacher.

We agree with the view expressed by the Commissioner that:

> "The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions."

We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See *Redcay* v. *State Bd. of Educ.*, 130 *N. J. L.* 369 (*Sup. Ct.* 1943); *aff'd o. b.*, 131 *N. J. L.* 326 (*E. & A.* 1944).

Here, however, there is no indication in the record that the teacher's acts were premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.

Although such conduct certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances. The Commissioner noted that the teacher received his full salary during his suspension by the Township Board. However, consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State,

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with the resultant jeopardy to his equity rights in the teacher's pension fund accruing from his 19 years credit.

At the time appellant was suspended he had 23 years teaching experience and held a Master's Degree. He had been employed since 1954 by the Holland Board. It appears that if this teacher, who is aged 56, is reemployed in New Jersey, he will be eligible for retirement in approximately four years with a pension for life of one-half of his last year's salary—in this case an annual pension of at least $3,500. We observe that the local Board recognized that Fulcomer's teaching record was good and his teaching ability unquestioned. He had not been disciplined in any manner by the Board prior to the date of the incidents involved in these charges and he had consistently received pay raises each year.

The matter is therefore remanded to the Commissioner of Education for the purpose of making an affirmative decision as to the proper penalty to be imposed. Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system.

We retain jurisdiction.

SULLIVAN, S. J. A. D. concurring.

I am in full agreement with the majority opinion and I concur in the remand to the Commissioner to fix a proper penalty. However, I would also hold that, under the facts and circumstances here shown, dismissal is not warranted and some lesser penalty should be imposed.

KOLOVSKY, J. A. D. (dissenting).

I do not agree that the Tenure Employees Hearing Act, *L.* 1960, *c.* 136, now *N. J. S. A.* 18:3–23, *et seq.*, (Hearing Act) terminated the authority of local boards of education (local board) to determine the penalty to be imposed on a teacher having tenure who is found guilty of charges of inefficiency, incapacity, conduct unbecoming a teacher or other just cause for disciplinary action.

I concur with the views expressed by all the parties to this litigation and the administrative interpretation adopted and applied by the State Department of Education since 1960 that the 1960 legislation—which includes not only *L.* 1960, *c.* 136 (Chapter 136) but also *L.* 1960, *c.* 137 (Chapter 137)—transferred from the local board to the State Commissioner of Education (Commissioner) only the function of examining into the charges and determining whether they are true in fact. Neither expressly nor by implication did the legislation transfer from the local board to the Commissioner the power to determine the penalty, whether it be dismissal or some less drastic disciplinary action. That power remains as before in the local board.

The Legislature has vested the power to appoint, transfer or dismiss teachers in the local board, directing that any such action must result from a

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majority vote of the whole number of members of the board. *R. S.* 18:6–20; ***R. S.* 18:7–58.**

Further, it is settled law that except as limited by a contract of employment, by the Federal and State Constitutions, by the Teacher's Tenure Act and by other legislation such as the Law Against Discrimination, the local board "has the right to employ and discharge its employees as it sees fit." *Zimmerman* v. *Board of Education of Newark,* 38 *N. J.* 65, 71 (1962).

Chapter 136, the Hearing Act, must be read in conjunction with Chapter 137, which was enacted at the same time. *Key Agency* v. *Continental Cas. Co.,* 31 *N. J.* 98, 103 (1959). Chapter 137 amended sections of the various tenure acts applicable to employees of local boards, *viz.*, *N. J. S. A.* 18:5–51, 18:5–67, 18:6–27, 18:7–56, 18:13–17, 18:14–44 and section 2 of *L.* 1957, *c.* 181. By its terms, Chapter 137 was to be inoperative unless and until the Hearing Act was enacted.

N. J. S. A. 18:13–17, a section of the Teacher's Tenure Act, read as follows prior to its amendment by *L.* 1960, *c.* 137:

> "No teacher, principal, superintendent or assistant superintendent under the tenure referred to in section 18:13–16 of this Title shall be dismissed or subjected to a reduction of salary in the school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary or clerk of the board of education having control of the school in which the service is being rendered, *and after the charge has been examined into and found true in fact by the board of education upon reasonable notice to the person charged who may be represented by counsel at the hearing.* Charges may be filed by any person, whether a member of the school board or not." (emphasis added)

Chapter 137 amended *N. J. S. A.* 18:13–17 by substituting for the underscored language the following:

> "and after the charge has been examined into and found true in fact after a hearing conducted in accordance with the Tenure Employees Hearing Act."

Identical substitutions were made by Chapter 137 in the statutory provisions dealing with the tenure rights of other employees of local boards, *viz.*: persons holding a secretarial or clerical position, *N. J. S. A.* 18:6–27 and *N. J. S. A.* 18:7–56; attendance officers, *R. S.* 18:14–44; and school nurses, *L.* 1957, *c.* 181, *sec.* 2, *N. J. S. A.* 18:14–64.1b. The same change was made by Chapter 137 in the sections dealing with other tenure employees, secretaries, assistant secretaries and business managers, *N. J. S. A.* 18:5–51 and public school janitors, *R. S.* 18:5–67, which, while not using the language underscored above, similarly provided for a hearing before the local board and a determination by it that the offense charged had been proven.

By the adoption of Chapters 136 and 137, the function of examining into a charge against an employee having tenure and determining whether it is

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true in fact is taken from the local board and vested in the Commissioner or a person appointed to act in his behalf. *N. J. S. A.* 18:3–29.

Nothing in Chapter 137 manifests a legislative intent to modify or eliminate the authority of the local board under *N. J. S. A.* 18:13–17 and the other cited tenure sections to dismiss or impose some other penalty upon a teacher or other employee, despite his tenure rights, once an appropriate charge against him has been found to be true in fact.

Nor is such legislative purpose to be found in Chapter 136. The Hearing Act prescribes the procedures to be followed in the presentation of and hearings on charges preferred against an employee of a local board who is under tenure of office. Those procedures culminate in a hearing before the Commissioner or someone appointed to act for him and factual findings by the hearing official. If his finding is that the charge is "true in fact," then it is for the local board to impose the penalty pursuant to the provisions of the tenure sections exemplified by *N. J. S. A.* 18:13–17.

The basic motivation for the enactment of Chapters 136 and 137 was the desire to eliminate the prejudice inherent in a situation where the local board "often appears as both prosecutor and judge, *i. e.*, it makes the charges and then must judge of their truth." (Statement attached to the bill which became Chapter 136). That purpose was accomplished by the designation of the Commissioner in place of the local board as the one who is to find whether the charge is "true in fact." Effectuation of that purpose does not require that the power to fix the penalty be vested in the State Commissioner rather than the local board.

Fact finding is a judicial function. There is nothing improper or unusual in placing that function in one body, here the Commissioner, while leaving the determination of whether the employee is to be dismissed or penalized in some other way in the hands of the local board whose function it is to employ and discharge employees. *Cf. Harrison* v. *State Board of Education*, 134 *N. J. L.* 502 (*Sup. Ct.* 1946).

In *Harrison* v. *State Board of Education, supra,* prosecutrix had tenure of office as principal of the Girls Vocational School at Woodbridge, a county institution. After a hearing, the county board of education found her guilty of misconduct and ordered her dismissal. The State Commissioner reversed. The State Board of Education reversed the Commissioner and affirmed the local board. In affirming the State Board, the court noted that under the *certiorari* act, *R. S.* 2:81–8, it was under a duty to weigh the evidence, and make its own independent determination of the facts. It then proceeded to review the evidence and found that the proofs established the truth of the charges, concluding at page 505:

> "We are only concerned with the truth of the charges; once guilt of misconduct has been established, the disciplinary action is exclusively within the domain of the local board."

In my opinion, the Commissioner followed the statutory mandate when on June 11, 1962, after determining that the charges against appellant were true in fact and were "sufficient to warrant his dismissal by the Board of Education

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of Holland Township under the provisions of *R. S.* 18:13–17," he remanded the matter to the local board for the determination of the penalty to be imposed.

Following his dismissal by the local board on June 25, 1962, appellant appealed to the State Board of Education. In its decision of December 4, 1963, the State Board affirmed the Commissioner's findings as to the truth of the charges. However, it ruled that "there is not sufficient evidence in the record before this board in order to reach a determination as to whether outright dismissal from the system was warranted or whether a lesser penalty would have sufficed." It remanded the matter to the Commissioner "to the end that he shall forthwith conduct a hearing at which there shall be developed all evidence relevant to the question of the propriety of the penalty to be imposed upon David Fulcomer for his conduct as above set forth" and then "report to this board his findings and decision as to the proper penalty." The State Board retained jurisdiction of the appeal.

Following a hearing pursuant to the remand, the Commissioner filed an opinion dated November 13, 1964, in which he found:

> "(1) that the Holland Township Board of Education gave full and fair consideration to a determination of the penalty to be imposed upon David Fulcomer as a result of conduct unbecoming a teacher; (2) that its judgment that his tenure of position was forfeit and he be dismissed from its employ was not unreasonable, arbitrary, or capricious in the circumstances of this case. The Commissioner finds no reason to reverse the decision of the Holland Township Board of Education."

By a decision dated March 2, 1966, the State Board affirmed the Commissioner for the reasons set forth in his opinion of November 13, 1964. Appellant appealed to this court under *R. R.* 4:88–8.

The majority and I agree that there is substantial evidence in the record to support the findings by the administrative bodies that the charges are true in fact and that, therefore, this court should not disturb those findings. *Close* v. *Kordulak Bros.*, 44 *N. J.* 589, 599 (1965).

Our basic disagreement concerns who is to fix the penalty: the Commissioner as the majority has ruled, or the local board as I believe.

Further, in my opinion, the local board's determination as to the penalty to be imposed is not to be disturbed, absent an abuse of discretion. Unless such abuse of discretion is shown, neither the Commissioner, the State Board nor we may modify the penalty fixed by the local board. *Harrison* v. *State Board of Education*, *supra*, 134 *N. J. L.* at *p.* 505; *Russo* v. *The Governor of State of New Jersey*, 22 *N. J.* 156, 175 (1956); see also *Boult* v. *Board of Education of Passaic*, 136 *N. J. L.* 521, 523 (*E. & A.* 1948); *Kopera* v. *West Orange Bd. of Education*, 60 *N. J. Super.* 288, 295 (*App. Div.* 1960). To be distinguished are cases arising under the Civil Service Act, for that act grants power to the Civil Service Commission to modify a penalty imposed by the municipality on one of its employees. On judicial review of the determination of the Civil Service Commission, the court may revise the decision made by the Civil Service Commission with respect to the penalty. *West New York* v. *Bock*, 38 *N. J.* 500, 514, 520 (1962); see also same case below, 71 *N. J. Super.* 143,

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148 (*App. Div.* 1961). Unlike the Civil Service Act, nothing in the Education law authorizes the Commissioner or the State Board to modify the penalty imposed by the local board.

Both the Commissioner and the State Board ruled that the action of the local board in fixing the penalty at dismissal in the circumstances of this case was neither unreasonable, arbitrary or capricious. I find no justification for reversing those determinations, particularly in view of the expertise of the Commissioner and the State Board in the area here involved. *Freud* v. *Davis*, 64 *N. J. Super.* 242, 246 (*App. Div.* 1960).

I would affirm.

93 *N. J. Super.* 404 (1967)
226 *A. 2d* 30

Commissioner of Education
Order on Remand

For the Petitioner, DeMasi & Harbourt (Joseph V. DeMasi, Esq., of Counsel)

For the Respondent, Herr & Fisher (Cowles W. Herr, Esq., of Counsel)

This matter is before the Commissioner of Education on remand from the Superior Court, Appellate Division, which on March 3, 1967, issued the following Order:

> "That this matter be and hereby is remanded to the Commissioner of Education for the State of New Jersey for the purpose of making an affirmative decision as to the proper penalty to be imposed upon David Fulcomer, such decision to be made in accordance with the written opinion of the majority of this Court written by the Honorable Lawrence A. Carton, Jr. [93 *N. J. Super.* 404] Such penalty shall be based upon the Commissioner's finding as to the nature and gravity of the offenses under all of the circumstances involved, and any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system."

The events preceding the decision and order of the Court may be summarized as follows:

Charges of conduct unbecoming a teacher were filed against Mr. Fulcomer (hereinafter referred to as the teacher) by the parents of Donald Yowell (hereinafter referred to as the pupil) and certified to the Commissioner by the Holland Township Board of Education. Testimony on the charges was heard by the Assistant Commissioner of Education in charge of Controversies and Disputes on April 11, 1962. On June 11, 1962, the Commissioner promulgated his decision, in which he determined that the teacher had improperly and unnecessarily inflicted physical violence upon the person of the pupil in two incidents on December 20, 1961; that those acts constituted conduct unbecoming a teacher; and that the charges were sufficient to warrant

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dismissal. *In the Matter of the Tenure Hearing of David Fulcomer,* 1961-62 *S. L. D.* 160 Thereafter the Board dismissed him from his employment.

An appeal to the State Board of Education was taken by the teacher from the findings of the Commissioner. After considering briefs of counsel and oral argument, the State Board affirmed the Commissioner's findings of conduct unbecoming a teacher. 1963 *S. L. D.* 251 It concluded, however, that there was

> "* * * not sufficient evidence in the record before this Board in order to reach a determination as to whether outright dismissal from the system was warranted, or whether a lesser penalty would have sufficed." *Id.*

The matter was therefore remanded to the Commissioner of Education with the direction that he

> "* * * conduct a hearing at which there shall be developed all evidence relevant to the question of the propriety of the penalty to be imposed upon David Fulcomer for his conduct as above set forth. At said hearing evidence shall be produced by all parties concerned showing David Fulcomer's record as a teacher prior to the incidents of December 20, 1961, evidence bearing upon the question as to whether Mr. Fulcomer's conduct amounted to deliberate premeditated action, motivation or provocation for such acts, and any other evidence which the Commissioner may deem relevant to the question of the penalty to be imposed. Evidence shall likewise be introduced at said hearing bearing upon the employment of Mr. Fulcomer subsequent to the above incidents and down to the present date. It is further recommended that upon completion of said hearing the Commissioner shall report to this Board his findings and decision as to the proper penalty." *Id.*

Following the remand from the State Board of Education, a further hearing was held on July 30, 1964. In his decision of November 13, 1964, the Commissioner found:

> "* * * (1) that the Holland Township Board of Education gave full and fair consideration to a determination of the penalty to be imposed upon David Fulcomer as a result of conduct unbecoming a teacher; (2) that its judgment that his tenure of position was forfeit and he be dismissed from its employ was not unreasonable, arbitrary, or capricious in the circumstances of this case. The Commissioner finds no reason to reverse the decision of the Holland Township Board of Education." *In the Matter of the Tenure Hearing of David Fulcomer,* 1964 *S. L. D.* 142, 145

Subsequently, on March 2, 1966, the State Board of Education affirmed the decision of the Commissioner of Education for the reasons set forth in his opinion. An appeal was taken to the Superior Court, Appellate Division, in April 1966, and the decision of the Court was delivered on January 17, 1967. *In the Matter of Fulcomer,* 93 *N. J. Super.* 404 (*App. Div.* 1967) The following excerpts from the opinion of the Court are particularly pertinent at this posture:

> "* * * the evidence fully supports the finding that the teacher was guilty of conduct unbecoming a teacher, warranting disciplinary action.

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"However, in our opinion, the Commissioner erred in failing to render an independent decision as to the penalty to be imposed based on the evidence before him and in permitting the local board to exercise this function. The Commissioner also erred in restricting his function to an appellate review as to whether the local board's determination was clearly unreasonable, arbitrary or unlawful. This restricted interpretation of the duties imposed upon him by the Tenure Employees Hearing Act, we believe, resulted in prejudice to the rights of the appellant and requires that the matter be remanded to the Commissioner for decision as provided herein." (at page 409)

* * * * * * *

"The matter is therefore remanded to the Commissioner of Education for the purpose of making an affirmative decision as to the proper penalty to be imposed. Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." (at page 422)

During the time which has elapsed since the Court's remand, efforts have been made to reach an amicable settlement. The Board of Education has discussed the matter at several meetings, one of which it transcribed and sent to the Commissioner, and both counsel have searched diligently for some basis for settlement. Counsel submit, however, that an impasse has been reached in their negotiations and discussions and they now request that the matter go immediately forward to a determination by the Commissioner of the proper penalty to be imposed.

In its opinion the Court suggested that the penalty should be based upon findings with respect to the nature and gravity of the offenses under all the circumstances involved, evidence as to provocation, extenuation or aggravation, and harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system. Review of the circumstances is therefore to be made with these elements in mind.

The pupil involved was not unruly or defiant and had not been a difficult child to control. Nor is there any evidence that other pupils or the class as a group had ever presented any problems of discipline. On the contrary, the class appears to have been a well-behaved group. The record discloses no indication of any particular aggravation or provocation or other extenuating circumstances which might serve to explain the teacher's conduct. In fact, the teacher's sudden, violent reaction in the absence of provocation remains for the Commissioner one of the inexplicable aspects of this matter. A pocketbook passing episode, which preceded the teacher's attack, although improper classroom conduct, required no drastic action by the teacher. Such childish behavior is not extraordinary and would be expected to have been controlled in simple and routine fashion by the teacher. Examination of the entire situation involved in this charge gives no clue to the reason for the teacher's violent reaction. Under the circumstances the Commissioner must

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hold that the use of such extraordinary physical restraint was unnecessary and inexcusable. The Commissioner finds, therefore, that the teacher's act constituted a grave offense against the pupil and the good order of the school and as such it cannot be lightly excused.

On the other hand, it must be noted that the teacher had taught for a total of 23 years, the last seven in the school where the incident occurred, with no other blemish of this kind on his record. Although some testimony was offered of other relatively minor incidents in which he was alleged to have laid hands on one or more pupils, the Commissioner considers the proofs of these occurrences to be inconclusive and insufficient. The single incident of this charge, therefore, is the only instance of improper conduct which has been established against the teacher.

It is to be noted also that there is no indication that the teacher's act was premeditated, cruel or vicious, or done with the specific intent to inflict corporal punishment. It appears, rather, that the teacher acted on impulse in the mistaken and misguided notion that physical restraint was called for.

There is no indication that the teacher's actions had any lasting effect on the continued operation of the school. From the testimony of other children in the class, it is clear that they were shocked at the time, but there is no evidence that the experience was more than temporarily traumatic, or that it had a continuing effect upon the proper functioning of the school in any adverse way. Whether this would have occurred had the teacher not been suspended can be only speculative. The fact is that he was relieved of his duties and remained away from the school thereafter.

It must be further noted that a number of considerations other than the single incident complained of herein intruded in the Board's deliberations and probably influenced its decision to impose the penalty of complete dismissal. During the course of the hearings and as appears in the transcripts of meetings of the Board, it was obvious that the teacher had incurred the disapproval of members of the Board, the principal, and some of his colleagues through actions unrelated to the charge herein. The Commissioner is convinced that in deciding to dismiss the teacher there is a strong likelihood, not dispelled, that the Board failed to isolate the particular instance of unbecoming conduct found herein from its additional concerns with respect to other aspects of his behavior in the school and was improperly influenced thereby. This was most clearly reflected in recorded discussions of the Board with regard to reinstatement of the teacher, in which the fear was expressed that his return would result in an aura of disharmony and conflict in the school and interfere with its smooth operation.

The Commissioner does not question the Board's concern for the harmonious functioning of the school nor does he impugn the motives of its members in ousting the teacher and refusing to reinstate him. However, if the teacher was dismissed for behavior other than or in addition to that charged and found to be true herein, then such other alleged improper conduct should have been charged and proved before being considered in terms of penalty. It is apparent to the Commissioner, upon the evidence, that the Board reached the conclusion that this teacher's usefulness to the school system was compromised for a variety of reasons and the parent's charge of improper conduct

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provided an immediate, convenient excuse for the Board to terminate the relationship. Such a course, however, denied to the teacher the right guaranteed by the Teachers Tenure Act to hear all of the evidence used against him with respect to other alleged shortcomings and to present his defenses thereto. The Commissioner holds, therefore, that the penalty in this case must be limited to the single incident of unbecoming conduct of which the teacher has been charged and found guilty.

It remains for the Commissioner to determine the punishment which should appropriately be imposed for the wrongful behavior. After considering all of the circumstance herein, the Commissioner concludes that forfeiture of tenure rights and dismissal from the school system is an unnecessarily harsh sanction under the circumstances. In the Commissioner's judgment, there is no question that the teacher committed a serious offense. However, in the light of his prior record, length of service, approaching retirement and other factors considered *ante*, the fact of this single, isolated instance of misconduct does not, under all the circumstances, call for as severe a penalty as summary dismissal. Although unfitness may be demonstrated by a single incident (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), the Commissioner does not consider the single episode herein sufficiently flagrant to warrant such a finding. In the Commissioner's judgment, a less severe punishment will serve the necessary purposes of correction and deterrent.

The teacher has been suspended from his former employment since early in 1962. During that time he has had to seek work elsewhere, has inevitably suffered damage to his professional reputation, and has endured the mental anguish attendant upon the uncertainty of his future and his involvement in this protracted litigation. The Commissioner believes this to have been sufficient punishment for his one instance of misconduct. The Commissioner concludes, therefore, that no further penalty should be imposed and that the teacher should now be reinstated in his employment in the Holland Township school system. In reaching that conclusion, the Commissioner is aware of the Board's belief that tension and discord will result from such reinstatement. The Commissioner, however, has every expectation, based on the representation of counsel, that the teacher has accepted the error of his earlier behavior, does not wish or intend to create disharmony or unrest in the school, and seeks only an opportunity to conclude his teaching career successfully in the area in which his home is established. If this should not prove true the Board has appropriate avenues available to it for the effective correction of any intolerable situation. In any event, the Board should give the teacher the chance to prove that any continuing doubts and anxieties with respect to the effect of his return are groundless.

The Commissioner further determines that the teacher's reinstatement does not include any right to compensation for the period during which his service has been interrupted. The precise degree of financial detriment suffered by the teacher, if any, has not been established. It is clear that the Board paid him full salary during the time he was suspended following the certification of charges until his ultimate dismissal. Although no evidence was proffered with respect to his activities since then, it has come to the notice of the Commissioner through representations of his council, that the teacher has been employed in a school system in another area for at least most of the period

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of this litigation. It has also been indicated that he suffered no decrease of salary but has earned as much as if he had continued in his employment in Holland Township. Counsel urged, however, that any financial advantage has been more than offset by the added expenses of maintaining two part-time residences, travel between them, and the expenses attendant upon his attempts to be reinstated. No precise figures, competently established, were presented to the Commissioner with respect to the allegation, and the inference is strong that the teacher has neither suffered nor profited significantly with respect to income. Accordingly, the teacher is not entitled to any monetary compensation.

In accordance with the directive of the Court and for the reasons stated above, the Commissioner finds and determines that the penalty of summary dismissal imposed upon David Fulcomer for conduct unbecoming a teacher was unnecessarily severe under the circumstances herein. The Commissioner finds further that the teacher has suffered sufficient punishment for his infraction by reason of the lengthy suspension and other sanctions which have occurred and no further penalty is appropriate. The Holland Township Board of Education is therefore directed to reinstate David Fulcomer in its employment at the beginning of the 1967-68 school year at the appropriate place on respondent's salary schedule for his years of experience.

COMMISSIONER OF EDUCATION.

August 9, 1967.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued October 3, 1966, decided January 17, 1967, remanded March 6, 1967, final brief submitted on remand December 13, 1967, decided on remand—

Before Judges Sullivan, Kolovsky and Carton.

On appeal from decision of State Board of Education.

Mr. Joseph V. DeMasi submitted brief on behalf of Teacher-Appellant, David Fulcomer.

Mr. Cowles W. Herr submitted brief on behalf of respondent, Holland Township Board of Education (*Messrs. Herr and Fisher,* attorneys).

Mrs. Marilyn Loftus Schauer, Assistant Attorney General, submitted brief on behalf of State Board of Education (*Mr. Arthur J. Sills,* Attorney General of New Jersey).

PER CURIAM.

We have reviewed the findings and determination of the Commissioner of Education after the remand of this matter pursuant to the direction of the court.

The decision of the Commissioner dated August 9, 1967, including his determination as to the penalty to be imposed upon the teacher, is in all respects affirmed.

No costs.

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LV

WHERE BUDGET CUT IS NOT ARBITRARY AND APPROPRIATION IS ADEQUATE, COMMISSIONER WILL NOT INTERVENE

BOARD OF EDUCATION OF THE BOROUGH OF ROSELLE PARK,
Petitioner,

v.

MAYOR AND COUNCIL OF THE BOROUGH OF ROSELLE PARK, UNION COUNTY,
Respondent.

For the Petitioner, Andrew V. Guarriello, Esq.

For the Respondent, Alfonso L. Pisano, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from an action of respondent, hereinafter "Council," pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was twice rejected by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in change of the Divisions of Controversies and Disputes and of Business and Finance on April 19, and May 23, 1967, at the State Department of Education, Trenton.

At the annual school election on February 14, 1967, the voters rejected the Board's proposals to raise $1,813,028 for current expenses and $97,033 for capital outlay. At a second referendum pursuant to *R. S.* 18:7–81, held on February 28, 1967, the proposals were submitted in the lesser amounts of $1,779,028 and $86,033 respectively and were again rejected. The budget was then submitted to Council pursuant to *R. S.* 18:7–82. After receipt of the budget from the Board, the Council met and determined by resolution to set the amount to be raised for current expense at $1,697,228, a reduction of $81,800. The capital outlay amount was lowered to $42,833, a reduction of $43,200. The Board contends that the action of the Council was arbitrary and capricious and the amount certified is insufficient to provide an adequate system of education for the pupils of the school district and appeals to the Commissioner to restore the funds deleted by the Council.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick,* 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

"* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be

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independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

"* * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

In its Answer, Council specified the line items of the budget in which it considered savings could be effected without affecting the quality of education to be provided, as follows:

	Item	*Reductions By Borough Council*	
Current Expenses			
213	Teachers Salary	$40,100	
214B	Guidance Personnel	4,000	
230A	Library Expenses	3,000	
250B	Travel Expenses—Instruction	1,000	
250C	Miscellaneous Expense—Instruction	5,000	
720B	Repairs to Building—Contracted Service	14,800	
730A	Replacement of Equipment for Instruction	5,900	
740A	Other Expenses—Upkeep of Grounds	500	
740B	Other Expenses—Repairs of Buildings	2,500	
820B	Compensation Insurance	2,000	
1010	Salaries—Student Body Activities	1,000	
1020	Other Expenses—Student Body Activities	2,000	
	Total Current Expenses		$81,800

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Item		*Reduction By Borough Council*
Capital Outlay		
Buildings	$28,200	
Equipment	15,000	
Total Capital Outlay		43,200
Total		$125,000

The Commissioner will review these recommendations for reductions in the light of the principles enunciated by the Court recited *supra.* In so doing it should be remembered that he is not exercising his own independent judgment with respect to the desirability of the item. If permitted, he would be inclined to restore all of the amounts deleted in recognition of their value and the Board's desire to furnish the best possible educational program for the community. The Commissioner is constrained, however, to a determination of whether Council's reductions are so drastic that a minimum school program cannot be maintained.

Account No. 213—Teachers' Salaries: In addition to salary increases for incumbent teachers the Board seeks to add six additional teachers at a cost of approximately $47,000. Council recommended a reduction of $40,100.

It appears that at least two of these new positions are essential to the proper functioning of the school system. Although the population has been relatively stable, the enrollment increased by an unanticipated 34 pupils during the current year. As a result the number of kindergarten classes has had to be increased from nine to ten, requiring an additional teacher during 1966-67. It appears necessary also to provide a class for children who have been determined to be emotionally disturbed.

The Commissioner recognizes the desirability of the additional staff contemplated by the Board, especially those aimed at providing practical experience for less able pupils. However, within the restrictions placed on his intervention, he cannot go beyond reinstating the salaries of the two teachers deemed to be essential to carry out State-mandated programs for kindergarten and handicapped pupils. It appears that Council decided to eliminate all but one of the six new positions budgeted. The Commissioner finds that a second position is essential and directs that $7,000 of the $40,100 curtailed by Council be reinstated for this purpose.

Account No. 214B—Guidance Personnel: In addition to normal salary increments for the three full-time counselors, the Board seeks to increase the part-time services of a vocational guidance counselor to full-time. The budgeted increase is $7,508. Council reduced this account by $4,000. The amount set by Council will permit a modest increase in this desirable service. The Commissioner finds no ground to interfere and the reduction will stand.

Account No. 230A—Library Expenses: Two years ago the Board expended $2,748 in this account. For 1966-67 it budgeted $5,660 and was also able to allocate an additional $4,394 from State and Federal funds to this purpose for a total of $10,054. It seeks to maintain this level by budgeting $10,588 for the ensuing year.

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There is no question that the amount provided for library books prior to this year was far below the recommended American Library Association standard for school libraries of $4.00 per pupil. Having reached that standard with the help of outside funds, the Board commendably seeks to maintain it. Council has reduced the amount by $3,000 which will permit the expenditure of $7,588 for this purpose.

Much as the Commissioner values generous provisions for library books, he must recognize that the amount set by Council represents a reasonable one-year increase in the funds to be raised locally for this purpose. He must, therefore, decline to interfere in this determination, and hopes that the Board may be able to make up the difference from sources other than local tax monies.

Account No. 250B—Travel Expenses—Instruction: For the 1966-67 year the Board budgeted $2,000 but spent an additional $1,000 from unanticipated State Aid realized from the sales tax. It seeks now to maintain this account at the $3,000 level. Council recommends a $1,000 reduction to $2,000.

This account provides for travel for visits to colleges, to industrial plants, and to various conferences. The Commissioner has no doubt that such a program is eminently desirable but the $1,000 curtailed by Council cannot be deemed absolutely essential. The amount will, therefore, remain as fixed by the governing body.

Account No. 250C—Miscellaneous Expense—Instruction: The amount allocated to this account increased from $2,000 in 1966-67 to $15,700 for next year. Part of the reason for the rise is the transfer from account 420C (miscellaneous supplies—health) of an amount for psychiatric services. The budget shows, however, that only $600 was so transferred. Apparently the Board seeks to provide more extensive psychiatric consultation and to employ an additional teacher for supplemental instruction purposes. The account has now been reduced by $11,000—$6,000 by the Board in its second submission and $5,000 by Council—to a final figure of $4,700. This represents a $2,100 increase over the funds available in both accounts for the past year and should make possible the increase in the psychiatric services. It has not been clearly shown that the additional funds are essential to the proper operation of the school and the amount set by Council will not, therefore, be disturbed.

Account No. 720B—Repairs to Buildings—Contracted Services: The Board budgeted $23,900 in this account for the following purposes:

Roof maintenance (3 schools)	$9,600
Boiler repair	4,000
Painting	3,000
Flooring replacement (6 classrooms and basement)	3,300
Convert basement room to library	4,000
	$23,900

Council cut the amount by $14,800. The Board claims the entire amount is necessary in order to overcome under-budgeting in past years for maintenance work and to provide a safe and healthful environment for children.

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To determine this issue, the Commissioner caused an inspection to be made of the school plant. The report clearly indicates that conditions exist which present a hazard to the health, safety and comfort of pupils. Wood floors were found which are cupped and have been worn to the point that floor nails are protruding; the artificial illumination provides insufficient light for proper vision; roofs are leaking to the degree that metal buckets are being used to catch water, and sections of plaster are beginning to fall; the tubes in the boiler in the junior high school leak and it is doubtful that this boiler can pass the required inspection. The Commissioner takes notice also that while the average expenditure for maintenance purposes in all New Jersey schools in 1965-66 was $20 per pupil, Roselle spent only $10. After considering all factors, the Commissioner concludes that the funds requested by the Board in this account are essential to the welfare of the pupils compelled to attend the schools. The Commissioner will, therefore set aside the reduction made by Council and will direct the reinstatement of $14,800 in the school appropriations.

Account No. 730A—Replacement of Equipment: The budget shows the following for this account:

Expended	*Available*	*Requested*
1965-66	1966-67	1967-68
$1,584.85	$3,529	$9,862

Council deleted $5,900 from the budget request, leaving $3,962 available. Although the equipment sought to be purchased is undoubtedly desirable, the Board has not sustained its burden of a clear showing that it is essential to the schools' proper functioning. Under the circumstances herein the Commissioner must decline to alter the governing body's determination.

Account No. 740A—Upkeep of Grounds: Council reduced the $1,850 requested for this purpose by $500 to a final sum of $1,350. No testimony was offered to provide sufficient grounds for the Commissioner to override the governing body's decision. The account will stand, therefore, in the reduced amount.

Account No. 740B—Repairs of Buildings: In view of the condition of the buildings noted under Account No. 720B above, the Commissioner considers the total amount budgeted by the Board for repairs to be necessary to the continued proper operation of the schools. Included herein is an amount of $1,800 for replacement of artificial lighting in six classrooms. The inspection ordered by the Commissioner revealed that the incandescent fixtures in the three elementary schools and the junior high school provide only 18 footcandles of illumination instead of the required minimum of 30 footcandles. Replacement of lighting in six classrooms is only a beginning and any extra funds in this account should be used to improve the lighting in additional classrooms. Because of the necessity to protect the eyesight of the pupils the Commissioner will override the economy suggested by Council in this account and will direct the reinstatement of the $2,500 by which it was reduced.

Account No. 820B—Insurance: The amount budgeted for this purpose increased from $3,800 in 1966-67 to $22,800 for 1967-68 as a result of the Board's decision to pay the premiums for hospitalization insurance for its employees. It was agreed at the hearing, however, that the reduction of

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$2,000 ordered by Council will still provide sufficient funds in this account. By reason of this stipulation, the amount will stand at $20,800 as reduced.

Account No. 1010—Salaries—Student Body Activities: The Board increased the amount budgeted in this account from $10,225 during 1966-67 to $12,750 for 1967-68, an increase of $2,525. Council suggested that it be reduced by $1,000.

This account provides pay for extra-curricular assignments such as coaching the various athletic teams and serving as advisor to various activity groups. The amounts budgeted for junior high school activities amounting to $775 were not budgeted prior to this year.

In its testimony the Board indicated that the amount designated for each of the activities was arrived at during the course of salary discussions with the staff. It appears that the Board is committed to the payment of these amounts for the services performed. The Commissioner concludes that the terms of this salary agreement must be fulfilled. He directs, therefore, that the $1,000 which was deleted by Council be restored in order that the student activity program may be properly conducted.

Account No. 1020—Other Expenses—Student Body Activities: This account provides relatively small sums for a wide variety of pupil activities. The Board's budget calls for an increase of $1,838 over the amount available this past year, and Council suggests a reduction of $2,000. The Board claims that it has lost this amount in estimated gate receipts.

After considering the testimony in support of this item, the Commissioner concludes that the Board has not clearly demonstrated that it cannot maintain a thorough and efficient school program under the curtailed amount. Therefore the economy recommended by Council of $2,000 will stand.

Capital Outlay—Buildings: The Board's budget called for $54,200 in this account, all but $1,000 of which was ear-marked for the installation of mandated fire detection equipment. Council reduced the amount by $28,200 to $26,000, noting that such equipment does not have to be completely installed until September 1968 and suggesting that half of the work be done out of the 1967-68 appropriations and be completed by using funds in the succeeding year's budget. As such a program will meet the deadline established by the State Board of Education, the Commissioner finds no ground to intervene and will, therefore, permit Council's reduction of $28,200 to remain.

Capital Outlay—Equipment: Council reduced the amount of $31,833 requested by the Board for new equipment by $15,000 to $16,833. The new items of equipment requested by the school staffs are undoubtedly worthwhile and would provide valuable aids to the program of instruction. If left to his independent judgment the Commissioner would have no hesitancy in endorsing purchase of the entire list. Under the restraints imposed upon his determination, however, he must conclude that the Board has not shown that economies in the purchase of new equipment will have such an adverse effect that an inadequate educational program will inevitably result. Under such circumstance Council's determination must remain unchanged.

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In summary, the Commissioner finds and determines that the sum of $25,300 comprising $7,000 for an additional teacher, $14,800 for contracted services for repairs, $1,000 for salaries for student activities and $2,500 for repairs to buildings, is necessary to the operation of a thorough and efficient educational program in the Roselle Park public school system. The Commissioner further finds that the other reductions suggested by Council amounting to $56,500 in the current expense budget and $43,200 in the capital outlay account or a total of $99,700 have not been clearly shown to be essential to the proper functioning of the schools, and those reductions will remain as determined. The Commissioner directs that an amount of $25,300 be added to the appropriations for the current expenses of the Roselle Park school district for the year 1967-68 school year.

COMMISSIONER OF EDUCATION.

August 9, 1967.

LVI

WHERE BUDGET CUT IS NOT ARBITRARY AND APPROPRIATION IS ADEQUATE, COMMISSIONER WILL NOT INTERVENE

BOARD OF EDUCATION OF THE TOWNSHIP OF MADISON,
Petitioner,

v.

THE MAYOR AND COUNCIL OF THE TOWNSHIP OF MADISON, MIDDLESEX COUNTY,
Respondent.

For the Petitioner, Cohen, Hoagland and Cohen (Richard S. Cohen, Esq., of Counsel)

For the Respondent, Margolis, Margolis, Turak and Gordon (Marc J. Gordon, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," taken pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1966-67 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The Board seeks the restoration of certain of the funds eliminated by the Council.

At the annual school election of February 8, 1966, the Board sought voter authorization for the appropriation of $3,767,758 for current expenses and $175,900 for capital outlay for the 1966-67 school year. The voters failed to approve these amounts. At a second election held pursuant to *R. S.* 18:7–81

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on February 23, 1966, reduced amounts of $3,745,758 for current expenses and $84,900 for capital outlay were submitted and were again rejected. The Board thereupon delivered its budget to respondent Council as provided by law. *R. S.* 18:7–82 On March 6, 1966, the Council determined the amount necessary to be raised for current expenses at $3,450,658, a reduction of $295,100, and eliminated all funds for capital outlay purposes, a reduction of $84,900. The Board thereupon instituted the present appeal on March 11, 1966, alleging that the reduced appropriations would not permit the operation of a thorough and efficient system of public schools and that the quality of education in the school district would suffer serious adverse effects. The Board alleged further that respondent's action was arbitrary, unreasonable and capricious, was without consideration of the needs of the school system, and was grounded upon improper standards and in satisfaction of prior political commitments.

In its Answer, respondent Council maintained as one of its defenses that the issues raised by petitioner did not constitute a controversy or dispute arising under the school laws and that the Commissioner of Education, therefore, was without jurisdiction to hear the matter.

On March 7, 1966, and prior to the institution of this action before the Commissioner of Education, the Board filed a complaint in Superior Court, Law Division, demanding that the Council be restrained from certifying the reduced amounts of appropriations to the Middlesex County Board of Taxation. On March 10, 1966, the restraint was granted and the Board was directed by the Court to file a petition with the Commissioner for a full determination of the meritorious issues raised. The subject petition was then filed on March 15, 1966. Council challenged the authority of the Commissioner to hear and decide such an issue and appealed to the Appellate Division. On April 11, 1966, the Court rendered a decision in a parallel case, *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 91 *N. J. Super.* 20 (*App. Div.* 1966), in which it confirmed the authority of the Commissioner under *R. S.* 18:3–14 to review the action of Council with respect to the school budget within certain specified limits. At a conference of counsel herein, both parties took notice of the *East Brunswick* case and agreed that should it be certified to the New Jersey Supreme Court, further proceedings in the subject matter would be held in abeyance pending the Court's decision. The Supreme Court took certification in the *East Brunswick* matter and rendered its decision on October 24, 1966.

In its decision, *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94, the Supreme Court affirmed the Appellate Division's finding that the Commissioner of Education had jurisdiction to decide the subject controversy and went on to set down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

> "* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obliga-

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tion to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

"* * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

Following the Court's decision, no further action was taken in this case until after the annual school election in February 1967. Thereafter, counsel for the Council requested a conference which was held on April 26, 1967. At that meeting, counsel for the Board conceded that the issue with respect to reduction of appropriations for current expenses has become moot for the reason that the 1966-67 school year was virtually complete and the school system has functioned within the amounts provided. The Board, however, continued to press its need for the deleted funds for capital outlay purposes. A hearing was therefore held on this question before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and Business and Finance at the State Department of Education, Trenton, on May 24, 1967.

The Madison Township school district is organized under the provisions of Chapter 7 of Title 18. It provides an educational program in one high school building and 16 elementary schools. It has experienced phenomenal growth in recent years as illustrated by its enrollment which has increased from 6,962 pupils in 1962-63 to 10,200 in 1966-67 with an estimated 11,600 expected in September 1967. Construction of a second high school has been approved by the electorate and proposals for additional elementary classrooms are planned for submission to the voters during the coming year. One hundred and twenty-one classrooms were added in 1965. Appropriations for school purposes have increased greatly because of this unusual growth, and the Board contends it has never had sufficient funds to meet all the capital programs and improve-

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ments required. Although the school year to which the budget reduction contested herein was all but over at the time of the hearing, the Board maintains that there is still need for the capital funds eliminated by the Council and asks the Commissioner to intervene and restore the amounts deleted.

Council argues that the matter is now moot for the reason that any deficiencies which resulted from the elimination of capital outlay funds have been corrected by the appropriations for the 1967-68 year. Council contends further that the Board has not shown that the reductions have resulted or will result in a failure to meet minimal educational standards in the district.

The Board's capital outlay account for the past several years shows the following amounts budgeted and expended:

	Total Budgeted	*Total Amount Expended*	*Amount Expended for Site Improvement*
1963-64	$91,129	$105,335.94	$46,256.73
1964-65	69,950	82,431.00	25,049.15
1965-66	165,806	102,659.00	8,035.00

A surplus of $48,000 unexpended at the close of the 1965-66 year was reserved to be appropriated in 1966-67. As stated above, the Board first proposed a local tax budget of $175,900 for 1966-67 and resubmitted a reduced amount of $84,900 at the second election which was also rejected. Council then reduced the amount to zero.

In its first budget the Board proposed the following capital expenditures:

1.	Professional fees for sites	$ 3,000*
2.	Improvements to sites	20,000*
3.	New pre-fabricated storage building	14,000
4.	High School auditorium lighting controls and shop dust-control system	15,000*
5.	Equipment for administration	600
6.	Instructional equipment for new buildings	52,300
7.	Purchase of eleven buses	66,000
8.	Operational equipment—new tractor and mower	5,000*
9.	Maintenance tools	500
10.	Band and athletic equipment	1,500
	Total	$177,900
* Items eliminated at second submission		43,000
	Total	$134,900

Use of surplus and other revenue reduced the amount to be raised by local taxes from $134,900 to $84,900.

The Board presented testimony with respect to the need for all of the items proposed. The main thrust of its appeal, however, is directed toward restoration of monies to be used for site improvement. It points to the fact that in

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addition to the $23,000 budgeted for site work it had contemplated using $48,000 unexpended from the prior year for such purposes. However, when no capital funds were appropriated it had to direct what it termed the "artificially generated surplus" of $48,000 from site work to the purchase of instructional equipment for the new schools. The Board considers its most pressing need, therefore, to be improvement to its school sites and, while not conceding that the other funds are unnecessary, places its first priority on resstoration of the $71,000 intended for site work which was not made available.

In opposing any such restoration, Council cites the appropriations certified for capital outlay purposes for the coming year. At the school election in February 1967 the Board's proposal of $351,745 for capital outlay for the 1967-68 school year also met with voter rejection. After the second defeat Council reduced the amount by $40,000 and certified an appropriation of $311,745. While Council does not admit that it erred in cancelling all appropriations for capital purposes for 1966-67, it contends that whatever deficiencies occurred thereby will be compensated by the greatly enlarged allowance for the coming year.

The Commissioner has no doubt that the Madison Township school district could use several times the amount it seeks herein to have restored for worthwhile, valid and desirable purposes. Neither can there be any question that the sites at the Cheesequake, Grissom, Carpenter, Madison Park, Voorhees, and Southwood Schools are in a deplorable state. Pictures of the areas surrounding these buildings were exhibited at the hearing and demonstrate clearly the need to correct serious problems of erosion and drainage and to grade, seed, landscape, and surface various areas. The Superintendent's testimony that money is spent needlessly for interior maintenance because of exterior sand areas and that play spaces are restricted and often unusable is entirely credible. It is also obvious that the longer correction of these conditions is postponed, the more extensive and costly the remedies will be.

Even though this be so, the Commissioner is constrained to agree with Council that there is insufficient ground at this posture for the Commissioner to interfere with the determination made. Were the Commissioner free to exercise his own independent judgment, which he is not under the limitations imposed by the Court, he would have no hesitancy in restoring the total amount budgeted by the Board for capital outlay purposes. He must note, however, that the voters of the school district have not been willing to authorize funds for the improvement of the unsightly and educationally undesirable conditions of the school sites and that Council has concurred in the decision of the voters. Under such circumstances the Commissioner is constrained to substitute his judgment and to intervene to override the decision of the electorate and the governing body only when it can be clearly shown that not to do so would produce such adverse effects that a thorough and efficient program of education cannot be provided. The fact is that the fiscal year has been completed without any clear showing of such a result. Also to be considered is the fact that much more adequate funds than heretofore will be available to the Board for capital outlay purposes. This is not to say that all the needs of the schools will now be met. The Board has stated, and the Commissioner concurs, that it

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could use double the amount proposed to sound purpose. Nevertheless it is true that the Board will now be able to correct the most critical deficiencies during the ensuing year. Under such circumstances the Commissioner must decline to interfere with the earlier determination of Council.

The Commissioner's decision not to intervene in this case rests also on one other consideration. It is obvious that in planning for new schools the proposal submitted to the people has been pared to the minimum amount required to erect the building, and the bond issue to be authorized has not included funds for all the equipment, site work, and other costs necessary to a complete project. The result is that these items are then placed in the annual school budget to be raised in a single year's tax levy rather than being spread over the life of a bond issue. The Commissioner has long questioned the wisdom of such a procedure. In saying this, he is well aware of the enormous problems with which boards of education in this school district have been faced and the commendable achievements they have accomplished. He is likewise cognizant of the difficulty of securing approval of bond referendums and the temptation to make the proposal as palatable to the voters as possible by limiting the sum requested to the least amount needed to erect the building, in the hope that once the school is built the people will vote enough money to complete it properly. The Commissioner believes such a policy to be unwise on two counts. The first is that it does not present a true picture to the electorate who are led to believe that they will be getting a completed school when they authorize the bond issue. The second is that it requires the annual tax levy to bear the burden of an expenditure which, as a capital outlay, should be spread over a number of years. The result is that the current taxpayers bear the entire expense, and future taxpayers, who will use and share in the advantages of the improvement, are relieved of sharing in the costs. The Commissioner recognizes that interest payments are added to the cost when a bond issue underwrites a school expansion project, but in his judgment that fact does not outweigh the advantages of the authorization of completed projects when they are proposed.

For the reasons stated the Commissioner will decline to intervene in this matter to reinstate the capital outlay funds eliminated by the Council in its determination of the appropriations for school purposes for the 1966-67 school year.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

August 11, 1967.

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LVII

WHERE BUDGET CUT IS NOT ARBITRARY AND APPROPRIATION IS ADEQUATE, COMMISSIONER WILL NOT INTERVENE

BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE,
Petitioner,

v.

THE BOROUGH COUNCIL OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,
Respondent.

For the Petitioner, Trombadore & Trombadore (Raymond R. Trombadore, Esq., of Counsel)

For the Respondent, Donald C. Chase, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, hereinafter "Board," appeals from the action of respondent, hereinafter "Council," taken pursuant to *R. S.* 18:7–82, certifying to the County Board of Taxation a lesser amount of appropriations for school purposes for the 1967-68 school year than the amount proposed by the Board in its budget which was rejected twice by the voters. The facts of the matter were educed at a hearing before the Assistant Commissioners in charge of the Divisions of Controversies and Disputes and of Business and Finance on June 21, and July 26, 1967, at the State Department of Education, Trenton.

At the annual school election of February 14, 1967, the voters rejected the Board's proposals to raise $1,205,066 for current expenses and $39,393 for capital outlay. The items were submitted again on February 28, 1967, at a second referendum pursuant to *R. S.* 18:7–81 and again failed of approval. The budget was then sent to the Council pursuant to *R. S.* 18:7–82 for its determination of the amount of funds required to maintain a thorough and efficient local school program.

Thereafter, following a conference with the Board on March 9, the Council adopted a resolution on March 13, certifying the amount of the tax levy for current expenses at $1,130,066, a reduction of $75,000. The capital outlay item was certified in the amount of $14,393, a reduction of $25,000. The Board contends that the Council's action was arbitrary and capricious and the amount certified is insufficient to provide an adequate system of education for the pupils of the school district. The Board appeals to the Commissioner to restore the funds deleted by the Council.

In the case of *Board of Education of East Brunswick* v. *Township Council of East Brunswick*, 48 *N. J.* 94 (1966), the Court laid down guiding principles for the review of twice-rejected school budgets by the municipal governing body as follows:

"* * * The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be

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independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. Where its action entails a significant aggregate reduction in the budget and a resulting appealable dispute with the local board of education, it should be accompanied by a detailed statement setting forth the governing body's underlying determinations and supporting reasons. * * *" (at page 105)

The Court also defined the function of the Commissioner when, after the governing body has made its determination, the Board appeals from such action:

"* * * the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated 'thorough and efficient' East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R. S.* 18:7–83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness." (at page 107)

The testimony reveals a series of meetings of the Board and Council. Prior to the statutorily required public hearing on the budget before its final adoption and the first referendum, the Board invited the Council to meet with it. At this conference, the Board explained the increases it believed to be necessary and gave a copy of the budget to those Council members who attended. Following the second rejection of the proposed budget at the polls, the Board and the Council met on March 9, 1967, and conferred for about four hours. Council met subsequently on March 13 and adopted a resolution reducing the amount to be raised for current expenses from $1,205,066 as proposed by the Board to $1,130,066, a reduction of $75,000. The resolution also lowered the amount for capital outlay, by $25,000 from the $39,393 figure rejected by the voters to $14,393, making a total reduction of $100,000 in the tax levy. The Mayor and Council also issued a statement (Exhibit P-2), pertinent excerpts of which stated:

"The Mayor and Council have explored certain areas where we feel that decreases are possible, but we do not desire to list these by line item. Rather, we feel that it is more appropriate to have the Board of Education make the necessary adjustments based upon the budgetary figures that we are about to certify.

"We do however feel that the following are areas in which it is perhaps wiser to forestall expenditures to future years if only to be absolutely

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necessary, rather than having them all come in 1967. Under the current portion of the budget: excessive additional teachers, library, guidance, part time secretaries, summer help and miscellaneous expenses for instruction. We recommended the medical insurance program be further studied, but leave its acceptance or rejection to the discretion of the Board of Education. Under the capital outlay portion we recommended the examination of the possibility of spreading the payments of assessments over a number of years and also bonding of expensive equipment. This would stabilize these amounts rather than having such a tremendous increase all at one time.

"* * * We feel that we have an obligation to reach the mandate of the people of Manville who twice rejected the original amounts. We have reacted to this mandate by cutting as much as possible without jeopardizing our children's education."

Thereafter, at its meeting on March 20, the Board adopted a resolution (Exhibit P-3) requesting the Council "to specify amounts reduced by line item of the Budget and furnish this information to the Board of Education by March 27, 1967." At a meeting on March 27, the Council expressed its willingness "to meet with the Board of Education President and its Finance Committee to explain areas it felt reductions should be made * * *." (Exhibit P-4) An attempt to meet on April 5 was unsuccessful and was rescheduled for April 18. (Exhibits P-5 and 6) Apparently, some misunderstandings arose with respect to this proposed conference, with the result that on April 17 the Board met and adopted a resolution to file the petition of appeal herein to the Commissioner of Education. As a result of a conference of counsel following filing of the petition on April 25, it was agreed that the Board and the Council would meet to explore possible areas of agreement. Such a meeting was held in June prior to the hearing of this matter, but proved unfruitful.

The Board contends that Council failed to give the needs of the school district adequate study and consideration, that it acted on the basis of misunderstanding and misinformation, and that its determination to make a reduction in an aggregate amount without reference to specific line item economies was motivated solely by voter reaction with no consideration of the best interests of the school district. The Board alleges that Council's action was therefore arbitrary and capricious and contrary to the directive of the Court in the *East Brunswick* case, *supra*.

The Commissioner finds that the proofs offered are insufficient to support the charge of aribtrary and capricious action by Council. It is true that the Council made a lump sum reduction without reference to specific line item economies but such action is not necessarily arbitrary or capricious. In this case, the Council suggested general areas in which it believed unnecessary expenditures were contemplated but left it to the Board's discretion to make the specific implementation. Thereafter, the Council indicated its willingness to discuss specific line item economies with the Board and when directed to do so by the Commissioner, detailed the particular savings it recommended by line item in its Answer to the appeal herein. Council's action, in this case, was far different from the kind of arbitrary conduct condemned by the Commissioner in *Board of Education of National Park* v. *Borough Council of National Park,* decided April 10, 1967, and the Commissioner will not so characterize it.

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The proofs also fail to support the allegation that Council's action was based solely on voter reaction. It is obvious that the Council was aware that the voters had twice rejected the Board's budget, else it would not have been faced with the duty to fix the school appropriations. Nor does the directive of the Supreme Court imply that the Council must close its mind entirely to the fact of voter disapproval in the Commissioner's judgment. It does mean, however, that the governing body cannot make its determination solely on the basis of voter rejection without regard to the rights of the children as they are reflected in the needs of the school district. In this and similar cases, the aspirations of the Board have run beyond the acceptance of the electorate. It is the Council's difficult task to find a balance between these positions which will preserve the rights and protect the interests of the children who are to be served. Council, therefore, cannot overlook the reaction of the voters as though it had never occurred, but neither can it ignore the responsibility of the school district to provide a proper education for its pupils. In this case, the Commissioner finds that the charge that Council acted solely on the basis of voter reaction is not supported by a sufficiency of proofs.

The testimony does support the charge that Council, in some respects, acted on the basis of insufficient or incorrect information. It appears further, however, that Council may not have been supplied with some data or information which could have been helpful to it. The testimony discloses that the Board supplied copies of a publication entitled "Budget Presentation" (Exhibit P-1) which contained its budget and a good deal of supporting data. For some unexplained reason, however, copies of another publication with a similar title but containing a much more detailed breakdown of the budget (Exhibit P-8) was not delivered to the Council. From his study of the two instruments the Commissioner has to conclude that the more explicit data in the second, unsupplied statement was essential to a proper consideration of the financial needs of the school district and, had it been given to all members of Council at the outset, the more complete information might have produced a different result. The Commissioner reiterates herein the statement made in the case of *Board of Education of Monmouth Regional High School District* v. *Township Committee of the Township of Shrewsbury, the Mayor and Council of the Borough of Eatontown, the Mayor and Council of the Borough of New Shrewsbury, Monmouth County*, decided June 5, 1967, wherein he said:

> "The Commissioner has been called upon recently to hear a series of appeals by boards of education contesting the adequacy of school appropriations fixed by municipal governing bodies. In several of these matters he has noted an unfortunate lack of cooperation and even a degree of hostility developing between board and council. Such a condition is to be deplored. Understandably, the board of education is apt to feel chagrined and frustrated at a double rejection by the electorate. It is also true that boards of education in such a situation often question the wisdom of the statutory plan which assigns the determination of the school district's financial needs to a separate governmental entity which may or may not be well informed on the subject. The fact remains, however, that such is the legislative scheme and it behooves all who are in any way involved to lend their best efforts and cooperation to making the procedure operate as effectively as possible in the interests of the children to

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be served. The governing body's task is a difficult one. It is required to consider an extremely complex matter and to reach a decision which will have important and far-reaching effects, in a very short period of time. If the governing body is to discharge such a duty properly, it must have the advantage of as much information as can be useful to it in arriving at a sound determination. The board of education should, therefore, take the initiative to supply detailed data and helpful information for the governing body's use and should be prepared to consult and assist in any helpful way. The governing body, in turn, should take as much time as possible to digest the information supplied and to consult with the board with respect to the problems and educational needs to be met. It is in such a spirit of mutual understanding and cooperation, with the educational welfare of the children of the community as the paramount consideration, that the legislative plan must proceed, if it is to be successful."

In this case the Commissioner finds that the Council acted on the basis of the information furnished by the Board. The Commissioner finds further that the Board has not established its allegation of arbitrary and capricious conduct by the Council.

The Board also contends that the reductions made by Council will so adversely hamper its operations that a thorough and efficient school system cannot be maintained, and it contests all but two of the line item economies which Council suggested, as follows:

DETAILED STATEMENT OF BUDGET REDUCTIONS

CURRENT EXPENSES

Account		*Budgeted By Board*	*Recommended By Council*	*Reduction*
110b	Board Secretary's office	$ 23,580	$ 20,580	$ 3,000
120b	Contractual services—administration	3,450	450	3,000
213.1	Teachers' salaries	1,052,050	1,036,050	16,000
214	Other instructional staff salaries	62,360	46,360	16,000
215	Secretaries' salaries	26,100	22,100	4,000
216	Other salaries—instruction	6,060	3,060	3,000
240	Teaching supplies	44,075	39,075	5,000
410	Health services salaries	33,710	31,910	1,800
610	Plant operation salaries	73,500	69,500	4,000
640	Utilities	27,700	26,500	1,200
650c	Care of grounds	2,000	1,000	1,000
710	Maintenance salaries	20,400	18,400	2,000
720b	Building repairs	12,050	10,050	2,000
730b	Non-instructional equipment replacement	2,211	1,211	1,000
820	Insurance	33,010	21,010	12,000
				$75,000

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CAPITAL OUTLAY

1220a	Professional fees for sites	$ 3,000	$ 1,000	$ 2,000
1220c	Improvement of sites	9,995	1,995	8,000
1230	Buildings	21,500	6,500	15,000
				$25,000

The Commissioner would customarily consider each of these items separately and would make findings with respect to the effect of the reduction on the maintenance of a thorough and efficient system of public schools in the district. He would then direct the reinstatement of funds deemed essential or decline to intervene if such grounds did not exist. In this case, however, he finds no necessity to record his evaluation of each suggested economy in detail. Suffice it to say that from his study of this matter the Commissioner considers the following items which Council suggested for elimination or reduction to be essential to the adequate functioning of the school program for which funds must be provided.

Item 214	$5,900 for salary of a second librarian
Item 216	$3,000 for salary of guidance staff employee
Item 240	$5,000 for teaching supplies
Item 730	$1,000 for replacement of equipment
Item 820	$12,000 for employee hospitalization insurance
Total	$26,900

The other suggested reductions unquestionably represent highly desirable items, in the Commissioner's judgment, which would improve the quality of the educational program and the opportunities offered to the children of the community. The Commissioner cannot find, however, that they constitute such essential elements of an adequate school program as to afford him the opportunity to intervene and alter Council's determination.

The hearing of this matter was not concluded until after the close of the 1966-67 fiscal year, and it was therefore possible to determine with reasonable preciseness the actual status of the Board's accounts. The Board Secretary testified that his records showed the following:

CURRENT EXPENSE—1966-67

Total receipts	$1,638,230.74
Total expenditures	1,479,685.72
Cash balance 6/30/67	$ 158,545.02
Appropriated for 1967-68 Budget	60,000.00
Balance	$ 98,545.02
Encumbered	9,300.00
Available surplus	$ 89,245.02

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CAPITAL OUTLAY

Total receipts	$	49,644.86
Total expenditures		23,810.83
Cash balance 6/30/67	$	25,834.03
Appropriated for 1967-68 Budget		10,000.00
Available surplus	$	15,834.03

The Board President testified that the Board wants to erect a new middle school to house grades six to eight in order to relieve overcrowding and use of emergency classrooms. It has twice proposed the acquisition of a site for this purpose but the voters each time have failed to approve. The Board now is contemplating asking permission of the electorate to transfer $80,000 of its current expense surplus to the capital outlay account for the purpose of acquiring a new school site. To this $80,000 it would add $10,000 from capital outlay balances for a total of $90,000 for site acquisition.

Desirable as such a program may be and much as the Commissioner might wish to endorse and encourage it, it is obvious that any surplus available to the Board must first be applied to the essential expenditures eliminated by Council. As long as the Board has the funds to provide these items available to it, the Commissioner is in no position to order a reinstatement in appropriations for such purpose. It may be that the Board will choose to use additional surplus to supply other curtailed items which are highly desirable and it may, of course, do so. In taking this position it is to be understood that the Commissioner does not advocate the elimination of the entire balance. A reasonable working surplus is necessary to the efficient operation of the school system. A surplus of $100,000 is larger than necessary for a school district the size of Manville. In fact, under the Board's plan to commit $90,000 of its surplus to site acquisition, it would have reduced its working balance to a minimum. The Commissioner finds, therefore, that although some of the economies suggested by Council cannot be permitted because they would have an adverse effect on the proper functioning of the schools, the reductions can be offset by surplus funds available to the Board. Under such circumstance there is no ground for the Commissioner to overrule the determination of the school appropriations certified by the Council.

The Commissioner wishes to commend the efforts of the Board to upgrade the quality of the educational program which it administers. In his examination of the Board's budget, the Commissioner found no inflated costs or unreasonable requests for funds. In his opinion it is unfortunate that the community has not been willing to afford the kind of educational opportunities for its children which the Board aspires to provide. Finally, the Commissioner expresses the hope that the Board's efforts to acquire a site and construct a new school in order to provide more adequate facilities may prove acceptable to the citizens of the community.

For the reasons stated the petition is dismissed.

COMMISSIONER OF EDUCATION.

August 11, 1967.

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LVIII

BOARD NOT REQUIRED TO GUARANTEE EMPLOYMENT FOR SUBSTITUTE TEACHER

JOSEPH S. MANS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

For the Petitioner, *Pro Se.*

For the Respondent, William A. Massa, Esq.

COMMISSIONER OF EDUCATION

DECISION ON MOTION TO DISMISS

In this action petitioner alleges that the respondent unreasonably denied him permission to teach in the Jersey City school system for the school year 1965-66, and has remained similarly adamant in its denial since then. Respondent denies the allegation and has moved to dismiss the petition on the grounds that it fails to state a cause of action.

Petitioner contends that he holds a "lifetime" elementary teacher's certificate, that he is not a substitute teacher but "permanent" substitute charged with the duties and responsibilities of a regular teacher and that the fact that he frequently alerted respondent to the "spreading evil of drug addiction among school children" places him in a special category. Petitioner further contends that he has been denied employment by respondent because of his crusade to force respondent to conduct compulsory periodic physical examinations of all public school children in order to detect any early drug addiction. See *Joseph S. Mans* v. *Joseph Skrypski, M. D., Medical Director, and Board of Education of the City of Jersey City, Hudson County*, decided by the Commissioner of Education, February 23, 1967.

Petitioner makes no claim to tenure and, in fact, asserts that the question of tenure is irrelevant to his petition. He prays that respondent be required to reinstate him as an elementary teacher and to reimburse him with the difference between the amount of money he earned in 1965-66 as a per diem substitute teacher in another school system and the amount he would have earned as an employee of respondent's school system had he been permitted to continue teaching there.

Respondent contends that since petitioner has not acquired tenure, it has no obligation to continue or guarantee his employment.

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The Commissioner finds no allegation in the petition, nor in any affidavit setting forth an enforceable legal claim by petitioner to re-employment. Indeed, petitioner makes no claim that any contractual right to employment has been violated. The Commissioner further finds that the petition is not even predicated upon any decision or action of the respondent Board of Education constituting an issue which would be presently justiciable before him and which would be an appropriate subject for review.

Petitioner was employed by respondent as a substitute teacher. Whether he was a "permanent" substitute, as he alleges, is not material, since he makes no tenure claim. The Commissioner knows of no authority requiring a board of education to guarantee employment for a substitute teacher. Such employment is a matter which lies solely within the discretion of the board of education. *Schulz* v. *State Board of Education, 132, N. J. L. 345* (*E. & A.* 1944); *Smith* v. *Bloomfield Board of Education,* 1957-58 *S. L. D.* 69

It is well settled that there is no right to public employment beyond the rights accorded in the statutes. *Zimmerman* v. *Newark Board of Education,* 38 *N. J.* 65, (1962); *Taylor and Ozmon* v. *Paterson State College,* decided by the Commissioner March 29, 1966; *Amorosa* v. *Bayonne Board of Education,* decided by the Commissioner December 30, 1966 The New Jersey Supreme Court enunciated this principle in *Zimmerman, supra,* at page 70, when it quoted the "historically prevalent view" expressed in *People* v. *Chicago,* 278 *Ill.* 318, 116 *N. E.* 158, 160, *L. R. A.* 1917 *E,* 1069 (Sup. Ct. 1917) as follows:

> "'A new contract must be made each year with such teachers as [the board] desires to retain in its employ. *No person has a right to demand that he or she shall be employed as a teacher.* The board has the absolute right to decline to employ or to re-employ any applicant *for any reason whatever or for no reason at all.* * * *'" (Emphasis supplied.)

The Commissioner finds and determines, therefore, that the petition herein raises no question of material fact with respect to respondent's denial of employment to petitioner and states no cause of action justiciable before him. Respondent's motion is therefore granted and the petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

August 17, 1967.

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LIX

BOARD NOT RESPONSIBLE FOR EDUCATION OF CHILD VOLUNTARILY WITHDRAWN FROM THE PUBLIC SCHOOLS

IN THE MATTER OF "MG,"

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHATHAM, MORRIS COUNTY; THE MORRIS COUNTY CHILD STUDY TEAM, LESLIE V. REAR, CHAIRMAN; AND THE OFFICE OF SPECIAL EDUCATION SERVICES OF THE NEW JERSEY DEPARTMENT OF EDUCATION, BOYD E. NELSON, DIRECTOR,

Respondents.

For the Petitioner, Smith, Kramer & Morrison (E. Russell Kramer, Esq., of Counsel)

For Respondent Board of Education, McCarter & English (Steven B. Hoskins, Esq., and Arthur C. Hensler, Jr., Esq., of Counsel)

For Respondents Child Study Team and Office of Special Education Services, Arthur J. Sills, Attorney General (Marilyn Loftus Schauer, Esq., Assistant Attorney General, and Stephen G. Weiss, Esq., Deputy Attorney General, of Counsel)

COMMISSIONER OF EDUCATION

DECISION

This petition of appeal is brought by the parents of a daughter, now eight years old, hereinafter referred to as "MG." Petitioners assert that MG is an emotionally disturbed and socially maladjusted child, who has been educated for her entire school career in a private school. They seek an order from the Commissioner authorizing the placement of their daughter in the private school and the payment by respondent Board of Education of the tuition and transportation costs for her attendance there. Respondent Board concurs with the placement of MG in the private school, but asserts that it cannot pay tuition and transportation costs without the prior approval of the Commissioner of Education, which approval has been denied upon recommendation of the Morris County Child Study Team and the Office of Special Education Services of the State Department of Education. It appearing to the Commissioner, therefore, that the Morris County Child Study Team and the Office of Special Education Services are necessary parties to a full determination of this matter, he directed, by an Order dated June 9, 1966, that they be joined as parties respondent.

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A hearing was conducted on February 23, 1967, at the office of the County Superintendent of Schools, Morris Plains, by a hearing examiner appointed for that purpose. The report of the hearing examiner is as follows:

MG was born on August 24, 1958. When she was 18 months old an aphasic condition was diagnosed, which is accompanied by abnormal emotional and social behavior. When she reached school age in 1963, upon the recommendation of a neurologist and a speech and hearing team at Columbia-Presbyterian Medical Center, New York City, that special schooling was necessary, and in the absence of such facilities in Chatham Township, the parents on their own volition placed her in the Midland School for Brain Damaged Children, North Branch, New Jersey, where she has been enrolled ever since. MG's mother testified that in February 1964 she was asked if she would consider placement of the child in a class for aphasic children that would open in Chatham Borough in April. She said she would be unwilling to withdraw MG from Midland School during the school year. Later, after investigating the program of the Chatham Borough class, she concluded that the program would not meet MG's needs as well as they were being met at Midland. In the fall of 1964, the mother requested that MG be evaluated by the Chatham Township Child Study Team. That evaluation was made (Exhibits P-1, 2, 3, 4), and it confirmed the finding that MG is aphasic and hyperactive in behavior. In terms of present school facilities, it was found that she should be considered socially and emotionally maladjusted, and in need of special educational facilities. The Team reports indicate also that MG appeared to be suitably placed in Midland School, and making progress there. A similar conclusion was reached in the fall of 1965, according to the mother's testimony. (Tr. 12)

In the fall of 1965, petitioners learned that Midland School had been approved for placement of emotionally disturbed and socially maladjusted children under the terms of *Chapter* 187, *Laws of* 1963, the so-called "Grossi Amendment," which authorized local boards of education to

"* * * provide instructional and related special services for emotionally disturbed or socially maladjusted pupils by:

* * * * * * *

"f. sending children to privately operated, nonprofit, day classes in schools whose services are nonsectarian providing services for emotionally disturbed or socially maladjusted children if no suitable public school placement is available. * * *"

Petitioners applied to respondent Board for payment of MG's tuition and transportation. An application to the Commissioner, dated November 23, 1965, for approval of MG's placement in the Midland School was made by the Chatham Township Board of Education through its Child Study Team. (Exhibit P-5) This application sets forth, *inter alia:*

"M - - - - is a multiple handicapped youngster who has severe communication disorders. Evaluation indicated that she had adequate intellectual ability but, due to a neurological impairment of the aphasiac type she is unable to verbalize adequately.

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> "Therefore, the primary diagnosis for this youngster would place her under the provisions of the 1954 Beadleston Act. However, when our staff looked into the public school classes for the neurologically impaired, it was our impression that she would not be contained in such a setting due to her hyperactivity, anxiety and aggression. There is a strong emotional component that would make public school neurological placement rather questionable; therefore, in the opinion of this staff although the primary diagnosis is neurological, the secondary factor of emotional disturbance has more importance for the design of an educational program."

The application sets forth also the reason for believing that the private school placement is more appropriate than a public school program as follows:

> "It was the opinion of our staff that M - - - - could not be contained within a public school facility for neurologically impaired children. She needed a smaller class size with a helping teacher as well as the regular classroom teacher. She has great need for specialized techniques particularly controlled environment which we felt could only be found in a school like Midland. * * *"

Respondent Board, by resolution, approved payment of MG's tuition at the Midland School. (Exhibit P-6)

The application was submitted through the Morris County Child Study Team, which received both the application and the evaluative reports which had been prepared by the Chatham Township Team. On January 18, 1966, the Morris County Team met with the Chatham Township school psychologist and informed him that before approval could be given to the application, placement in available public school facilities for aphasic children should be explored. The school psychologist replied by letter (R-1) that MG's parents did not agree to a public school placement, and asked that the Morris County Team forward the application to the State Department of Education. The application was not so forwarded, but the Office of Special Education was notified of the action of the Morris County Team. (R-2, 3) The petition of appeal herein was filed on March 28, 1966.

In several previous cases, the Commissioner has held that a board of education may not be held responsible for the cost of a special education program when the parents have voluntarily withdrawn their child from the public schools of the district and placed it in a private facility of their own choosing. *In the Matter of "R"* v. *West Orange Board of Education*, decided by the Commissioner December 15, 1966; *In the Matter of "G"* v. *Union City Board of Education*, decided January 19, 1967; *In the Matter of "M"* v. *Board of Education of Springfield Township*, decided April 18, 1967. *In the Matter of "MF"* v. *Board of Education of Springfield Township*, decided July 28, 1967 In the instant matter, however, respondent Board has demonstrated its willingness to accept responsibility for and pay the necessary and proper costs of MG's placement in a private school program, but lacks the necessary approval of the Commissioner to authorize it to do so and receive State reimbursement as provided by law. *R. S.* 18:14–71.46

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Although in their petition of appeal petitioners assert that respondent Morris County Child Study Team has no authority to disapprove respondent Board's application, this challenge was not pursued. Rather, the focus of petitioners' attack is upon the correctness of the Morris County Child Study Team's determination that MG's special education needs would best be served in a public school class for aphasics, and its consequent refusal to recommend approval of her placement in a private school facility. It is petitioners' contention that MG is making good educational progress in her private school placement, and that to uproot her would be detrimental to that progress. Moreover, petitioners argue, the available public school classes for aphasic children in Morris County do not offer a program equivalent in time or content to that which she now receives.

Witnesses for the Morris County Team and the Office of Special Education Services testified, however, that in their judgment MG's primary handicap is aphasia, with secondary emotional and social disturbances which must necessarily accompany her neurological impairment. The testimony also shows that there are available public school programs for meeting MG's primary need which carry with them supplementary programs and procedures to deal with the emotional and social overlay. Under such circumstances, these respondents contend, they cannot under the statutes approve a private school placement until and unless available public school facilities have been explored and found lacking.

It is the hearing examiner's conclusion (1) that respondent Board of Education acted in the exercise of its judgment and in accordance with its authority under the law in applying for approval of MG's placement in the Midland School; (2) that since no essential controversy exists with respect to the classifiication of MG, respondent Morris County Child Study team acted in proper exercise of its judgment in determining that MG's special education needs can be served in a class for aphasic children; (3) that since such classes are available in public schools for MG's enrollment, said Morris County Team had no alternative under the law but to refuse to recommend approval of the application for private school placement; and (4) that respondent Office of Special Education Services placed proper reliance upon the Morris County Team, over which it exercises general supervision on behalf of the Commissioner, to review the application made for MG's private school placement and take the action which in the judgment of said Team was proper and lawful.

The hearing examiner further concludes, in the light of the Commissioner's decisions cited *supra*, that petitioners have no valid claim for relief since they have voluntarily withheld MG from enrollment in suitable public school facilities which respondent Board is obligated to provide in accordance with the statutes.

* * * * * * *

The Commissioner has carefully considered the findings and conclusions reported by the hearing examiner and concurs therein.

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The Commissioner observes that a question has been raised in this case concerning the reliance placed upon the County Child Study Team by the Office of Special Education Services in the processing of applications for private school placement. He calls attention to the fact that the Commissioner is responsible for the coordination of the work of the county departments of child study and the general administration of special educational services in the public schools of the State. *R. S.* 18:14–71.36 Members of county child study teams are appointed by the Commissioner and are charged with the duty of performing the services required to be performed at the county level. *R. S.* 18:14–71.37 County teams function in consultation with local boards of education. *R. S.* 18:14–71.38 It is therefore consistent not only with the statutory scheme but also with sound administrative practice for the Office of Special Education Services to rely upon the county team to review applications, as was done herein, and to consult with the local school authorities, as was also done herein. The right of appeal from a county team's determination is demonstrated in the instant matter.

The Commissioner reiterates his previous finding *(In the Matter of "R" v. Board of Education of West Orange, supra)* that parents, in their natural concern over the educational welfare of their children, have the right to enroll them in a private school if they believe that their educational needs will best be served thereby. However, in so doing, they relieve local boards of education of responsibility for providing any facilities save those which by law they are authorized to provide.

The Commissioner accepts the findings and conclusions set forth herein, and accordingly, dismisses the petition.

COMMISSIONER OF EDUCATION.

August 23, 1967.

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LX

BOARD NOT REQUIRED TO FURNISH SPECIAL EDUCATION PROGRAM "EQUAL" TO THAT BEING PROVIDED BY A PRIVATE SCHOOL

IN THE MATTER OF "RJ,"

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHATHAM, MORRIS COUNTY; THE MORRIS COUNTY CHILD STUDY TEAM, LESLIE V. REAR, CHAIRMAN; AND THE OFFICE OF SPECIAL EDUCATION SERVICES OF THE NEW JERSEY DEPARTMENT OF EDUCATION, BOYD E. NELSON, DIRECTOR,

Respondents.

For the Petitioner, Jay J. Toplitt, Esq.

For the Respondent Board of Education, McCarter & English (Steven B. Hoskins, Esq., and Arthur C. Hensler, Jr., Esq., of Counsel)

For Respondents Child Study Team and Office of Special Education Services, Arthur J. Sills, Attorney General (Marilyn Loftus Schauer, Esq., Assistant Attorney General, and Stephen G. Weiss, Esq., Deputy Attorney General, of Counsel)

COMMISSIONER OF EDUCATION

DECISION

This petition of appeal is brought by the mother of an eleven-year-old boy, hereinafter referred to as "RJ." The petition asserts that respondent Board of Education has failed to provide the proper educational facilities for RJ, who has consequently been placed in a private school at the personal expense of his parents. Petitioner seeks an order from the Commissioner requiring the respondent Board to pay the tuition and transportation costs for his attendance at the private school or to provide an educational program equal to that which he now receives. The Board denies that it has failed in its duty to RJ, and asserts that it cannot provide for his education at a private facility without the prior approval of the Commissioner of Education, which approval has been denied upon recommendation of the Morris County Child Study Team and the Office of Special Education Services of the New Jersey Department of Education. It appearing to the Commissioner, therefore, that the Morris County Child Study Team and the Office of Special Education Services are necessary parties to a full determination of this matter, he directed, by an Order dated June 9, 1966, that they be joined as parties respondent.

A hearing in this matter was conducted on April 11, 1967, at the office of the County Superintendent of Schools, Morris Plains, by a hearing exam-

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iner appointed by the Commissioner for that purpose. The report of the hearing examiner is as follows:

RJ entered first grade in the Chatham Township schools in the 1962-63 school year. He was promoted in the next year to second grade, and in the following year to third grade. In his schoolwork he exhibited manifestations of behavioral and learning problems, and during the early part of his third grade year he was evaluated by the Township's Child Study Team. On the basis of the findings, which included a psychiatric evaluation, a psychological evaluation, a social history, and an educational evaluation (Exhibits P-1, 2, 3, 4, R-2), the Team concluded that a special educational program was needed for RJ. The Chatham Township school psychologist testified that he could find no available placement for the boy in a public school class for either the socially and emotionally maladjusted child or the neurologically impaired child. He therefore suggested to the parents that RJ be placed in a private school, and proposed a placement in the Midland School. He indicated that the school district would endeavor to secure approval for the placement under the newly adopted "Grossi Amendment," *Chapter* 187, *Laws of* 1963. Application was made on December 8, 1964, by respondent Board, through the Morris County Child Study Team, for the Commissioner's approval of RJ's placement in the Midland School. The County Team notified respondent Board that the Midland School had not been approved for placement of children under the Grossi Amendment, and RJ's parents were so notified. The boy was withdrawn from public school and enrolled in the Midland School on January 18, 1965, at the parents' expense.

In the fall of 1965, upon receipt of information that the Midland School had been placed on an approved list of private schools for placement under the Grossi Amendment, respondent Board reapplied for the Commissioner's approval of RJ's placement in the Midland School, submitting the same application and supporting documents (the Township Team's evaluation reports) that had been offered a year previously. (R-3) On January 18, 1966, at a conference with the Township school psychologist, the Morris County Team informed him that it would not recommend approval of the application, indicating that it was the County Team's belief that the child should be placed in a public school class for the neurologically impaired. The school psychologist so notified the parents, who rejected the proposed placement in a public school facility, on the ground that RJ was making satisfactory progress in the private school, and they could see no reason to move him to an unknown situation. (Tr. 35)

The central question is whether the Township Team's determination that RJ is a socially and emotionally disturbed child is the correct classification for determining his special educational needs. There is no contradiction of the testimony that his behavior manifested such maladjustment. The Township Child Study Team believes that the primary causative factor of RJ's problems is emotional and social maladjustment, and that his educational needs are best met by the Midland School placement. The application for approval of the placement contains this justification: (R-3)

"R—is in need of a total therapeutic and educational program conducted by specially trained personnel on an individual or small group basis. After

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visiting the Midland School, the Child Study Team concluded that this setting would provide the maximum opportunity for R—'s emotional and educational growth."

The County Child Study Team, on the other hand, having studied the Township Team's evaluative reports, believes that there is sufficient evidence of neurological impairment to justify the conclusion that available placements in public school classes for the neurologically impaired must first be explored, since private school placement under *Chapter* 187, *Laws of* 1963, was not authorized for physically handicapped children. (It should be noted here that the amendment of the laws governing education of the handicapped—*R. S.* 18:14–17.1 *et seq.*—by *Chapter* 29, *Laws of* 1966, extends the opportunity of private school placement where no suitable public school facilities are available, to the physically handicapped *as well as* to the emotionally disturbed and socially maladjusted child. See *R. S.* 18:14–71.23, as amended.) The Township school psychologist believes that the County Team was improperly influenced in its determination by not having available to it, at the time it made its determination, a revised diagnosis of RJ made by the Chatham Township school psychiatrist. The original diagnosis (R-2) reads as follows:

"Brain damage as manifested by poor abstractive capacity, learning disability, immaturity, and secondary anxiety. Etiology unknown."

This diagnosis was furnished in connection with the original application for private school placement made in December 1964, which was summarily disapproved because Midland School had not then been approved under the rules adopted pursuant to the Grossi Amendment. Subsequently, after consultation with the other members of the Township Team, the psychiatrist changed his diagnosis to read as follows: (P-1)

"Socially and emotionally maladjusted under the provisions of the Grossi Amendment. Symptoms are manifested by poor abstractive capacity, learning disability, immaturity and secondary anxiety. Etiology unknown, although a neurological condition is suspected."

Through a clerical error in Chatham Township, the original diagnosis, *supra,* was resubmitted in connection with the December 1965 application for approval of RJ's placement in Midland School, the disapproval of which precipitated the petition herein. Although the revised diagnosis was made known to the Morris County Team at the time of the conference with the Township school psychologist on January 18, 1966, the County Team's witnesses testified that even the revised diagnosis would not affect their basic determination that placement in available public school classes for the neurologically impaired must first be explored. The County Team witnesses stress that in making their determination they reviewed the evaluation reports of all four members of the Township Team, each of which finds in RJ evidence of behavior consistent with "neurologically impaired children" (P-1), "a partial organic basis for his condition" (P-2), "organically based" behavior (P-3), and "behavior reminiscent of the 'brain-damaged' child" (P-4). The County Team recommended, in addition to exploration of available public school facilities, that an electroencephalogram be made to resolve any existing question of neurological impairment. The Supervising School Social Worker

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on the County Team testified that had the recommended steps been taken and no suitable public school placement been found and the possibility of neurological impairment been ruled out, the County Team would have reconsidered its determination. These steps were obviated, it is clear, by the unwillingness of RJ's parents to have him withdrawn from the Midland School and by the institution of the action herein.

It is the conclusion of the hearing examiner from the testimony and exhibits offered in this hearing, that the possibility of neurological impairment as the primary causative factor in RJ's emotional and educational difficulties is sufficiently established to justify the Morris County Child Study Team's determination to withhold approval of the application for his placement in a private school facility. The hearing examiner further finds that public school facilities for RJ's education were available for the "exploration" recommended by the County Team, and he concludes, therefore, that since such exploration was not conducted because of petitioner's unwillingness to withdraw her son from his private school placement, there was no failure by any of the respondents herein to provide the educational program for RJ as required by law. *Cf. In the Matter of "R"* v. *Board of Education of West Orange,* decided by the Commissioner December 15, 1966.

* * * * * * *

The Commissioner has reviewed and considered the findings and conclusions of the hearing examiner as reported herein. The Commissioner holds that each of the respondents has discharged its duty with respect to RJ in accordance with the provisions of the statutes. He observes in this case that there was a broad area for the exercise of professional judgment within the bounds established by the statutes. While he understands the natural anxiety and concern of parents for the welfare of their handicapped children, and affirms their right to withdraw their children from the public schools and place them in private schools of their own choice, he also affirms the necessity for a careful observance of the limits established by the Legislature upon the provisions for the special educational needs of such children at public expense. He therefore holds that petitioner herein has not established a right to claim reimbursement for the tuition costs for the placement of RJ in the Midland School. He further holds that under the law there is no basis for a demand that RJ be furnished an education "equal" to that being provided for RJ at the Midland School; the requirement of the law is that RJ be furnished a *suitable* program of education in accordance with the provisions of *R. S.* 18:14–71.23. The evidence is clear, and the Commissioner so holds, that petitioner by her own volition has not made it possible for the appropriate public authorities to explore the suitability of publicly operated programs.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

August 23, 1967.

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LXI

A CONTRACT CAPABLE OF BEING ENFORCED MUST MEET STATUTORY REQUISITES

SERGEY PADUKOW,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,

Respondent.

For the Petitioner, Harry Green—Robert F. Novins (Robert F. Novins, Esq., of Counsel)

For the Respondent, Harold Kaplan, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, an architect, alleges that he entered into a binding contractual relationship with the respondent Board which, he further alleges, the Board thereafter improperly abrogated. The respondent Board maintains, on the other hand, that it never entered into a binding "contract" with petitioner for his services and that its actions with respect to petitioner and the subsequent employment of another architect were legal and proper in all respects.

Respondent's previous motion for summary judgment was dismissed by the Commissioner on January 19, 1967. Thereafter, a full hearing on the factual issues was conducted by the Assistant Commissioner in charge of the Division of Controversies and Disputes on March 7 and 17, at the office of the Ocean County Superintendent of Schools. Counsel subsequently submitted memoranda of law. The following facts were elicited from the testimony and exhibits.

In June 1965, respondent sent a letter to some 16 or 17 architects, including petitioner, announcing its intention to construct two new elementary schools plus an addition to another school, and setting forth its desire to interview interested architects with regard to these projects. Petitioner, having replied to this letter, was invited to appear before the Board on August 5, which he did. At that meeting, which was attended by all but one Board member, petitioner was informed in general terms of the size and kind of construction projects contemplated. Petitioner testified that at the meeting he displayed pictures of a school building on which he had worked, presented some schematic drawings to illustrate suggestions of possible construction economies in school buildings, and outlined the services he was prepared to offer and the fees he would charge. There is some question with respect to whether certain specific items were discussed but it is clear that questions such as time required,

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unit costs, supervision, kind of heating plant, and various other elements of the project and of architectural services in connection therewith were at least mentioned. The interview with petitioner lasted approximately one hour and was one of three interviews conducted by respondent that same evening. In all, the Board conducted 16 such interviews with as many architects, ordinarily scheduling three per night, one hour apart.

On August 9, petitioner sent a letter to the President of the Board giving additional information with respect to the installation of electrical heat. No further communication took place between the parties until late in October when arrangements were made for members of the Board to accompany petitioner on an inspection tour of a nonpublic school building in a neighboring community with whose construction petitioner had been associated.

On November 1, 1965, at a regular meeting of the Board, the following motion was adopted by a 7-to-1 roll call vote:

> "* * * moved that we employ Mr. Padukow as the Architect for our building program which will be presented to the Jackson Township residents."

On the next day, November 2, one member of the Board telephoned the Board's Secretary and requested him to refrain from notifying petitioner of the Board's action pending further discussion. The Secretary complied and no formal notice was sent then or thereafter to petitioner. However, the Board's action became known to petitioner through a telephone call from a newspaper reporter and by virtue of newspaper accounts of the November 1 meeting. As a result, he began immediately to make studies and prepare sketches for the proposed project. Thereafter, on November 8, the one member of the Board who had been absent the night petitioner was interviewed, visited petitioner's office, reviewed the drawings under preparation, and asked petitioner some questions about the project. Petitioner testified that he learned from this member that some members of the Board were talking about rescinding the motion on November 1. Consequently, petitioner attended the next meeting of the Board on the evening of November 9 and made a statement to the Board that he had consulted his attorney, had been advised that he had a contract with the Board, and that he, therefore, considered himself the "architect of record." Petitioner next addressed a letter to the Board, dated November 15, in which he said:

> "I would like to notify you that I am ready, willing and able to furnish architectural services, for which you retained me at your meeting of November 1, 1965.
>
> "This letter is written to stop various rumors to the effect that I intend to withdraw from said employment. This is not true! I am, therefore, asking that you designate a conference meeting so we may begin work on the plans."

On November 18, the Board again met and formally rescinded its action of November 1 with respect to petitioner's employment. At a regular meeting of January 3, 1966, respondent entered into a contract with another architect. The appeal herein was filed on March 8, 1966.

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It is agreed that the two issues presented for the Commissioner's determination are as follows:

A. Did a valid and binding contract exist between petitioner and respondent?

B. If the answer to A above is affirmative, was the purported rescission of the contract within the authority of respondent and was such rescission effected in a legal manner?

Petitioner contends that at the interview on August 5, the nature of the project and the services to be performed by him were discussed in sufficient detail to provide a basis for "a meeting of the minds." He alleges that the discussion included the nature and extent of the project, time required for performance, location, cost, division of responsibilities, and fees. The answers he gave to respondent's questions on that occasion, petitioner avers, constituted an "offer" which later was accepted by respondent by virtue of its action at its regular meeting on November 1. Petitioner contends that the aforesaid "offer" and "acceptance," having stemmed from a meeting of the minds, therefore resulted in the creation of a valid, binding, and enforceable contract of employment. Petitioner rejects any contention that an integrated contract, formally drawn, is essential to effect respondent's legal obligation to him, and contends that the statutes empower a board of education to act and bind itself by resolution duly adopted at a regularly called meeting.

Respondent takes the position that the adoption of its motion on November 1 did not constitute a legal and enforceable "contract" but was merely an expression of the Board's interest in engaging petitioner and was declarative of an intent to thereafter enter into formal negotiations with him in preference to the other architects interviewed. Respondent also maintains that the August 5 interview was nothing more than an exploratory conference and that a number of substantive elements necessary to a formal agreement were not touched upon at that time, or at any time thereafter. Its action on November 1, respondent contends, was an attempt to arrive at a consensus of the Board with respect to the selection of an architect with whom it could then enter into contractual negotiations. Moreover, respondent avers, *R. S.* 18:7–63 precludes a board of education from entering into a contract until it has been presented and passed upon at a legally constituted meeting of the Board. Respondent points out that no written contract was before the Board on November 1, nor were the issues, terms and conditions of any future contract fully discussed by the Board or included in the motion which it adopted at that time. Its action, therefore, respondent argues, reflects nothing more than a "willingness" to enter into a contract with petitioner in preference to the other architects considered, pending successful negotiation of the terms and conditions of employment.

The statute cited by respondent's counsel, *R. S.* 18:7–63, reads in relevant part as follows:

> "* * * the board shall neither enter into a contract nor pay a bill or demand for money against it, until the same has been presented and passed upon at a regularly called meeting of the board."

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The only pertinent case brought to the Commissioner's attention with regard to this statute is *American Heating and Ventilating Company* v. *Board of Education of West New York*, 81 *N. J. L.* 423 (*E. & A.* 1911). In that case the defendant Board passed a resolution directing the President and Clerk of the Board to enter into a contract with the plaintiff company to install a heating, ventilating and sanitary system in a public school. Thereafter, such a contract was executed on behalf of the Board by the named officers. The Court of Errors and Appeals held that the plain language of the statute had been violated since *the Board* had not been presented with the contract, nor had *the Board* executed it. The Court further pointed out that it was immaterial whether any written proposal before the Board at the time it passed the resolution contained provisions identical to those in the contract actually executed, since:

> "* * * the resolution did not purport to be the acceptance of any *specific* proposal or the authorization of any *particular* contract or the approval of any of the terms thereof." *Id.*, 81 *N. J. L. at* 426 (Emphasis added.)

The circumstances present in the case before the Commissioner, while not identical with those involved in the *American Heating* case, are similar enough to dictate, in the Commissioner's judgment, a like result. The respondent's action of November 1 was in the nature of a broad statement of intent, was not based upon a previously drawn agreement, and was not specific as to any essential terms of the contemplated contractual arrangement. Absent evidence of any deliberation or discussion by the Board as to the essential terms which it would insist be incorporated in a contract presented to it, it cannot be said that a "contract" even existed. It is undisputed that neither prior to the motion, nor thereafter, were the salient features of a formal contract negotiated. While petitioner insists that such matters were raised during his August interview it is clear from the record, and the Commissioner so finds, that the Board members treated this discussion in general terms only, subject to future negotiations. The language of the motion itself, as well as the statements by the Board members as to the reasons for their votes, as reflected in the minutes, gives no indication whatever that the Board had finally determined upon the terms of the contemplated contract.

In the Commissioner's judgment the wording of the November 1 motion was extremely inartful and left much to be desired. It would have been preferable had the Board more precisely articulated their true intent, as revealed by the testimony, that employment of petitioner was subject to negotiation and eventual presentment of a formal, integrated contract. However, boards of education represent the public and their actions must be gauged in that light. While public bodies, merely because of their public nature, will not be permitted to visit inequity and unfairness upon private persons with whom they deal, *cf.* 405 *Monroe Corp.* v. *City of Asbury Park*, 40 *N. J.* 457 (1963), their actions must be evaluated with a view to the overall public interest which is involved. *N. J. S. A.* 18:7–63 was apparently designed as a safeguard against hasty, intemperate board action and to foster complete, knowledgeable deliberation prior to committing the expenditure of public funds. Where, as here, a board of education is considering the awarding of a contract of a substantial nature, and one which would presumably be binding beyond the life of the board itself, *cf. Board of Education of Voca-*

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tional School v. *Finne*, 88 *N. J. Super.* 91 (*Law Div.* 1965), it was incumbent that the statutory requisites be met. In this case, they were not.

Based upon the testimony and the exhibits, the Commissioner finds and determines that no contract capable of being enforced existed between the petitioner and the respondent Board of Education and that the resolution of November 18, 1965, rescinding the motion of November 1, was, therefore, valid and proper. Accordingly, for the reasons stated, the petition must be dismissed.

COMMISSIONER OF EDUCATION.

August 25, 1967.

Pending before the State Board of Education.

LXII

STATUTES DO NOT PROVIDE FOR PRINCIPAL'S VACATION AS A MATTER OF RIGHT

RALPH W. HEROLD,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MOUNT ARLINGTON, MORRIS COUNTY,

Respondent.

For the Petitioner, *Pro Se.*

For the Respondent, Mills, Doyle and Muir (Robert Muir, Jr., Esq. of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, who was employed as administrative principal in respondent's schools until he resigned in February 1965, seeks compensation for vacation time which he alleges had accrued to him at the time of his resignation. Respondent denies that petitioner has any vacation rights beyond those specifically provided under the terms of its employment contract with him.

The case is presented on a Stipulation of Facts and argument heard on March 2, 1967, at the office of the County Superintendent of Schools, Morris Plains, by a hearing examiner appointed for that purpose. The report of the hearing examiner is as follows:

The following facts are stipulated. Petitioner was first employed by respondent under a contract which ran from August 1963 to June 30, 1964.

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The contract contained no provisions for a vacation. A second contract, running from July 1, 1964, to June 30, 1965, contained the following statement:

> "Mr. Herold is to have one months paid vacation during the summer of 1965."

The third contract, running from July 1, 1965, to June 30, 1966, contained a like provision for one month's paid vacation during the summer of 1966. It also provided that a 90-day notice of termination would be required from either party, whereas the two previous contracts had required a 60-day notice. All of the contracts bound the petitioner to observe and enforce the rules prescribed for the government of the school by respondent.

Respondent's policy manual contains the following statement relative to the administrative principal's vacation:

> "He shall remain in school one week following closing date and return one week prior to opening. He shall have a vacation period of one month during the months of July and August unless otherwise agreed upon."

During the 1965-66 school year petitioner accepted an offer of employment in another school district. On November 15, 1965, he submitted a letter of resignation, asking that he be released from his employment "as quickly as possible, before the termination of ninety days from this date if it can be so arranged." At a special meeting on November 18, the Board accepted the resignation effective 90 days from November 15, but with the proviso that should a suitable replacement be secured prior to the effective date, the Board in its discretion might release petitioner at that time.

On February 9, 1966, petitioner addressed a letter to respondent in which he requested that the Board grant him "accumulated vacation time to become effective February 15, 1966." He calculated this accumulation to be .625 months, and the salary for this period of time, based on a monthly rate of $833.00, to be $520.63. Respondent then advised petitioner that his request for pay in lieu of vacation was denied. On May 23, 1966, petitioner by letter asked the Board to re-evaluate his request. Again respondent denied petitioner's request. The petition herein followed.

It is petitioner's contention that a month's paid vacation is his right by contract, that the vacation follows upon completion of the year's work, and, therefore, that upon the termination of his 1965-66 contract before its completion he became entitled to a proportionate part of the month's vacation granted for that year, or for proportionate salary in lieu thereof. He asserts that respondent could have extended the effective date of his resignation so as to release him on February 15 but to keep him on the payroll for an additional .625 months, or in the alternative pay him that fraction of a month's salary.

Respondent urges, however, that petitioner's rights do not extend beyond the express terms of his contract, which provided a month's paid vacation during the summer of 1966, subject to the stated policy of the Board with respect to his vacation as set forth *supra*. The contract, respondent points out, makes no provision for the payment of salary in lieu of vacation time, or for

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any proration thereof if the contract were terminated prior to its expiration date.

The statutes make no provision for a principal's vacation as a matter of right. *R. S.* 18:13–5 authorizes boards to make rules and regulations governing the employment of teachers and principals, as follows:

> "A board of education may make rules and regulations not inconsistent with the provisions of this title governing the engagement and employment of teachers and principals, the terms and tenure of the employment, the promotion and dismissal of teachers and principals, and the salaries and the time and mode of payment thereof. A board may from time to time change, amend, or repeal such rules and regulations.
>
> "The employment of any teacher by a board, and the rights and duties of the teacher with respect to his employment, shall be dependent upon and governed by the rules and regulations in force with reference thereto."

R. S. 18:13–7 requires that employment contracts shall specify, *inter alia*, "the salary, and such other matters as may be necessary to a full and complete understanding."

The hearing examiner concludes from the above-stated facts that petitioner has not established a claim to a prorated portion of the month's vacation authorized by his contract to be taken "during the summer of 1966," or to salary in lieu thereof. Had this alternative been intended by the parties it would have been set forth in the contract itself. Absent any such express provision, petitioner's alleged entitlement to an in lieu prorated payment is unsupportable.

* * * * * * *

The Commissioner has reviewed and considered the findings and conclusion of the hearing examiner as set forth herein, and concurs in all respects. The Commissioner finds and determines, therefore, that petitioner, by virtue of his termination of his contract, acquired no right to accrued vacation time or salary in lieu thereof. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

September 6, 1967.

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LXIII

COMMISSIONER'S POWER TO DECIDE CONTROVERSIES EXTENDS TO QUESTIONS INVOLVING CONTRACTS

RAINER'S DAIRIES,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, CAMDEN COUNTY,

Respondent.

For the Petitioner, Norman Heine, Esq.

For the Respondent, Curry, Purnell and Green (George Purnell, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION ON MOTION AS TO COMMISSIONER'S JURISDICTION

Petitioner protests the cancellation by respondent of its contract to supply milk to respondent's schools during the 1964-65 school year. Petitioner seeks to have the resolution of cancellation set aside and the contract reinstated, and to restrain respondent from purchasing milk elsewhere until this matter is determined. Respondent answers that it canceled the contract because of petitioner's failure to conform to the specifications upon which the contract was based.

At a conference of counsel held on January 26, 1965, in the office of the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education, Trenton, respondent was given leave to amend and supplement its answer in order to raise the question of the Commissioner's jurisdiction in this proceeding. Counsel have filed memoranda addressed to this question.

Respondent challenges the Commissioner's jurisdiction to decide this controversy on the ground that it is not one which arises under the school law. The decision of this case, respondent argues, will not require the application or interpretation of any school law or any rule or regulation of the State Board of Education or of the Commissioner. Moreover, in respondent's view, the Commissioner could not grant the relief sought even if his jurisdiction were unquestionable. If respondent has wrongfully canceled the contract, it is argued, petitioner's recourse is a suit at law for damages. Petitioner, on the other hand, while conceding that the Commissioner has never before been requested to decide the issue presented herein, urges that it is "tacitly implied" in the statutes that the Commissioner is an administrative tribunal for the resolution of problems—even those normally within the purview of the courts —which arise within the context or framework of education. Petitioner cites

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numerous instances in which the Commissioner has decided questions in which contracts were involved.

The quasi-judicial function of the Commissioner of Education is set forth in *R. S.* 18:3–14, which reads in part as follows:

> "The commissioner shall decide without cost to the parties all controversies and disputes arising under the school laws, or under the rules and regulations of the state board or of the commissioner."

In considering the broad powers of the Commissioner under this statute, the courts have noted

> "* * * the legislative purpose to set up a comprehensive system of internal appeals with broad powers vested in the administrative tribunals to insure that controversies are justly disposed of in accordance with the School Laws." *Laba* v. *Board of Education of Newark*, 23 *N. J.* 364, 381 (1957)

It is the Commissioner's belief, and he so holds, that the "broad powers" vested in him by the Legislature comprehend the power to review any determination or action of a local board of education when it is presented to him as a controversy or dispute for his decision. In *Laba*, *supra*, the Supreme Court said, at page 382:

> "* * * Within the statutory phraseology, an appeal from a determination by a local board of education may readily be permitted to follow a course comparable to the ordinary appeal in our judicial structure."

The broad scope of the Commissioner's authority as an administrative tribunal has been discussed by the Supreme Court *In re Masiello*, 25 *N. J.* 590, 607 (1958), and most recently in *Booker* v. *Board of Education of Plainfield*, No. A-64, decided June 28, 1965. In the Booker case, the Court said:

> "* * * that under *R. S.* 18:3–14 the Commissioner is to decide all controversies and disputes arising under the school laws or under the rules of the State Board or of the Commissioner, and that this involves a responsibility on his part to make independent determinations, giving due weight, of course, to the findings and actions and the measures of discretion vested below."

The present matter involves a determination by the respondent Board of Education on a question arising out of its operation of "cafeterias or other agencies for dispensing food to public school pupils." R. S. 18:11–14 The food supplies purchased pursuant to the authority granted by this law may be purchased without advertisement for bids in accordance with rules and regulations of the State Board of Education, or by advertisement in accordance with the provisions of *R. S.* 18:7–64. In this case, the milk purchases were made on contract with petitioner, and when respondent determined that the milk being supplied did not, it is alleged, conform to the specifications and the contract, it canceled the contract. Even assuming, *arguendo*, that the Commissioner cannot grant all the relief sought by petitioner, the Commissioner will determine whether respondent's resolution canceling petitioner's contract is lawful and a proper exercise of its discretionary authority.

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The Commissioner finds and determines that his jurisdiction under *R. S.* 18:3–14 extends to this matter. Leave is given to petitioner to proceed with his case.

COMMISSIONER OF EDUCATION.

August 12, 1965.

Note: Subsequent to the filing of the petition against Collingswood Board of Education an identical petition was filed against Cinnaminson Board of Education. The Commissioner's decision in the Collingswood matter became the basis for the consolidated appeal of both matters before the State Board of Education.

DECISION OF STATE BOARD OF EDUCATION

RAINER'S DAIRIES,

Petitioner-Appellee,

v.

BOARD OF EDUCATION OF THE BOROUGH OF COLLINGSWOOD, IN THE COUNTY OF CAMDEN,

AND

BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, IN THE COUNTY OF BURLINGTON,

Respondent-Appellant.

For the Petitioner, Victor Taylor, Esq.

For the Respondent, Curry, Purnell and Greene, Esqs.

Petitioner contracted to supply milk to the schools of each of the respondents during the 1964-65 school year. Respondents cancelled the contracts on the grounds that petitioner failed to conform with the specifications contained in the contracts. Petitioner applied to the Commissioner of Education to set aside the resolution of cancellation, to reinstate the contracts and to restrain respondents from purchasing milk elsewhere pending the determination of the cause. Respondents, on motion, challenged the Commissioner's jurisdiction to decide the controversy. They alleged that the controversy did not arise under the school laws of the State.

By decision dated August 12, 1965, the Commissioner determined that his jurisdiction extends to the matters in controversy and gave leave to the petitioner to proceed. His decision stated that even if he could not grant all of the relief sought by the petitioner, the Commissioner would determine whether the resolutions cancelling the contracts were lawful. Respondents appealed to the State Board of Education. Oral argument was waived by agreement of the parties.

R. S. 18:3–14 provides that:

"The commissioner shall decide without cost to the parties all controversies and disputes arising under the school laws, or under the rules and regulations of the State Board or of the Commissioner."

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Under this broad grant of authority, the Commissioner is obliged to hear and decide a great volume of cases involving controversies and disputes arising under the school laws. Whether the Commissioner has the right to decide the issues presented in this matter appears to be a question not before considered by the Commissioner, the State Board of Education or the courts of this State.

Of course, the mere fact that a case involves a Board of Education is not sufficient to impose jurisdiction upon the Commissioner. If the laws were otherwise, every negligence case involving a Board of Education would have to be determined by the Commissioner.

In his decision, the Commissioner argues that since, under *R. S.* 18:11–14, respondents are authorized to operate "cafeterias or other agencies for dispensing food to public school pupils," this is a controversy arising under the school laws. If this argument were followed to its logical conclusion, the Commissioner would be obliged to take jurisdiction over negligence claims arising out of food consumed in school cafeterias. Certainly, cases of this kind should remain in the courts absent a specific legislative enactment to the contrary.

In the case of Reilly vs. Board of Education of Camden, 127 *N. J. L.* 490 (Sup. Ct. 1941), an analogous situation was presented. Reilly was a janitor in the Camden schools. He claimed a pension under the Veteran's Pension Law. He made application to the Board of Education in Camden, which denied his pension. He thereupon appealed to the Commissioner, who dismissed the appeal. The State Board of Education affirmed the Commissioner. The New Jersey Supreme Court held that the Veteran's Pension Law is not part of the school law and that thus the Commissioner was without jurisdiction.

It should be noted that although Reilly was a school employee, clearly employed under the school laws of the State, the Commissioner did not assume jurisdiction over a question concerning his veteran pension rights.

The Commissioner's decision suggests that even if the Commissioner does not have jurisdiction to grant all of the relief requested, he certainly may determine whether the school board resolution abrogating the contract was lawful.

It is the opinion of the State Board of Education that the Commissioner has no jurisdiction in commercial matters of the kind involved in this case. It would certainly not be conducive to the expeditious determination of disputes to have part of the case determined by the Commissioner and the rest by the courts. We believe that the traditional jurisdiction of the courts in matters involving contracts, breach, damages and specific performance should not be disturbed except in cases arising directly under the school laws. This is not such a case. The decision of the Commissioner is reversed and the petitions are dismissed.

September 6, 1967.

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LXIV

BOARD OF EDUCATION REQUIRED TO AWARD CONTRACT IN ACCORDANCE WITH BID SPECIFICATIONS

SCHMALZ MILK CO., INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT, UNION COUNTY, AND DURLING FARMS, INC.,

Respondents.

For the Petitioner, Sachar, Sachar & Bernstein (Edward Sachar, Esq., of Counsel)

For the Respondent Board, Beard and McGall (William M. Beard, Esq., of Counsel)

For the Respondent Durling Farms, John T. Lynch, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a New Jersey corporation (hereinafter "Schmalz"), alleges that respondent Board of Education improperly rejected its low bid to supply milk during the 1967-68 school year, and improperly awarded the milk contract to the next lowest bidder, also a New Jersey corporation (hereinafter "Durling"). Petitioner seeks an order setting aside the award to Durling, and directing that the Board award the contract to Schmalz. Respondents contend that the Schmalz bid did not conform to the specifications, and that the Board properly awarded the contract to the next lowest bidder whose bid did so conform.

The facts in this matter have been stipulated in documents received and marked in evidence. Counsel waived hearing, argument, and the filing of briefs.

Respondent Board advertised for bids to supply its milk requirements for the 1967-68 school year, to be received and opened on June 23, 1967. The Board reserved "the right to reject any or all bids and waive immaterial informalities." (P-1) The specifications furnished by the Board required, *inter alia:*

> "All bidders must have a certificate by a licensed physician certifying that all persons employed in milk processing have passed a satisfactory clinical and laboratory examination within twelve (12) months previous to the date when the milk is to be furnished, and also certifying that said employees had no communicable diseases. * * *" (P-2)

Respondent asserts that this specification was made by virtue of a letter from the school lunch consultant of the State Department of Education, which

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offered "a sample copy of milk specifications that meet state requirements." The sentence quoted above was contained in the sample specifications. (R-1)

Schmalz submitted its bid on the supplied form (P-3) completing all items. It bid a price of $0.02438 margin bid per ½ pint. The bid was not accompanied by the physician's certificate. Durling submitted a bid for $0.0244 margin bid per ½ pint, and attached the following certificate (P-7):

"June 15, 1967

"I have performed an examination within twelve months of the plant employees of Durling Farms and can certify that said employees had no communicable diseases.

/s/ M. W. Looloian, M.D."

The Board met on June 29, 1967, and, on its attorney's advice, rejected Schmalz's bid because it was not accompanied by the physician's certificate as set forth in the specifications, *supra*. The contract was thereupon awarded to Durling (P-4), and on July 3 Schmalz was notified by letter from the Assistant Superintendent of Schools of the rejection of its bid and the reason therefor. (P-5) On July 20 petitioner's attorney forwarded to the Board the following certificate (P-6):

"July 17/67

"I hereby certify that all persons employed by Plant No. 4, Inc. in milk processing have passed a satisfactory clinical and laboratory examination on the 13th day of July, 1967, and that said employees had no communicable diseases.

/s/ Leon Tish, M.D."

In submitting the case on the stipulated evidence as set forth *supra*, and without formal hearing or argument, counsel agree that the issue to be determined by the Commissioner is whether respondent Board improperly rejected the bid of petitioner, and whether the doctor's certificate furnished by Durling complied with the specifications.

Petitioner contends that the Board's rejection of its bid was improper because the specifications did not require that the physician's certificate accompany the bid, but rather that the successful low bidder must furnish a suitable certificate of examination "previous to the date when the milk is to be furnished." Petitioner submitted such a certificate under date of July 20, 1967, indicating that the examination of petitioner's employees had been conducted on July 13. Since petitioner was the lowest responsible bidder, it asserts that as a matter of law it is entitled to be awarded the contract. Moreover, petitioner contends, since the certificate furnished by Durling does not show *when* during the 12 months preceding June 15, 1967, the examination was conducted, it does not provide the necessary assurance that such examination falls within 12 months preceding the date when the milk is to be furnished and is therefore unacceptable. In any event, petitioner avers, there is no requirement in law that such certification of physical examination be required as a condition of awarding a milk contract.

Respondent Board asserts that its requirement of the physician's certificate is reasonable since it is founded upon sample specifications furnished to it by a school lunch consultant of the New Jersey Department of Education.

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The Board further contends that it was entitled to examine the physician's certificate as a part of petitioner's bid in order to be assured that all persons employed in milk processing by the successful bidder had satisfactorily passed a successful physical examination and had no communicable disease. No bid could be accepted, respondent asserts, unless this specification were strictly complied with.

Respondent Durling defends its certificate as showing that its employees had been examined within the 12 months preceding the submission of its bid, and asserts that the Board could readily demand additional certification of examination during the performance of the contract, to show that an examination had been conducted within the 12 months preceding any date on which milk would be furnished.

Except as provided in *R. S.* 18:7–64 and *R. S.* 18:11–14, Title 18 sets no special conditions for the awarding of contracts for milk. *R. S.* 18:7–64 otherwise authorizes boards of education to advertise for proposals for supplies "under such regulations as the board may prescribe." The sample specifications furnished to the Board do not purport to be "State requirements," but are represented as meeting State requirements, including any requirements of other departments of State government, as well as Federal Milk Orders. The respondent Board may make such additional specifications as in its judgment are reasonable and not inconsistent with law. Having made such requirements it may not waive them in favor of any bidder, unless it is such a minor informality as not to affect the right of all bidders to compete on equal terms.

The Commissioner finds and determines that all bidders were required to submit the physician's certificate with their proposal. Since the respondent Board was not assured that Schmalz, as the lowest responsible bidder, could comply with its requirements, it properly rejected petitioner's bid.

The question remains, however, whether the contract was properly awarded to Durling, the next lowest bidder. Durling did attach to its proposal a physician's statement to the effect that Durling's employees had been examined during the preceding 12 months. However, absent specific information as to the date of such examination, the Board could have no assurance that the examination had been conducted within 12 months of the date of its contemplated first delivery of milk in September. Thus the significance of the certificate furnished by Durling is no greater, in terms of the Board's specifications, than Schmalz's failure to deliver a timely certificate at all. The Commissioner, therefore, holds that as respondent Durling did not comply with the specifications, it was awarded the contract improperly. Such a contract is therefore a nullity and must be set aside.

Having found that neither petitioner Schmalz nor respondent Durling is entitled to the milk contract on the basis of bids offered on June 23, 1967, and no evidence having been offered that there were other bidders, the Commissioner directs the Board of Education of the Scotch Plains-Fanwood Regional School District to reject all bids and expeditiously re-advertise for bids for its milk requirements for the 1967-68 school year.

COMMISSIONER OF EDUCATION.

September 15, 1967.

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LXV

BOARD MAY NOT FILL MEMBERSHIP VACANCY NOT OCCURRING DURING ITS OFFICIAL LIFE

FREDERICK W. HEITMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF LAKEHURST, OCEAN COUNTY,

Respondent.

For the Petitioner, Camp & Simmons (Roy G. Simmons, Esq., of Counsel)

For the Respondent, Harold A. Schuman, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner in this case contends that he was denied the opportunity to become a candidate for election to a seat in the Lakehurst Board of Education because of respondent's failure to declare vacant the seat of a member who had ceased to be a resident of the district. He asks the Commissioner to order a special election to fill the vacancy for the unexpired term. The matter is submitted on the pleadings and a stipulation of the facts.

In his pleadings petitioner contends that Paul Wilson, a duly elected member of the Lakehurst Board of Education, ceased to be a resident of the Borough of Lakehurst and became a resident of the City of Millville on or about December 31, 1966. He alleges that respondent failed to declare Mr. Wilson's seat vacant and made no provision for the election of a candidate for the unexpired term at the annual school election on February 14, 1967. In its Answer respondent declares that it received no formal notice or indication of the change of residence of Mr. Wilson until on or about February 13, 1967, the day before the election.

Both parties stipulate that

"(a) prior to the annual school district election on February 14, 1967, respondent was aware of a vacancy on the Board caused by the change of residence of Paul Wilson;

"(b) said vacancy was not filled by the 1966 Board of Education, and has not been filled by the present Board of Education;

"(c) no person was elected to fill such vacancy at the annual school district election on February 14, 1967."

It is also agreed that

"Since the prayers for relief set forth in the petition are no longer in issue, the sole remaining issue is the question of who now has authority to fill

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the vacancy: (a) the present Board of Education, or (b) the Ocean County Superintendent of Schools."

It is clear that once an elected board member ceases to be a bona fide resident in the school district, his right to a seat in the board is cancelled and a vacancy immediately exists. *R. S.* 18:7–11 The school laws also provide for the filling of vacant seats in the board as follows:

R. S. 18:7–55

"The board may fill a vacancy in its membership * * * except a vacancy caused by a failure to elect, or by removal of a member for failure to have the qualifications required by section 18:7–11 of the Revised Statutes or as the result of a recount or contested election or one which is not filled within sixty-five days after the occurrence of the vacancy. The person so appointed shall serve only until the organization meeting of the board after the next election for members."

R. S. 18:4–7

"A county superintendent of schools may:

* * * * * * *

"d. Appoint members of the board of education * * * for any school district under his supervision which shall fail to elect members at the regular time or in case of a vacancy in the membership of the board of education which occurs by reason of the removal of a member for failure to have the qualifications required by section 18:7–11 of the Revised Statutes or as the result of a recount or contested election or which is not filled within sixty-five days of the occurrence of the vacancy. Such appointees shall serve only until the organization meeting of the board of education after the next election in the district for members of the board of education."

An issue similar to that herein was raised in the matter of *Bruck* v. *Board of Education of the Borough of North Arlington*, 1953-54 *S. L. D.* 72. In that case a board member resigned after the last date for the filing of nominating petitions but before the date of the annual school election. The Commissioner ruled that

"Therefore it was impossible to provide a place on the ballot for the voters of the school district to elect a member to the Board for the unexpired term. It, therefore, becomes the duty of the County Superintendent of Schools to appoint from the citizens * * * a person having the legal qualifications of a Board member to fill the unexpired term * * *."

In this case it is stipulated that Mr. Wilson ceased to be a resident of the Borough of Lakehurst prior to the annual school election on February 14, 1967. The seat held by him was therefore vacant. Whether or not the vacancy occurred in time for the unexpired term to be placed on the ballot is not in issue. The fact is that it did not appear on the ballot and consequently no one was elected to fill the vacant seat. It must be held, therefore, that there was a failure to elect. That being so, the responsibility for appointing a citizen to the vacant seat on the Board belongs to the county superintendent of schools. *R. S.* 18:4–7d, *supra*

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A board of education is empowered to fill only those vacancies occurring during its official life. *Bruck* v. *Board of Education of North Arlington, supra* The incumbent Board of Education did not come into being until its organization meeting the week following the February 14 election. *R. S.* 18:7–53 It is stipulated that the vacancy herein occurred prior to February 14, 1967. Therefore, the subject vacancy did not occur during the official life of the current Board of Education.

The Commissioner finds and determines that there was a failure to elect a qualified citizen to a seat in the Board of Education of the Borough of Lakehurst to fill the unexpired term of Paul Wilson at the annual school election on February 14, 1967. The Ocean County Superintendent of Schools is authorized and directed, therefore, to appoint a person having the qualifications for such position to fill the vacant seat in the Board. The term of the person so appointed shall expire at the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION.

September 15, 1967.

LXVI

BOARD MAY NOT REQUIRE PARTICIPATION IN PUPIL ACCIDENT INSURANCE

MARIE S. HOWARD,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

Respondent.

For the Petitioner, *Pro Se.*

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

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a member of respondent Board of Education, challenges the validity of a policy adopted by the respondent requiring pupil participation in its high school accident insurance program as a requisite for participation in the school's interscholastic athletics program. Respondent rejected petitioner's motion to rescind the policy, from which action the instant appeal has been taken.

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A hearing in this matter was held on July 18, 1967, at the office of the County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner for that purpose. The report of the hearing examiner is as follows:

Pursuant to the authority granted to it by *N. J. S. A.* 18:14–105.1 *et seq.*, respondent has arranged for student accident insurance which pupils may purchase through the school. Respondent pays no part of the premium for this insurance. However, it does pay the premium on a special accident policy covering football players in grades 10, 11, and 12. The basic plan provides accident insurance coverage during the school year from the time a pupil leaves home to go to school until he returns home in an uninterrupted trip from school. The premium for this coverage for pupils in grades K-8 is $2.50 per year; for pupils in grades 9-12 it is $3.50. Also available to pupils is a policy which provides round-the-clock coverage for a full 12 months, at a cost of $12.50 for pupils in grades K-8 and $13.75 for pupils in grades 9-12. Pupils may purchase either plan.

In the High School, any pupil participating in any interscholastic sport (including cheerleading) must be insured under at least the basic plan except that football players in grades 10-12, covered by the special policy, are not required to purchase the insurance to play football. While the High School's requirement, as stated in its "Student Handbook" (P-2) and homeroom bulletins (P-6, 7) was never "formally" adopted as a policy of respondent Board, the evidence is clear that the Board had full knowledge of and acquiesced in the regulation. Indeed, having formally rejected, on January 9, 1967, petitioner's motion to rescind the requirement by a vote of 7-2, respondent may plainly be said to have adopted it as its own.

The statutes authorizing pupil accident insurance read as follows:

R. S. 18:14–105.1

"The board of education in any school district may arrange for and maintain, and may pay the premiums for policies of accident insurance with any insurance company created by or under the laws of this State or authorized by law to transact business in this State, to provide for payments to pupils of the school district in connection with loss resulting from bodily injury sustained by such pupils through accidental means while participating in, practicing or training for, or during transportation to or from games or contests conducted by the school district, or by any school of the district, or with the consent of the board of education or of the school and under the supervision of an employee of the board of education, and for payments to pupils injured in connection with the conduct of the physical education program of the district.

R. S. 18:14–105.2

"A board of education maintaining such accident insurance for the benefit of its pupils may require the payment to the board of education by pupils, to whom the benefit of such insurance is extended, of a proportionate share of the premiums or any part thereof. The sums to be paid by the pupils shall be established by a schedule determined by the board of education, but no pupil electing not to participate in the accident

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insurance coverage, shall be required to make any payment toward the cost of the premiums therefor.

R. S. 18:14–105.3

"The provisions of this act shall not be construed to impose any liability on the part of a board of education for injury sustained by a pupil as a result of or in connection with any of the games or contests hereinabove mentioned, or as a result of or in connection with the conduct of the physical education program of the school district or of any school of the district."

It is petitioner's contention that respondent Board, through its maintenance, support, and approval of the interscholastic athletics program of the High School, must assume full authority over and responsibility for the regulation of the High School which is challenged in this matter. She contends further that since the athletics program is supported as a part of the total program of the school, the regulation in question could operate to deprive a noninsured pupil of a right to participate in interscholastic athletics. She contends further that the regulation extends no benefit to the Board, since the statute imposes no liability on the Board in any event. Finally, she urges, if the Board wishes to provide insurance for all of its athletes, it should do so at public expense, as it is already doing for its varsity football players.

Respondent's position is that it has broad discretionary rule-making power to authorize or approve such a regulation as the one *sub judice*. The rule, it avers, is wisely conceived to protect parents from financial loss in the event of athletic injuries to their children, establishes a reasonable condition precedent to participation in the interscholastic athletics program, and therefore is not an arbitrary or capricious misuse of the Board's rule-making power. Moreover, respondent contends, participation in the athletics program is voluntary and not a part of the required curriculum of the school. In this connection, respondent presses the distinction made by the Commissioner in *Willett* v. *Board of Education of Colts Neck*, decided December 2, 1966. In that case the Commissioner held that a board could not make a rule requiring parents to pay the cost of field trips:

"* * * which are an integral part of the classroom teaching-learning process, which occur during regular school hours and in which all pupils in a class automatically participate, as contrasted with other activities which are not directly related to the classroom program, which take place outside of the normal school day, and which pupils elect to attend. The expenses of these latter elective activities are often underwritten by charging participants or spectators a fee. * * *"

The Commissioner further noted that his determination:

"* * * does not extend to and is not applicable to such other school affairs as dances, concerts, dramatic productions, athletic events and the like, for which admission charges are ordinarily made. * * *"

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Thus, respondent argues, the Commissioner has, in effect, held that a board of education may make a rule such as the one in question where participation is purely voluntary, as it is in interscholastic athletics.

* * * * * * *

The Commissioner has reviewed the facts in this matter as reported to him by the hearing examiner, *supra.*

While the statutes do indeed confer upon boards of education broad powers to make rules and regulations for the government and management of the schools, the statutes also require that such rules and regulations shall not be inconsistent with Title 18. *R. S.* 18:7–56 In the case of pupil accident insurance, the board is expressly prohibited from requiring any pupil electing not to participate in the accident insurance coverage to pay any part of the cost of the premium. *N. J. S. A.* 18:14–105.2 Clearly this statutory prohibition does not distinguish between the required physical education program and the voluntary athletics program. If the Legislature had intended such a distinction, it would have said so. Thus respondent's action, which has the effect of a rule, creates a distinction which is inconsistent with Title 18 and cannot therefore be sustained. The principles established in *Willett, supra,* are not applicable here. In that case, the Commissioner distinguished between certain elements of public education which are inherently a part of the "free public schools" intended by the makers of the State's Constitution, and certain other activities which are not so encompassed. But the Legislature, by its own language, has made no provision for such a distinction in authorizing an ancillary benefit to pupils which has no direct relationship to the operation of the public school program.

The Commissioner finds and determines, therefore, that a policy consented and agreed to by respondent, requiring participation in the pupil accident insurance coverage as a condition precedent to participation in the interscholastic athletics program of the district, is inconsistent with the provisions of Title 18 and must therefore be set aside as void and of no effect.

COMMISSIONER OF EDUCATION.

September 19, 1967.

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LXVII

TENURE TEACHER MAY BE DISMISSED ON PROOF OF INEFFICIENCY

In the Matter of the Tenure Hearing of Francis M. Starego, Borough of Sayreville, Middlesex County

For the Complainant, Hayden and Gillen (Eugene F. Hayden, Esq., of Counsel)

For the Respondent, Frederick J. Fox, Esq.

Commissioner of Education

Decision

Respondent, a teacher under tenure in the Sayreville public schools, is charged with inefficiency in the performance of his duties. The charges, signed by the Acting Superintendent of Schools, were certified as sufficient, if proved true in fact, to warrant dismissal or a reduction in salary, by resolution adopted at a regular meeting of the Sayreville Board of Education on May 13, 1965. The resolution recites the fact that, in accordance with the requirements of *R. S.* 18:3–26, respondent, hereinafter "the teacher," was given notice of his deficiencies by letter dated January 26, 1965, from the Superintendent of Schools and afforded 90 days in which to improve his performance. Complainant contends that no substantial improvement was made during this three months' probationary period, and dismissal charges were therefore filed on May 12, 1965. The teacher was permitted to continue until the close of the school year in June 1965 but was suspended thereafter pending determination of the charges herein.

Hearings on the charges were conducted by the Assistant Commissioner in charge of the Division of Controversies and Disputes at the Middlesex County Court House, New Brunswick, on July 16 and October 8, 1965, January 4, February 18, April 26, and September 30, 1966, and March 31, July 11 and 18, 1967.

The charge of inefficiency rests on four allegations of unsatisfactory performance by the teacher as follows:

a. unsatisfactory class discipline

b. inability to motivate students

c. lack of ability in certified subject areas

d. lack of suitable classroom techniques

Testimony in support of the charges was given by the Superintendent of Schools, the assistant superintendent, the junior school principal and the high school principal. Each of these witnesses had occupied other positions during a long tenure in the school system and at one time or another had had particular supervisory responsibility for the teacher.

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The record reveals that the teacher was first employed in the Sayreville schools in September 1950. He was first assigned to teach classes in English in the high school. According to the then high school principal he was reassigned to teach science shortly thereafter in the hope that he would have less difficulty. At least twice during his 15-year tenure he was relieved of classroom teaching duties and assigned to the library or to monitor study halls. Beginning about 1956 and in succeeding years the Board of Education denied him the normal salary increment given to other teachers. This action was unsuccessfully contested by the teacher before the Commissioner of Education in *Starego* v. *Sayreville Board of Education*, 1964 *S. L. D.* 100. Finally, the charges herein were filed in May 1965 and the teacher was suspended at the close of the 1965 school year.

Each of the school administrators testified as to detailed observations which had been made of the teacher's performance in the classroom over most of the span of his employment. The Commissioner finds no necessity to attempt to analyze and evaluate each of the incidents or instances related. Evaluation of a teacher's competency is generally a matter of total impression resulting from a synthesis of observations made over a period of time. That this is so is well demonstrated in this case in which, over the years, four qualified supervisors visited the teacher's classes, recorded their observations and in due course arrived at the conclusion that he was an incompetent and ineffective teacher.

The testimony of all four supervisors is similar in the kinds of inadequate performance observed. They related that when they arrived at the teacher's room they would often find that the classwork had not yet begun even though it should have been well underway; that clusters of pupils were permitted to waste time in idle talk; that pupils would put their head on the desk, gaze for long periods out of the windows, or ignore the class work in a variety of ways without being called to attention by the teacher; that pupils were permitted to leave the room and roam the corridors unnecessarily and without reason or purpose; that the teacher failed to control such unacceptable pupil behavior as throwing objects out of windows; that his classes were often so boisterous and noisy that they disturbed others; and that at times he lost control of his group to such a degree that he sent for the principal to come and restore order.

It was apparent that each of the witnesses believed that the teacher's unsatisfactory control of his pupils was the inevitable concomitant of the sterile and unstimulating teaching techniques which they reported he employed. They testified that he relied to an excessive degree on such outmoded practices as oral reading from the textbook followed by copying and answering the questions at the end of the chapter; that seldom were more than a handful of pupils afforded the opportunity to participate in the lesson; that there was almost a complete absence of discussion, explanation, demonstration, questioning, use of the chalkboard, or other techniques employed by a competent teacher to stimulate interest and thought; and that, although such equipment was available, there was little or no use of charts, models, and oher audio-visual aids. They testified further that the teacher often came to class poorly prepared. As evidence of his lack of thorough planning they pointed to the paucity of the entries in his plan book, the fact that the teacher would frequently abandon the lesson in progress when they came to observe

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and would assign seat work, and the meager content of the lessons that were presented.

The school supervisors also cited the record of excessive numbers of pupil failures by the teacher as evidence of his ineffectiveness. They pointed to classes in which the rate of failure was 15 pupils out of 21, 7 out of 11, 21 out of 27, and 7 out of 8, as examples.

The teacher entered a general denial of inefficient performance. He defended the teaching methods he employed as proper and adequate and his high failure rate as being necessary and justified under the circumstances. He excused any ineffectiveness on his part by alleging that the school system presented extraordinary discipline problems; that he was consistently assigned pupils whose capacity to learn was low and who were less motivated to learn; and that teaching aids other than the textbook were either lacking, inadequate, or unavailable to him. The teacher further implied that the schools in which he taught were poorly organized and administered because of the inefficiency of the administrative staff whose low evaluation of his work he ascribed to *their* incompetency and personal bias.

The Commissioner finds and determines that the evidence adduced amply supports the charges of inefficiency and ineptness. The picture of the teacher's performance which emerges from the testimony of the supervisors clearly portrays this ineptness and inefficiency. Whether the ineffectiveness in this case results from lack of understanding of the teaching-learning process, from lack of effort or from indifference, it is plain that the teacher failed to measure up to even minimal standards of satisfactory teaching. In the light of the uncontradicted evidence there is no question that these charges were justifiably preferred; indeed, it is surprising that they were so long delayed. This fact in itself refutes the teacher's attempt to infer bias. The testimony shows clearly that each of the four supervisors was well disposed toward the teacher, had suggested ways in which he could overcome his deficiencies, had encouraged him to undertake further study to improve his performance, and has sought patiently to help him become a successful teacher.

The teacher himself lends credence to the charges against him by his own testimony at the hearings. As an example, his defense of the use of oral reading from the textbook and his concept of the values derived therefrom flies in the face of generally accepted theory and practice and demonstrates his lack of understanding of the teaching-learning process. This one instance is multiplied many times in the teacher's total testimony and reinforces the conclusion that his concept of how children learn and how teachers assist in that process is woefully inadequate.

The Commissioner finds no merit in the teacher's defenses. In general, they amounted to nothing more than fault-finding, placing the blame on others, and specious excuses. It is clear that there were adequate supplies and equipment available which the teacher failed to use. Nor is there any evidence that the Sayreville schools presented problems of pupil discipline which are any different from those found in other schools. Although the teacher denied that his teaching techniques were inadequate, he offered no description of a variety of stimulating and well-founded methods which he employed by way of refuting the charge. Indeed, his description of the techniques he

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used served more to support the charges than to deny them. Finally, the Commissioner finds no merit in the respondent's attempt to excuse inadequate teaching, high failure rate, and poor discipline on the grounds that the children assigned are less able and therefore less inclined to learn and more inclined to misbehave. As was said *In the Matter of the Tenure Hearing of Leo S. Haspel, Board of Education of Metuchen,* 1964 *S. L. D.* 17 at 27, a case which in many aspects is similar to the instant one, and in which the teacher presented the same defenses:

> "* * * Poor discipline is often rooted in poor teaching. * * * Youth who are unchallenged, bored with stereotyped and unimaginative routines which to them have little meaning and no purpose, quickly lose respect for and rebel against the person who provides such leadership.
>
> "The Commissioner holds * * * that it is specious to seek to excuse poor discipline on the grounds that the children are less able and therefore more unmanageable. Competent teachers create a climate for learning which interests and motivates the members of the particular group being taught. Lack of discipline is the inevitable result of poor teaching whether the group be of high or low scholastic aptitude, and conversely, pupil self-control is a byproduct of good teaching."

The Commissioner finds, therefore, that there is more than sufficient evidence in this case to support the charges made. The question remains then whether the ineffectiveness thus proved warrants dismissal.

The paramount purpose of the public schools is to provide a thorough and efficient education for the children of the district. That purpose would be vitiated by protection in their employment of teachers who are proven to be inept and incompetent. The teacher in this case has had more than sufficient opportunity to rectify his patent shortcomings and to prove his capacity to discharge effectively the responsibilities of a teacher in the public schools. The teacher's unfitness having been clearly demonstrated by numerous incidents, cf. *Redcay* v. *State Board of Education,* 130 *N. J. L.* 369, 371 (*Sup. Ct.* 1943), affirmed 131 *N. J. L.* 326, (*E. &. A.* 1944), and he having failed to correct his deficiencies after proper notice was given him, his right to continue in his employment in this school system under the protection of tenure (*R. S.* 18:13–16) is, in the Commissioner's opinion, rendered forfeit. Accordingly, the Commissioner directs that his dismissal from the Sayreville school system as of the date of his suspension at the close of the 1964-65 school year be made absolute and final.

COMMISSIONER OF EDUCATION.

September 21, 1967.

Pending before State Board of Education.

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LXVIII

SENDING DISTRICT MUST ALLOCATE PUPILS TO RECEIVING HIGH SCHOOL IN PROPORTION FIXED BY LAW

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,
MONMOUTH COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BELMAR,
MONMOUTH COUNTY,

Respondent.

AND

BOARD OF EDUCATION OF THE BOROUGH OF MANASQUAN,
MONMOUTH COUNTY,

Intervenor.

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, Parsons, Canzona, Blair and Warren (Theodore J. Labrecque, Jr., Esq., of Counsel)

For the Intervenor, Pearce and Pearce (Owen B. Pearce, Esq., and William H. Burns, Jr., Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a receiving school district for high school pupils from the respondent school district of Belmar, contends that it has not been receiving the number of high school pupils from respondent's school district to which it is entitled by law and therefore seeks an order compelling respondent to rectify this situation. The Board of Education of Manasquan, also a receiving district for high school pupils from Belmar, was admitted as an intervenor in this action on the ground that its high school enrollment would be affected by the Commissioner's determination herein.

A hearing in this matter was held on May 17, 1967, at the office of the Monmouth County Superintendent of Schools in Freehold, by a hearing examiner appointed by the Commissioner for this purpose. The report of the hearing examiner is as follows:

Both Asbury Park and Manasquan have been receiving districts for high school pupils from Belmar for many years, the sending-receiving relationship dating back at least to the school year 1941-42. In that year and thereafter, according to the testimony of Belmar school board members, respondent's policy was to grant its pupils "free choice" of the high school they wished to

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attend. In the school year 1943-44 the high school pupils from Belmar were enrolled in Asbury Park, Manasquan, and Neptune Township High Schools. While some disparity of enrollment figures was adduced in the testimony (Tr. 4-6, Ex. P-1), records in the Division of Business and Finance of the New Jersey Department of Education, based upon enrollment reports submitted by the school districts affected, show the following enrollments of tuition pupils from Belmar enrolled in the receiving high schools in that school year:

Receiving School	*Number*	*Per Cent*
Asbury Park High School	62	44.3
Manasquan High School	76	54.3
Neptune Township High School	2	1.4

The hearing examiner recommends that in the determination of this matter, the Commissioner recognize the Departmental statistics as representing the official allocations for the school year 1943-44.

According to the testimony, petitioner thereafter received the following percentages of Belmar's high school pupils in the succeeding school years:

School Year	Per Cent
1945-46	37
1946-47	31
1947-48	39
1948-49	39
1949-50	44
1950-51	47
1951-52	47
1952-53	47
1953-54	56
1954-55	41
1955-56	39
1956-57	40
1957-58	(not reported)
1958-59	30
1959-60	26
1960-61	24
1961-62	26
1962-63	27
1963-64	23
1964-65	25
1965-66	24

It was further testified that from 1959-60 through 1964-65, Asbury Park operated its high school on double sessions. Single sessions were resumed in September 1965 when, as a result of the withdrawal of Ocean Township as a sending district, the total enrollment at Asbury Park High School dropped from 2,144 in 1964-65 to 1,295 in 1965-66. The enrollment in April 1967 was 1,120 and the anticipated number of pupils for 1967-68 is 1,220. The functional capacity of the High School is approximately 1,600 pupils. It was testified that Asbury Park High School has adequate facilities to accommodate all the pupils from the Belmar School system which it may be authorized to receive. A straight-line projection of 1965 enrollments made in connection

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with a study of school district regionalization (R-2), which purports to show a projection of such enrollments through 1972-73, indicates that by 1968-69 the enrollment at Asbury Park High School will be 1,933 pupils, and by 1972-73 it will reach 2,014 pupils. The testimony shows, however, that this projection does not take into account any attrition by reason of pupil dropouts or the enrollment of pupils in nonpublic schools. The hearing examiner concludes, therefore, that this projection does not competently indicate the reasonably anticipated enrollment in Asbury Park High School and recommends that it should be rejected.

It is petitioner's contention that the proportion of Belmar pupils attending public high schools to which it is entitled is fixed by law. The relevant statute, *R. S.* 18:14–7, reads in pertinent part as follows:

> "Any school district heretofore or hereafter created, which has not heretofore designated a high school or schools outside such district for the children thereof to attend, and which district lacks or shall lack high school facilities within the district for the children thereof to attend, may designate any high school or schools of this State as the school or schools which the children of such district are to attend. Whenever 2 or more schools are designated, the board of education of such school district shall make an allocation and apportionment of pupils to the designated high schools. "If no such allocation or apportionment of pupils has been made by resolution of the board of education of such district prior to the academic year 1943-44, the actual allocation and apportionment of pupils to the designated high schools in effect in the academic year 1943-44 shall be deemed to be the allocation and apportionment of pupils for the purpose of this section. * * *
>
> "No designation of a high school or schools heretofor or hereafter made by any district either under this section or under any prior law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the commissioner. Whenever 2 or more high schools have been designated, the commissioner shall make equitable determinations on applications for change of designation and allocation and apportionment by allocating and apportioning pupils of the sending district to the designated high schools. Any sending or receiving district aggrieved by the decision of the commissioner may appeal such decision to the State Board of Education which, in its discretion, may affirm, revise or modify such decision. * * *"

Thus, on the basis of the 1943-44 enrollment figures herein reported, petitioner was entitled to receive 44.3% of Belmar's high school tuition pupils.

Respondent Belmar, on the other hand, argues that it is not bound by the 1943-44 figure since prior to that school year its policy has been to permit its sending school pupils "free choice" of the high school they wish to attend. By the operation of the "free choice" policy, the percentage of Belmar pupils attending Asbury Park High School had dropped in 1965-66 to 24 %. Indeed, in only four school years since 1943-44 has Belmar sent 44.3% or more pupils to petitioner's high school.

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Intervenor Manasquan contends that it would be adversely affected by a ruling that would require Belmar to send to Manasquan a smaller proportion of its pupils than it has been receiving. Its budget for 1967-68, it was testified, was based upon tuition to be received for an anticipated 63 ninth-grade pupils from Belmar. Any drop in that number, it is argued, would result in higher per capita costs for high school education not only for Manasquan itself but also for other sending districts which Manasquan High School now serves. Intervenor also argues that its educational program would be adversely affected by a reduced enrollment, and that in its recent building program it anticipated utilization of facilites by Belmar pupils at existing levels of enrollment.

The testimony establishes that neither during the period of double sessions at Asbury Park High School, nor during any of the prior years when less than 44.3% of Belmar's pupils were sent to petitioner's high school, did petitioner make any appropriate effort to require enrollment of Belmar pupils in the percentage to which it now claims entitlement. In October 1964, in anticipation of returning to single sessions in 1965, the Superintendent of Asbury Park in a letter (P-2) to the Belmar Superintendent, did call attention to the allocations established by *R. S.* 18:14–7, *supra*, but no demand for compliance was contained therein.

The petition herein was filed in June 1966, and sought, in addition to an order requiring conformance to the provisions of *R. S.* 18:14–7, compensation from Belmar for tuition revenues lost if Belmar failed to conform by September 1966. Respondent has moved to dismiss the prayer for compensation on the ground that the Commissioner has no authority to award money damages.

It is the conclusion of the hearing examiner, based upon the foregoing facts, that (1) the enrollment of Belmar high school tuition pupils in Asbury Park High School in the school year 1943-44 constituted 44.3% of Belmar's allocation of its high school tuition pupils; (2) Belmar is not now providing for the enrollment of that percentage of its high school pupils in Asbury Park; and (3) although Asbury Park has not asserted any claim to such percentage until the filing of the petition herein, except for a letter in 1964 merely calling attention to the existence of percentage allocations, such failure cannot have the effect of changing the nature of the existing sending-receiving relationship without the express approval and consent of the Commissioner as provided by law.

* * * * * * *

The Commissioner has carefully reviewed and considered the findings and conclusions reported by the hearing examiner, *supra*. He concurs in the findings and conclusions, and in so doing calls to the particular attention of both sending and receiving high school districts that the Legislature has provided in *R. S.* 18:14–7 for the continuing stability of high school sending-receiving relationships by requiring the Commissioner's prior approval of changes or modifications in such relationships and only upon proper application and proof that good and sufficient reason exists therefor. See, *e.g.*, *In the Matter of the Application of the Board of Education of Caldwell-West Caldwell to Terminate Sending-Receiving Relationships*, etc., 1957-58 S. L. D. 43; *Bradley Beach Board of Education* v. *Asbury Park Board of Education*,

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1959-60 *S. L. D.* 159; *Board of Education of Spring Lake* v. *Board of Education of Asbury Park,* 1965 *S. L. D.* 133; *In the Matter of the Termination of the Sending-Receiving Relationship Between the Boards of Education of Middletown Township and Borough of Keansburg,* 1964 *S. L. D.* 62, affirmed State Board of Education, February 2, 1966.

The Commissioner finds and determines therefore that (1) by the provisions of *R. S.* 18:14–7 Asbury Park has been entitled to receive 44.3% of Belmar's secondary school pupils since the 1943-44 school year unless and until a change of such allocation was requested of, and approved by, the Commissioner; (2) no such change of allocation has been sought or approved; (3) Belmar is not now providing for the enrollment of 44.3% of its high school pupils in Asbury Park High School; (4) Asbury Park's failure to press its claim for the full allocation of Belmar's pupils, except for the 1964 letter cited *supra,* cannot have the effect of changing the nature of the existing sending-receiving relationship without the express approval and consent of the Commissioner; (5) in the absence of an appropriate application approved by the Commissioner for a change of allocation for additional numbers of Belmar pupils to attend Manasquan High School, Manasquan has no entitlement to receive more than 54.3% of Belmar pupils. It follows, therefore, and the Commissioner so holds, that unless a proper change of allocation is effected in accordance with law, respondent must assign 44.3% of its high school tuition pupils to Asbury Park High School.

The Commissioner finds no merit in petitioner's claim to compensation for loss of tuition revenues by reason of respondent Belmar's failure to assign the full complement of its high school pupils to Asbury Park High School in the 1966-67 school year. Petitioner did not file this action until June 1966. Thereafter, processing of the petition was subjected to a number of delays at request of counsel, unnecessary to detail, which prevented its resolution before the opening of either the 1966-67 or 1967-68 school years. Also to be considered is the fact that by the time of the filing of the petition, the districts involved, aware of the pendency of this litigation, had already set their budgets and fixed their tax rates for the 1966-67 and 1967-68 school years. For the reason that petitioner's application came too late in time for an effective determination prior to the commencement of the 1966-67 school year, the Commissioner will reject any consideration of compensation for loss of tuition revenues for that year. Similarly, the Commissioner must also reject consideration for loss of tuition revenues for the 1967-68 school year.

The Commissioner therefore directs that the parties shall forthwith take appropriate steps to reinstate the sending-receiving ratios of the 1943-44 school year to become effective no later than September 1968.

COMMISSIONER OF EDUCATION.

September 22, 1967.

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LXIX—LXX

BOARD MAY PAY LEGAL EXPENSE OF MEMBERS SUED FOR ACTION ARISING OUT OF PERFORMANCE OF DUTIES

MARIE S. HOWARD AND HELEN B. HOCKENJOS,
Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,
Respondent.

MARIE S. HOWARD,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,
Respondent.

For the Petitioners, *Pro Se*

For the Respondent, Egan, O'Donnell, Hanley & Clifford (Robert P. Hanley, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

This action is a consolidation of two separate petitions challenging the legality of payment of legal fees and the retention of legal counsel by the respondent Board of Education. The petitioners in both cases are members of the respondent. In the first appeal petitioners challenge the payment of legal fees for the defense of two other members of respondent Board who were named as defendants in a libel action. In the second petition, retention of counsel by respondent Board to represent it before the Commissioner in the first petition is protested. Respondent answers both petitions by saying that its actions were fully authorized by statute. Since both petitions arise from the same cause, they were consolidated for the purposes of hearing.

A hearing in these matters was held on May 23, 1967, at the Office of the County Superintendent of Schools, Morris Plains, by a hearing examiner appointed by the Commissioner for this purpose. The report of the hearing examiner is as follows:

At a special meeting of respondent Board of Education on February 10, 1966, two members of the Board publicly read or caused to be read a certain newspaper editorial (P-5). This editorial and the public reading thereof gave rise to a libel suit in which the said two Board members were named as defendants. Counsel for the Board represented these members in the suit, and on October 12, 1966, submitted bills to them in the total amount of

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$1,319.20 in connection with his services. The two members in turn submitted the bills to the Board for their respective shares of counsel's bills (P-1, P-6). The Board approved their payment (P-2, P-7) over petitioners' protest and negative votes. (P-8, P-9) The first petition herein followed.

Counsel for the Board disqualified himself from representing respondent Board before the Commissioner of Education in its defense of the first petition, and on January 9, 1967, respondent engaged other counsel to represent it. (P-1) Petitioner than filed the second petition, challenging respondent's authority to employ counsel for such purpose.

The parties are in accord that the central question to be resolved in the first petition is whether the actions of the two Board members in reading the editorial or causing it to be read are actions "arising out of and in the course of the performance of [their] duties" as Board members, within the meaning of *N. J. S. A.* 18:5–50.20, which provides for the payment by the board of the cost of defending such actions.

The testimony discloses that the Special Board meeting of February 10, 1966, was called to fix the amount of the budget to be submitted to the voters following the defeat of the first budget proposal on February 8. During the "public portion" of the meeting, following the transaction of the business of the meeting, a member of the audience referred to an editorial which had appeared in that day's issue of a newspaper circulating in the Township. A request was made from the audience that the editorial be read aloud. The President of the Board, not knowing the contents of the editorial and wishing to "have a better chance of controlling the reading of it" (Tr. 34), asked the chairman of the Board's public relations committee to read it aloud. A copy of the editorial was supplied to this member, and he read it. At one point near the end of the reading, the President interrupted to question whether the editorial was relevant to the limited purpose of the meeting, but upon being told that but a few sentences remained to be read, allowed the reading to continue to the end. The President testified that it was normal for members of the audience to make statements from the floor, to read statements or letters, or to ask questions of and receive answers from the Board during the public portion of the meeting. He further testified that he called upon the chairman of the public relations committee as the logical member to read aloud an editorial whose reading had been requested from the audience and which had been characterized by a number of the audience as having to do with the Board of Education. The member who read the editorial testified that he had only "scanned" the editorial prior to the meeting, that he was not aware of its precise contents, and that he read it when requested to do so by the President and when a copy was handed to him.

As to the second petition challenging the employment of counsel to defend the Board before the Commissioner, no testimony was offered. Petitioner argues, however, that the retention of counsel was not for the benefit of the Board, but to protect its improper payment of legal expenses for the personal benefit of two members of the Board. Respondent argues, on the other hand,

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that it has a statutory right to retain counsel to protect its interests when its actions are challenged.

* * * * * * *

The Commissioner has reviewed and considered the facts as found by the hearing examiner and reported above. His sole consideration is whether the payment of counsel fees in the first petition, and the employment of special counsel in the second petition were within the proper and lawful scope of board actions.

The Commissioner is constrained to observe that the so-called "public portion" of a board meeting is a device used by many boards of education to give citizens an opportunity to make statements or ask questions about school matters. While there is no requirement in law for such an opportunity for public participation, this device may serve useful purposes. However, the particular nature of the public's participation can be both amorphous and unpredictable. The topics which citizens may raise for question or discussion in a board meeting are often those which deeply concern them individually, whether or not they be relevant to the main business at the meeting. It lies within the power of the presiding officer, in the capacity of his office or in accordance with by-laws of the board, to make the decisions which, in his discretion, he deems necessary to guide, control, or even limit public participation. In the instant matter, the President was spontaneously confronted with reference to a newspaper editorial which he had not seen but which was represented to him as concerning the community and its Board of Education. The testimony shows that he exercised his official prerogative to have the editorial read aloud by the chairman of the Board's public relations committee, in order to keep better control of the proceedings. It is clear to the Commissioner, and he so holds, that the President's directive and the Board member's compliance were undeniably acts arising out of and in the course of the performance of their duties as board members.

It follows that, in accordance with the provisions of *N. J. S. A.* 18:5–50.20, when a civil action was brought against these Board members as a consequence of the incident, the cost of defending such action was properly to be borne by the Board of Education. The Commissioner finds and determines that the payment of $1,319.20 in legal expenses in connection with such defense was therefore a proper and lawful action of respondent Board of Education. The first petition herein is accordingly dismissed.

A like conclusion must be reached in the second petition. A board of education may sue and be sued and employ counsel therefor. *R. S.* 18:7–59 In the second petition respondent was "sued" before the Commissioner in a challenge of a lawful action. It was entirely within the discretionary power of respondent to defend its action, and, in view of its regularly retained counsel's understandable reluctance to serve as advocate under the particular circumstances, it was properly within its authority to employ separate counsel for that purpose. Accordingly, the second petition must likewise be dismissed.

COMMISSIONER OF EDUCATION.

September 29, 1967.

Pending before State Board of Education.

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LXXI

WHEN NO NEWSPAPER IS PUBLISHED IN DISTRICT, BOARD MAY SELECT PAPER CIRCULATING IN DISTRICT FOR PUBLICATION OF OFFICIAL NOTICES

GEORGE W. SCHULTZ, PUBLISHER THE WANAQUE BULLETIN AND CONTINUING WANAQUE BOROUGH NEWS,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE, PASSAIC COUNTY,

Respondent.

For the Petitioner, *Pro Se*

For the Respondent, Grabow, Verp, Rosenfelt & Chertcoff (Martin Verp, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a newspaper owner, editor and publisher, alleges that respondent Board of Education acted contrary to law in failing to designate his newspaper as the official advertising medium for public notices required by law, particularly the 1966-67 and 1967-68 school budget notices. Respondent denies the allegation and asserts that its action designating another newspaper was legal and proper.

A hearing in this matter was conducted by the Assistant Commissioner of Education in charge of Controversies and Disputes on March 14, 1967, at the office of the Passaic County Superintendent of Schools in Paterson.

Petitioner and his wife do business as the Tri-County Publishing Company. They own, edit and publish the weekly newspaper, *The Wanaque Bulletin and Continuing Wanaque Borough News* (hereinafter "*The Wanaque Bulletin*"). Also owned, edited and published by petitioner and his wife are ten other weekly newspapers, in Passaic, Bergen and Morris Counties, seven of which serve municpalities in the general area of the Borough of Wanaque and are generally the same as *The Wanaque Bulletin* in composition and content. The masthead and front page of the several newspapers, and sometimes pages three and six, differ. (Tr. 13 and Ex. R-2)

Petitioner has "an arrangement" with the operator of a radio and television repair and sales establishment in Wanaque, to provide counter and desk space in his shop for the receipt of mail, the deposit of news items and other written materials for *The Wanaque Bulletin* by members of the public, and the answering of inquiries. The shop operator is not authorized to perfrom any function with respect to the mail and written materials that are

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received other than keeping them until they are picked up by petitioner or a representative of petitioner's office and taken to either Butler or Riverdale, Morris County, where petitioner has printing plants. The masthead of *The Wanaque Bulletin* indicates that this repair shop is the publication office of the paper. (Ex. R-2) There is no telephone listing in Wanaque for *The Wanaque Bulletin.* (Tr. 54) Petitioner testified that he has similar "arrangements" in the other municipalities where he has newspapers except Butler and Riverdale, for the purpose of providing a "token office to meet the needs of the public." (Tr. 25) Petitioner testified that he visited said token office approximately six times between December 11, 1966, and March 14, 1967, and that his wife had made no visits.

In petitioner's plants in Riverdale and Butler, *The Wanaque Bulletin* and his other newspapers are composed, printed and prepared for circulation. Linotyping is done in both plants. All of the printing is done in the Riverdale facility. (Tr. 20, 21) Petitioner and his wife constitute the editorial staff for *The Wanaque Bulletin.* (Tr. 21) Seven persons, including linotypers, compositors, proofreaders and pressmen are employed to work in the plants in the output of *The Wanaque Bulletin* and their other newspapers. One additional person works in the Butler plant as a bookkeeper and a receptionist proofreader.

The paid circulation of *The Wanaque Bulletin*, petitioner testified, varies from 450 to 720. Of this number, 325 copies, more than 300 of which are paid, are mailed weekly from the Wanaque Post Office, where the newspaper is filed as second class mail matter. An average of 91 copies are sold at approximately three newsstands; about 33 copies are delivered in Wanaque by a delivery routeman; and a few additional copies are purchased by Wanaque residents at locations in Pompton Lakes and Ringwood. (Ex. R-1, and Tr. 27, 28, 29, 30)

In February 1965 and again in February 1966, petitioner applied to respondent for the designation of *The Wanaque Bulletin* as its official advertising medium for such public notices as it might be required to publish pursuant to law. On advice of its attorney, respondent determined that petitioner's newspaper did not qualify for said designation, and, in February 1966, designated *The Paterson Evening News*, a newspaper published in Passaic County and circulated in Wanaque, to carry the Board's notices to the public. Respondent did, however, subsequent to the filing of the petition herein, submit its 1967-68 school budget to petitioner for publication in *The Wanaque Bulletin* in January 1966, prior to the required public hearing on the budget (*R. S.* 18:7–77.1), even though his newspaper had not been designated as respondent's official advertising medium.

It is agreed that the issues presented for the Commissioner's determination in this matter are as follows:

a. Does the Wanaque Bulletin meet the qualifications established in the statutes for advertising notices required to be advertised by respondent?

b. If so, was the action of respondent in designating another newspaper for said purposes contrary to law?

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The statutes require certain notices to be published by boards of education of Chapter 7 school districts. After a board has prepared a statement of its annual budget and fixed a date for a public hearing thereon,

> "The board of education * * * shall cause notice of such public hearing and said statement to be published at least once in at least 1 newspaper *published in the municipality or if no newspaper be published therein then in at least 1 newspaper circulating in said municipality.* * * *" *R. S.* 18:7–77.1 (Emphasis added.)

Concerning the sale of bonds, the statutes provide:

> "In all other cases bonds shall be sold at public sale upon sealed bids after not less than seven days' notice of sale *published at least once in a newspaper, if any, published in the school district* * * *. If there is *no newspaper published in the school district the notice of sale shall be published in a newspaper published in the county and circulating in the school district.* * * *" *R. S.* 18:7–93 (Emphasis added.)

The advertising of annual and special school elections is required by *R. S.* 18:17–15, which reads in relevant part as follows:

> "The district clerk shall also cause such election to be advertised at least one week before the holding of such election *in a newspaper circulating in the district.*" (Emphasis added.)

See also *R. S.* 19:57–7 which, with respect to military service and absentee ballot notices, provides:

> "* * * All other officials * * * shall publish the same in at least 1 newspaper *published in each municipality or district* in which the election is to be held or *if no newspaper be published in said municipality, then in a newspaper, published in the county and circulating in such municipality, municipalities or district.*" (Emphasis added.)

Regarding advertisement for bids for supplies, buildings or repair of buildings, *R. S.* 18:7–64 provides:

> "* * * The advertisements required by this section shall be made *under such regulations as the board* may prescribe." (Emphasis added.)

It is petitioner's contention that *The Wanaque Bulletin* is the sole newspaper *published* in the Borough of Wanaque and, therefore, the only newspaper qualified to be designated by the Board of Education as the official advertising medium for its required legal notices, *supra.* In support of his contention, petitioner asserts that the token office in Wanaque is the publication office for *The Wanaque Bulletin.* Said token office, he asserts, constitutes the only legal publication office maintained by a newspaper in Wanaque. In further support of his contention, he avers that *The Wanaque Bulletin* has second class mail privileges at the Wanaque Post Office under the postal laws and regulations of the United States and conforms with the qualifications set forth in *R. S.* 35:1–2.2 and other New Jersey statutes.

Respondent denies that petitioner's newspaper is *published* in Wanaque. Respondent avers that the true publication office are those places where the business, administrative, editorial, composition and printing functions are carried out by petitioner, his wife and their employees, and that these are not located in the school district of Wanaque. The token office maintained

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by petitioner in Wanaque, respondent argues, is no more than a drop-off location for the depositing of mail, news items and other written materials for the newspaper, and it cannot reasonably be claimed that what is done there constitutes, in law, the act of publishing. The publishing of a newspaper, respondent contends, is accomplished where the editorial, business and administrative offices, and possibly the printing facilities, are located, although respondent agrees that a newspaper can be deemed to be published in one municipality and physically printed in another. In support of its contention, respondent cites *Bayer* v. *Hoboken*, 44 *N. J. L.* 131 (*Sup. Ct.* 1882); *Montesano* v. *Liberty Warehouse Co.*, 121 *N. J. L.* 124 (*E. & A.* 1938); and *Wildwood etc. Publishing Co.* v. *City of Wildwood*, 35 *N. J. Super.* 543 (*Law Div.* 1955).

Since, according to respondent, *The Wanaque Bulletin* is not truly *published* in Wanaque, it has no statutory obligation to designate that newspaper as its official medium for advertising the legal notices required by the statutes, *supra*. It avers, therefore, that its action designating *The Paterson Evening News* as its official medium was proper and valid and also served its purpose of utilizing a newspaper which reaches more of the voters and taxpayers of the district because of its greater circulation.

The basic question is whether *The Wanaque Bulletin* is "published" in the Borough of Wanaque. The Commissioner's review of the decisions cited by respondent and those in other jurisdictions produces no clear definition of the term "published" which is particularly applicable herein. However, upon the facts as presented, including especially petitioner's own designation of the address in Wanaque as a "token" office, the Commissioner is convinced that *The Wanaque Bulletin* cannot reasonably be said to have been published in Wanaque within the meaning and intent of the statutes applicable herein. In the light of that conclusion, therefore, petitioner cannot lay sole claim to be designated as the advertising medium for such public notices as respondent is required by statute to give. It is not questioned that *The Wanaque Bulletin* is one of at least two newspapers circulating within the municipality and school district. It is therefore a matter of respondent Board's discretion to select one or more of such newspapers for publication of required notices. That it selected *The Paterson Evening News* for its advertising in 1966 was an exercise of that discretion; that it submitted its 1967-68 school budget notice to *The Wanaque Bulletin* is a like exercise of the same discretion.

The Commissioner finds and determines that petitioner is not entitled by law to the exclusive right to publish the legal notices which the relevant statutes require respondent to publish. He further finds and determines that respondent's selection of another newspaper for such purposes constitutes a proper exercise of its discretion under the law. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

October 4, 1967.

Pending before State Board of Education.

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LXXII

BOARD MAY REQUIRE SUFFICIENT PROOF OF ELIGIBILITY FOR SICK LEAVE PAY

WILMA FARMER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondent.

For the Petitioner, Cahill, Wilinski & Mohrfeld (Edward Suski, Jr., Esq., of Counsel)

For the Respondent, Leonard A. Spector, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a teacher under tenure in respondent's schools, seeks to recover two days' sick leave pay which, she contends, respondent has improperly and unlawfully deducted from her salary. Respondent asserts that it properly deducted the pay for absence from her duties since petitioner had not sufficiently established that it was due to illness.

The essential facts in this matter are stipulated to be those set forth in the pleadings. It is further stipulated that this matter will be treated as a class action on behalf of all other teachers in respondent's schools who are similarly situated, with the proviso that the merits of petitioner's individual claims are not binding upon others in the class. The case is presented before the Commissioner on briefs of counsel.

Respondent employs approximately 883 teachers in its school system. Over the years, the number of teachers absent from their employment because of illness or other sick leave causes on any one day averages approximately 50. On January 4, 1967, 446 teachers called the Superintendent's office to report that they would not be at work on account of illness. On January 5, 368 called to make a like report. On January 4, the president of the Camden Education Association publicly stated that this action of reporting sick was a protest by the teachers. As a result of the mass absenteeism, repondent obtained in Superior Court an injunction restraining the Camden Education Association and the American Federation of Teachers and their members from striking or impeding the operation of the Camden school system.

Respondent required petitioner, and all others who claimed sickness as the reason for their absence on January 4 and/or 5, to file a physician's certificate, as provided in *R. S.* 18:13–23.9. Petitioner, and nearly all the others who had been absent, duly filed such certificates. Petitioner was then

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paid for the two days' absence, "subject to audit." Subsequently, the physician's certificates were examined by the Superintendent of Schools, the chief school physician, and by the Board, and were found to be, in the aggregate, questionable. As a result of this finding, on March 27, 1967, respondent adopted, by a vote of 4-0, with 5 members abstaining, a resolution authorizing the Secretary to deduct one or two days' pay, as the case might be, from all those teachers who had been absent on January 4 or 5, or both. Each of such teachers, including petitioner, was to be given notice of her right to present to the Board of Education sufficient proof of her alleged illness, and upon receipt of such proof, respondent by a majority vote, would order to be paid forthwith those teachers who sufficiently established proof of their illness. Respondent asserts that it subsequently received such proof from a number of teachers, and they have been repaid their previously deducted pay. Petitioner did not supply the sufficient proof requested, respondent says, and hence she has failed to establish her entitlement to sick leave benefit.

Petitioner rests her claim to sick leave benefit on three grounds:

I. The deduction of claimed sick leave violates her tenure rights in that it constitutes a reduction in salary without benefit of the procedural rights granted by the Tenure Employees Hearing Act (*R. S.* 18:3–23 *et seq.*).

II. In any event, respondent's resolution requiring her to furnish sufficient proof of her claimed illness is null and void, since it lacked the number of votes required for passage.

III. The Sick Leave Law (*R. S.* 18:13–23.8 *et seq.*) grants respondent no authority to determine the validity of a sick leave claim beyond requiring a physician's certificate.

I.

The relevant parts of the Sick Leave Law read as follows:

R. S. 18:13–23.8

"All persons holding any office, position or employment in all school districts, regional school districts or county vocational schools of the State who are steadily employed by the board of education or who are protected in their office, position or employment under the provisions of sections 18:13–16 to 18:13–19 of the Revised Statutes or under any other law shall be allowed sick leave with full pay for a minimum of 10 school days in any school year. If any such person requires in any school year less than this specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years."

R. S. 18:13–23.9

"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."

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R. S. 18:13–23.10

"Sick leave is hereby defined to mean the absence from his or her post of duty, of any such 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."

Petitioner contends that withholding of pay for sick leave claimed constitutes a reduction of salary in violation of the protection afforded her by the Teachers' Tenure Law (*R. S.* 18:13–16 *et seq.*), and a denial of procedural rights guaranteed in the Tenure Employees Hearing Act (*R. S.* 18:3–23 *et seq.*). She reasons that her annual salary was fixed by respondent, and that such salary is protected by the Sick Leave Law, *supra*, against the contingency of absence from her employment on account of illness. It follows, petitioner asserts, that the denial of a claim for sick leave constitutes a reduction in her salary, without benefit of the procedural rights afforded her in the Tenure Employees Hearing Act.

The Commissioner does not agree. Such an interpretation of the Teachers Tenure Law strains the legislation far beyond its intent. See *Zimmerman* v. *Board of Education of Newark*, 38 *N. J.* 65, 71 (1962). The Sick Leave Law assures school employees of a minimum number of days of sick leave pay. If an employee's absence exceeds the guaranteed minimum (including any accumulation of unused sick leave from previous years, the employing board of education *may deduct* all or part of the employee's pay for such excess. *R. S.* 18:13 23.11 Such a deduction, authorized by the statute, cannot be said to be a reduction of the employee's salary; it is unearned pay, no more and no less. Further, a board *may pay* for absence not constituting sick leave. *R. S.* 18:13–23.12 If it elects not to do so, however, the denial does not constitute a reduction in salary, since no right to be paid exists beyond the board's discretionary grant of such a right. In the present matter, respondent determined to pay teachers who established "sufficient proof" of their claimed illness and to deny pay to those teachers, including petitioner, who did not so establish that they were in fact entitled to sick leave pay. In *Greenberg* v. *Board of Education of New Brunswick*, 1963 *S. L. D.* 59, the petitioner similarly contended that the application of a personal leave of absence rule constituted a reduction of her salary in violation of her tenure rights. Concerning this contention the Commissioner said, at page 61:

"Petitioner argues further that the rule is inconsistent with the provision of the Teachers' Tenure Act, *R. S.* 18:13–16 *et seq.*, because it subjects her to a reduction in salary, however small. The Commissioner cannot agree that forfeiture of a day's pay as a result of infraction of a proper rule of the employer constitutes a reduction in salary. The Teachers' Tenure Act, designed to protect the quality of education available to pupils by insuring that teachers would work under some measure of economic security, cannot be stretched to cover the forfeiture of a day's compensation under circumstances such as those herein. Petitioner's annual salary in this case has not been reduced nor has it been affected differently than had she been absent for a day of sick leave in excess of her statutory allotment. The Commissioner sees no inconsistency with the statutes in the application of the instant rules."

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The Commissioner finds and determines, therefore, that the deduction of pay for an absence which is not established as having been due to illness within the meaning of the Sick Leave Law does not constitute a reduction in salary in violation of tenure rights.

II.

In any event, petitioner avers, the resolution authorizing the deduction and requiring her to furnish "sufficient proof" of her illness is null and void because it failed to receive the number of affirmative votes required for its passage. The vote, as noted *supra.*, was 4-0, with five members abstaining. Petitioner points to *R. S.* 18:6–20 as authority for her position. Respondent Board, being organized under the provisions of *Chapter* 7 of *Title* 18, is governed by *R. S.* 18:7–58, which is effectively identical with 18:6–20, and reads as follows:

> "No principal or teacher shall be appointed, transferred, or dismissed, or the amount of his salary fixed; no school term shall be determined, no course of study shall be adopted or altered, and no textbooks selected, except by a majority vote of the whole number of members of the board."

Petitioner contends that the resolution has the effect of "fixing" her salary, and therefore requires at least five clear affirmative votes for its adoption. The Commissioner agrees that where a specified number of votes for passage is required by statutes, nothing short of the requisite number of affirmative votes will suffice. See *Mount* v. *Parker,* 32 *N. J. L.* 341 (*Sup. Ct.* 1867); *Schermerhorn* v. *Mayor and Aldermen of Jersey City,* 53 *N. J. L.* 112 (*Sup. Ct.* 1890); *Minihan* v. *Board of Education of Bayonne,* 1938 *S. L. D.* 459, affirmed State Board of Education 462; *King* v. *Board of Education of Asbury Park,* 1939-49 *S. L. D.* 20. However, where a specified number of votes is not required, the abstention of members is to be regarded as acquiescence, and therefore tantamount to voting in the affirmative. In *Mount* v. *Parker, supra,* at page 342, the Court held as follows:

> "* * * It being the well established law, that where no specified number of votes is required, but a majority of a board regularly convened are entitled to act, a person declining to vote is to be considered as assenting to the votes of those who do. * * *"

The validity of the vote herein, therefore, turns upon the question of whether the challenged resolution falls within the category of actions requiring a majority vote of the whole number of members of the Board, as set forth in *R. S.* 18:7–58, *supra.* Specifically, is the amount of petitioner's salary fixed by the resolution?

The Commissioner holds that a salary is "fixed," within the meaning of *R. S.* 18:7–58, as a part of the act of employment or re-employment of the teacher. Such an interpretation is gathered from the context in which the word appears in the statute, which in its first clause describes the basic employment relationships between the teacher and the board of education. See also *R. S.* 18:13–5, 18:13–7. The import of any word or phrase is to be gleaned from the context and statutes *in pari materia. Public Service Electric & Gas Co.* v. *City of Camden,* 118 *N. J. L.* 245, 253 (*Sup. Ct.* 1937); *State* v. *Brown,* 22 *N. J.* 405, 415 (1956). See also *Treigman* v. *Reichenstein,* 27 *N. J.* 280,

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288 (1958); *Loboda, et al* v. *Clark Township, et al.*, 40 *N. J.* 424, 435 (1963). In the case of a tenure teacher, her salary is "fixed" either by action of the board in increasing her salary, possibly in accordance with a salary schedule, or in continuing it at its present level with or without affirmative action, as the board's rules or salary policy may dictate. As respondent's resolution did not "reduce" petitioner's salary, neither did it "fix" it. The resolution was an action of respondent to implement and apply the provisions of the Sick Leave Law, to provide the procedures for deductions for absence not constituting sick leave, and for payment when the right to sick leave pay was established by "sufficient proof."

III.

But, petitioner argues, no authority exists to demand more than the furnishing of a physician's certificate in support of a claim for sick leave pay.

It is necessary to examine the statute itself to determine the validity of petitioner's claim. Section 1 of the statute (*R. S.* 18:13–23.8) protects the employee's earnings for a minimum of 10 days of sick leave annually. No other kind of leave is guaranteed by this or any other section of the act. Sick leave is precisely defined in Section 3, relating the absence to "personal disability due to illness or injury," or to exclusion or quarantine because of contagious disease of the employee or in his or her immediate household. Section 2 authorizes a board of education to require the employee claiming sick leave to file a physician's certificate with the secretary of the board. But what may the board reasonably expect the certificate to show? In the light of the definition contained in Section 3, *supra,* the board is entitled to know whether the illness or injury claimed was sufficient, in the judgment of the certifying physician, to be disabling to the degree that the employee's absence was justified.

In the light of the unusual absenteeism of January 4 and 5, and the circumstances attendant upon it, respondent was justified in scrutinizing the physician's certificates filed by nearly all those who had been absent. Upon its finding that the certificates were, in the aggregate, "questionable," respondent was further justified in requiring sufficient proof that the absences were indeed due to "disabling" illness or injury as a condition of granting sick leave pay. There is no requirement in the statute which binds the board to accept the certificate as conclusively establishing that the absence was justifiable. As the Commissioner said in *Greenberg* v. *Board of Education of New Brunswick, supra,* respondent's rule governing personal leaves

> "* * * is an indication of its wish to consider the interests of individual members of the staff while attempting to control a situation which was getting out of hand. * * *"

and further, the effect of the rule

> "* * * is toward the maintenance and support of a thorough and efficient system of public schools. The purpose of the rule is to prevent breakdowns in the operation of the school program occasioned by excessive staff absence. That this is a valid purpose appears obvious."

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In the instant case, over half of respondent's total teaching staff were absent on January 4; slightly under half were absent on January 5. The harm caused to the school system was of such degree that an interim order restraining the teachers organizations and their members from engaging in any strike or any other action which would impede the operation of the city's school system was granted by the Superior Court. Respondent's action to prevent the expenditure of public funds for services not performed, under "questionable" conditions, must be viewed as within its discretion and designed to protect the public interest. It cannot be gainsaid that the public interest is always paramount. *New Jersey Turnpike Authority* v. *American, etc., Employees*, 83 *N. J. Super.* 389, 397 (*Ch. Div.*, 1964) This is especially apropos in this case, since petitioner's right to appeal to the Commissioner from an adverse decision by respondent upon the merits of such proofs as she may offer in response to the requirement of respondent's resolution, is not impaired by the Commissioner's determination that such a resolution was a proper exercise of the Board's discretionary authority to administer the Sick Leave Law. Wide power is given to the Commissioner to require the full and proper administration of the Sick Leave Law. (*R. S.* 18:13–23.13) Due process is assured to petitioner.

In summary, the Commissioner finds and determines that respondent's resolution requiring petitioner, as well as others similarly situated, to furnish sufficient proof that absences on January 4 and/or 5, 1967, were due to illness qualifying for sick leave pay, and deducting those days' pay until such proof is furnished, does not violate petitioner's tenure rights, is a validly adopted resolution, and does not exceed the authority granted to respondent in its administration of the Sick Leave Law for its employees.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

October 10, 1967.

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LXXIII

BOARD MAY REQUIRE EMPLOYEE REPRESENTATIVE TO DISCLOSE NAMES OF EMPLOYEES REPRESENTED

UNION TOWNSHIP FEDERATION OF TEACHERS LOCAL 1455, AFFILIATED WITH AMERICAN FEDERATION OF TEACHERS, AFL-CIO, ON BEHALF OF ITS MEMBERS,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

For the Petitioner, Rothbard, Harris & Oxfeld (Samuel L. Rothbard, Esq., of Counsel)

For the Respondent, Francis J. Simone, Esq.

COMMISSIONER OF EDUCATION

DECISION

Petitioner represents that it is a labor organization comprised of teachers and other professional staff members employed by respondent. It alleges that respondent Board of Education has refused to recognize it as the representative of a group of employees and has refused to meet with its representatives or to receive and discuss its grievances and proposals. It prays for an order declaring such conduct to be unlawful and directing respondent to receive its proposals and grievances and meet with its representatives for discussions and attempts at solutions.

Testimony, documentary evidence, and argument were offered at a hearing before the Assistant Commissioner in charge of Controversies and Disputes at the office of the Union County Superintendent of Schools, Elizabeth, on June 27, 1967. Both parties waived filing of briefs and chose to rest on the pleadings and evidence presented at the hearing.

The testimony reveals that petitioner sent the following letter to the Superintendent of Schools on October 12, 1964: (Exhibit P-2)

> "The Union Township Federation of Teachers would appreciate your arranging a meeting between the Board of Education and the representatives of the Federation for the purpose of presenting our program."

The Superintendent replied by letter dated October 20, 1964, as follows: (Exhibit P-3)

> "At the October 19, 1964, executive meeting of the Board of Education I presented your request to meet with the Board of Education for the purpose of discussing your organization's program. The Board of Education has instructed me to reply to this request as follows:
>
> "The Board does not feel that a meeting is in order and recommends that you submit your program to the Union Township Teachers' Association for presentation. However, if this does not meet with your approval you

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may present your program at any public meeting of the Board of Education which is the third Tuesday of each month."

Petitioner rejects the first alternative suggested by the Superintendent, asserting that the Union Township Teachers' Association is a rival organization and as such is not the representative chosen by its members to present their concerns. Although it has acceded to the second alternative by having one of its representatives appear at regular meetings of the Board on at least nineteen occasions between January 1963 and January 1967, it claims the privilege of private discussions with respondent. Such meetings have been denied and all of its grievances and proposals have had to be presented at regular public meetings of the Board. Petitioner argues that this is a right open to any citizen but that it, as the chosen representative of a group of employees, has a right to meet with the Board in private discussions of its members' concerns as well. Failure to do so, it maintains, is violative of the New Jersey State Constitution and is arbitrary, capricious, and discriminatory.

Respondent takes the position that it has no obligation to meet with any alleged representative of its employees until the *bona fides* of such representation has been established. In this case, respondent contends, it has never been furnished with a list of the names of the employees for whom petitioner purports to speak although it has requested such a list frequently. Without such a list, respondent argues, it has no way of knowing whether petitioner is the chosen representative of a group of its employees and whether it does, in fact, speak in their behalf. Respondent denies that there is any obligation which requires it to meet privately with any representative or group.

Petitioner introduced in evidence Exhibit P-4, a leaflet dated May 1966, entitled "The Union Teacher," for the purpose of showing that respondent did, in fact, know who at least nine of its members are. The leaflet, which has "Official Publication U. T. F. T. Local 1455" imprinted on its masthead, contains the names of five U. T. F. T. officers and four members of the publication's staff. The testimony discloses that this publication was submitted to the Superintendent for approval for placing in teachers' mailboxes and was also sent to members of the Board of Education.

Petitioner argues, therefore, that respondent already knows the names of at least nine of its members. It denies, however, that respondent has a right to disclosure of its membership list as a condition of recognition, contending that this would be an invasion of the rights of its members to privacy and might lead to harassment and reprisals.

The relevant section of the New Jersey State Constitution is Article I, Paragraph 19, which reads as follows:

"Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

The right of public employees to make known their grievances and proposals to their employers through chosen representatives and the obligation of employers with respect to receiving and considering the concerns of em-

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ployees have been clearly established by the New Jersey Courts, particularly in the case of *New Jersey Turnpike Authority* v. *American etc., Employees,* 83 *N. J. Super.* 389 (*Ch. Div.* 1964) as follows:

> "* * * Public employees have many desires similar to those of persons in private employment, to wit, fair rates of pay, impartial opportunities for advancement, safe working conditions, review of grievances, and reasonable hours of work. Nothing in the Constitution or statutes of this State renders unlawful the organization of public employees for their mutual interest. Further, they may have representatives of their own choosing present their 'grievances and proposals' to the proper authorities * * *.
>
> "Although the Turnpike is not obliged to engage in collective bargaining, it is under an affirmative duty to meet with its employees or their chosen representatives and consider in good faith the 'grievances and proposals.' * * *
>
> "It should be emphasized that any one or more representatives may speak only for those employees who chose them. The Turnpike has no right to recognize a representative of only a segment of its employees as agent for all of the employees of the Turnpike. Therefore, if five separate groups of Turnpike employees each have a different representative, all five representatives are entitled to recognition."

The single issue in this case is whether a board of education can require that it be furnished with a list of those employees for whom a representative purports to speak as a condition prerequisite to its recognizance and reception of grievances and proposals. Although respondent questions whether it is obligated to meet with employee-representatives in private sessions in any case, it does not press the point but concedes that it will make appropriate arrangements to so meet with any spokesman whose representation has been properly established.

The Commissioner has already commented on this issue in the case of *Perth Amboy Teachers' Association* v. *Perth Amboy Board of Education,* 1965 *S. L. D.* 159. The questions in that case arose out of a proposal to hold an election to determine which organization of school employees would have exclusive negotiation and representation rights with the Board of Education. After noting that the proposed election could not serve such a purpose for the reason that exclusive representation rights are not open to school employees under New Jersey law, the Commissioner continued as follows:

> "It would not be proper for the Board of Education herein to meet with the successful employee organization—or for that matter any employee-representative—*unless the Board were specifically informed with respect to the individual employees actually represented by the organization or the spokesman.* * * *
>
> "It is * * * not sufficient for an employee organization merely to 'represent' a particular number of employees in order to deal with the Board of Education. *It must, in some suitable manner, designate those individual employees for whom it purports to speak.* It is noted that the election which is proposed to be conducted pursuant to the Agreement calls for secret balloting. Such a secret ballot election, while indicative

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of the numerical strength behind a given representative, does not serve to inform the Board as to which employees a particular representative in fact represents. *Effective and proper representation should be accomplished by presenting the Board with a membership list or some other designation sufficient to inform the Board as to the identity of the persons whose grievances it must consider. * * *"* 1965 *S. L. D.* 159, 167, 168
(Emphasis added.)

The Commissioner concurs with respondent that it cannot deal effectively with grievances and proposals brought before it without knowing in whose name the presentments are made. There is a significant difference in procedures between public and private employment. In the private sector where collective bargaining is guaranteed, elections may be held to determine majority representation and the numerically superior organization becomes sole spokesman for all. In such case, there is no necessity for disclosure of persons comprising sub-groups. Where, as here, however, exclusive representation is not permissible and where every group has a right to have its voice heard, disclosure of those who comprise the group and for whom a representative claims to speak is not only reasonable but necessary as a basis for effective discussions and decisions. A board of education obviously would be in a better position to evaluate knowledgeably a grievance which it knew came from a small group of teachers in a single school as contrasted with one presented by a large number of employees in all parts of the school system. Moreover, it is conceivable that different consideration might be given to proposals which were the concerns restricted solely or largely to male or female employees, to veteran teachers or those newly hired, to elementary or secondary school employees, to "classroom" or "special subject" teachers, etc. It can hardly be questioned that a board can act more intelligently when presented with a problem if it knows the employees who are concerned than in the case when the confrontation is made by a nameless and faceless group.

Finally, the Commissioner fails to find any reason for petitioner's wish to hide behind a cloak of anonymity in its dialogues with respondent. The inference that disclosure of members may lead to harassment and reprisals is without foundation or merit. To initiate a proposed relationship in an atmosphere of such suspicion and mistrust augurs ill for any constructive progress. It must be presumed that both parties will enter into any discussions in a climate of good faith and mutual respect and understanding. In any event, if petitioner's fears should become fact, there are appropriate courses open to it by which effective relief may be obtained.

For the reasons stated, the Commissioner finds and determines that respondent's requirements, that it be specifically informed with respect to the employees which petitioner purports to represent, is a reasonable condition precedent to its recognition of petitioner as an organization authorized to present grievances and proposals to the Board of Education on behalf of a group of employees.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

October 23, 1967.

Pending before State Board of Education.

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LXXIV

ACTION FIXING SALARY OF TENURE TEACHER MAY NOT BE RESCINDED AT LATER MEETING

JAMES DOCHERTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WEST PATERSON, PASSAIC COUNTY,

Respondent.

For the Petitioner, Adolph A. Romei, Esq.

For the Respondent, Shavick, Thevos, Stern, Schotz & Steiger (Richard F. Aronsohn, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a teacher under tenure in respondent's schools, says that he has been improperly and unlawfully deprived of salary in violation of his tenure rights and respondent's salary schedule. Respondent denies that petitioner's tenure rights have been violated, and asserts that he does not possess the necessary qualifications for the salary to which he lays claim.

A hearing in this matter was held on May 4, 1967, at the office of the County Superintendent of Schools, Paterson, by a hearing examiner appointed by the Commissioner for this purpose. Briefs and memoranda of counsel were submitted. The report of the hearing examiner is as follows:

In the spring of 1965 petitioner was notified that his salary for 1965-66 would be $8,500. Upon presentation to the Superintendent of college transcripts, he was notified that effective September 1, 1965, he would be paid at the rate of $8,800, the additional $300 being the differential for teachers having the equivalency of the master's degree on respondent's salary schedule for that year. (P-4) On April 6, 1966, respondent elected him to a salary of $10,000 for 1966-67. The minutes of that meeting represent petitioner as having 15 years' experience and the equivalency of the master's degree. (P-8) Petitioner was notified by letter from the Superintendent of the Board's action. (P-1) Then, under date of June 8, 1967, petitioner received the following message from the Superintendent:
(P-3)

"Dear Mr. Docherty:

"The Board of Education has established the statutory requirement of thirty graduate credits for the Master's degree equivalency. Your transcript does not establish this requirement. Therefore, your equivalency is

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unestablished and, accordingly, your salary for 1966-67 is reduced from $10,000 to $9,200 as of September 1, 1966."

The testimony discloses that in December 1964 and December 1965 the Board of Education, in connection with the preparation of its budgets for the 1965-66 and 1966-67 school years respectively, considered salary policies for those years. In the spring of 1965 and 1966, after the annual school election and final determination of the budgets, the Board voted teachers' salaries in accordance with the previously considered salary schedules. Thus, the April 6, 1966, motion fixing salaries of teachers, including petitioner's, for 1966-67, engaged the teachers "at the *salaries* set forth in the 1966-67 salary schedule." (P-8) The schedules included the definitions necessary to interpret the differentials provided for various levels of education and experience. For 1965-66, the master's degree equivalency was defined as it is in *Chapter* 164, *Laws of* 1963, § 1 (*R. S.* 18:13–13.1) (P-4), as follows:

"* * * proof of the satisfactory completion of 30 additional semester hours in graduate courses beyond the course requirements for the bachelor's degree * * *."

In its policy for 1966-67, however, as it was revised on December 22, 1965, respondent changed the semester hours requirement from 30 to 32. (P-7)

The testimony further reveals that transcripts were submitted to the Superintendent, who evaluated the credits, and made appropriate salary recommendations to respondent. It is clear that for his recommendations as to petitioner's revised salary for 1965-66, and for the salary of $10,000 voted in April 1966 for the 1966-67 school year, the Superintendent took into consideration factors other than the designation of credits as "graduate" credits. Petitioner makes no claim to 30 or 32 graduate credits beyond the bachelor's degree. His testimony and the exhibits (Tr. 28, 29; Ex. R-1, R-2) claim, at the most, 19 graduate credits. The Superintendent frankly admits that he "made a mistake" in evaluating petitioner's credits. (Tr. 108) In a letter to the Board President on May 25, 1966, the Superintendent explained his evaluation and classification of master's equivalency in terms not of whether the credits were *graduate* credits, but whether they represented petitioner's effort to improve his capacity to teach. (R-6) He added in concluding his letter:

"In the event there is disagreement in Board policy, then, the credits and compensation of any teacher who has an equivalency credit is in question."

Following this letter, on June 7, 1966, respondent adopted a resolution (R-5) changing the graduate credit requirement for the master's equivalency from 32 semester hours back to 30 semester hours. The resolution concludes as follows:

"* * * 3. That for the purpose of determining the salary of a person holding a masters degree or the equivalent, the definition thereof as now set forth in *N. J. S. A.* 18:13–13.1 or as the same may hereafter be amended shall be applied."

The message from the Superintendent to the petitioner (P-3, *supra*), telling him that his 1966-67 salary had been reduced from $10,000 to $9,200, followed on June 8.

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Petitioner contends that the action of respondent in electing him to a $10,000 salary for 1966-67 gives him a vested right to that salary, and that no subsequent action of respondent effectively or lawfully abrogates that right. He stresses that at no time subsequent to April 6, 1966, did respondent take any affirmative action to rescind its fixing of his salary, nor did it take any action pursuant to *R. S.* 18:13–17 to reduce his salary under the provisions of the Teachers' Tenure Law. The Superintendent's notification that his salary had been reduced from $10,000 to $9,200, petitioner claims, was totally without authority and represents only the action of the Superintendent himself.

Respondent, on the other hand, asserts that no increment accrued to petitioner before the effective date of respondent's salary schedule, which, at the earliest, could not be prior to the beginning of the 1966-67 school year. In any event, respondent asserts, even assuming the existence of a salary schedule on April 6, 1966, petitioner acquires no vested right to a place on such a schedule based upon a mistake by the Superintendent in the evaluation of the teacher's credits. The resolution of June 7, 1966, redefining the master's equivalency at 30 graduate credits beyond the requirements for the bachelor's degree, respondent contends, was sufficient authority for the Superintendent to re-evaluate petitioner's credits, determine that he did not have the requisite numbers of graduate credits to qualify for the equivalency, and notify petitioner that his salary would be that for which he was properly qualified.

Upon the findings as herein set forth, the hearing examiner concludes that (1) petitioner does not have either 32 or 30 graduate credits beyond the requirements for the bachelor's degree; (2) the evaluation of petitioner's credits as the equivalent of a master's degree was erroneous albeit the error was based upon the Superintendent's belief that credits should be evaluated in terms of petitioner's effort to improve his capacity to teach and was in nowise caused by the petitioner; (3) respondent Board, upon erroneous information supplied by the Superintendent representing that petitioner had the master's degree equivalency, voted him a salary of $10,000 for 1966-67; (4) respondent Board redefined master's equivalency at a meeting subsequent to the aforesaid fixing of petitioner's salary; (5) the Superintendent, acting upon said definition, determined that petitioner did not have the requisite number of graduate credits to qualify him for a $10,000 salary; and (6) without further action by respondent Board, the Superintendent notified petitioner that his salary had been reduced from $10,000 to $9,200.

* * * * * * *

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

The Commissioner has previously considered the question of a tenure teacher's right to a voted salary in the case of *Harris* v. *Board of Education of Pemberton Township*, 1939-49 *S. L. D.* 164. In that case, Mrs. Harris, a tenure teacher, was voted a salary of $1,800 for the ensuing year. Some three months later, the Board of Education adopted a new salary schedule, and adopted a resolution rescinding the salary previously voted for Mrs. Harris and fixing a new salary of $1,600. In ruling upon Mrs. Harris' petition that the action reducing her salary be set aside, the Commissioner said:

"A board of education may rescind at any meeting a resolution which it passed during the course of the meeting and, accordingly, persons do not

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acquire rights until the final action has been taken on such resolution prior to adjournment. The resolution of May 5th, above set forth, was the final action at the meeting on that date in relation to the appointment of teachers * * *.

"If a teacher is under tenure, a board of education is authorized to increase her pay, but cannot reduce it except under the procedure set forth in the tenure statute, to which procedure the board has not reverted. * * *"

And elsewhere:

"* * * An acquired right through the adoption of a resolution by a board of education cannot be invalidated by a rescinding of the resolution at a subsequent meeting."

In the instant matter, the hearing examiner finds, and the Commissioner concurs, that there has never been a clear act of rescission by the Board. Although respondent redefined master's equivalency to be 30 instead of 32 graduate hours, this redefinition did not in any way touch upon petitioner's case. If there had been "a mistake," it was not of his making, and he cannot, as a teacher under tenure, be deprived of a right he had acquired by the final action taken by respondent in fixing his salary on April 6, 1966. The conclusion of the Superintendent, as evidenced by his letter to petitioner, notifying him that his salary was reduced from $10,000 to $9,200, is without legal efficacy. It was purely an administrative act, taken without the requisite authority of the respondent Board. *Cf. Regan* v. *Board of Education of Elizabeth,* 109 *N. J. L.* 1 (*Sup. Ct.* 1932), affirmed 112 *N. J. L.* 196 (*E. & A.* 1934).

The Commissioner therefore finds and determines that on April 6, 1966, petitioner was duly voted a salary of $10,000 for the school year 1966-67, and that the unilateral action which resulted in his being paid at a lower salary than $10,000 is in violation of his vested rights protected by the provisions of the Teachers' Tenure Act. Respondent is accordingly directed to pay to petitioner the difference in earnings since September 1966 to which he is entitled in accordance with the determination of the Commissioner herein.

COMMISSIONER OF EDUCATION.

Ocober 23, 1967.

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LXXV

CHILDREN RESIDENT IN QUALFIED INSTITUTION ENTITLED TO PUBLIC EDUCATION

ST. JOSEPH'S VILLAGE FOR DEPENDENT CHILDREN,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ROCKLEIGH, BERGEN COUNTY,
Respondent.

For the Petitioner, Francis B. Rusch, Esq.

For the Respondent, Logan and Logan (James P. Logan, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, an incorporated institution situated in the Borough of Rockleigh, having as its purpose the care of destitute, defective, abandoned, neglected or cruelly treated children, brings this action to protest the refusal of the Rockleigh Board of Education to provide an education at public expense for certain children who are residents at its facility. Petitioner asks the Commissioner to order the respondent to fulfill its obligation to these children. Respondent denies that it has any obligation to provide a free public education to any of the children in petitioner's care.

Hearings were conducted by the Assistant Commissioner of Education in charge of the Division of Controversies and Disputes at the Bergen County Court House, Hackensack, on June 20 and July 6, 1967. Counsel subsequently submitted briefs.

There is no significant dispute as to the material facts in this matter. Sometime prior to June 1954, St. Joseph's Home for the Blind—Sisters of St. Joseph of Newark, a corporation of New Jersey, made application to the Mayor and Council of Rockleigh for permission to conduct an orphan home and religious institution in the municipality. In consideration of approval of the project, the corporation entered into a covenant with the municipal governing body whereby it was agreed, *inter alia,* as follows:

"1. St. Joseph's covenants and agrees that the Borough of Rockleigh will not have to educate any children enrolled or residing at the institution and St. Joseph's further covenants and agrees that it will assume all responsibility for the expense of the education of any school children whose parents might work or live at the institution.

"2. St. Joseph's institution and school will care for and educate children from the approximate age of four years to the approximate age of fourteen years."

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Thereafter, the institution was constructed and became known as St. Joseph's Village, hereinafter referred to as the "Village."

The administrator of the Village described it as a residential setting accommodating a few more than 200 children varying in age from 5 to 14 years. The inmates are said to be neglected and abandoned children from broken homes in the Bergen, Hudson, Essex, and Union Counties area who have been placed by the courts or other agencies in the custody of the Associated Catholic Charities. In addition to caring for the physical needs of the children, the Village has maintained an educational program encompassing grades kindergarten through eight.

The testimony further reveals that early in 1966, the administrator of the Village had a telephone communication with the President of the Board of Education with respect to the admission of children from the Village into the public schools. It is to be noted here that the Rockleigh Board of Education does not operate any schools of its own but sends its elementary grade pupils, numbering 14 children in 1966-67, to the Northvale school system, and its secondary school pupils to the Northern Valley Regional High School District, paying tuition to those districts therefor. The administrator followed the telephone conversation with a letter dated February 24, 1966 (Exhibit P-1), a portion of which reads:

> "First of all, we would like to stress the fact that it is not our intent to burden the taxpayers of Rockleigh with additional taxes. We understand that the State of New Jersey has provisions for situations such as ours. We are obliged to provide facilities for our boys and girls that will make them good citizens of our country. Sending them out to a public school will lessen their sense of rejection and give them an opportunity to rub elbows with children from a normal home situation. Therefore, we feel we must pursue this course because it will prove advantageous to our children.
>
> "Whenever you schedule your next meeting, will you kindly let us know so that we can have a representative present?"

Respondent replied by letter dated March 10, 1966 (Exhibit R-9), supplying information with respect to the time of regular meetings of the Board.

On April 8, 1966, the administrator sent the following letter (Exhibit R-4) addressed to the President and members of the Board of Education:

> "St. Joseph's Village for Dependent Children in common with many similar institutions, has recognized that while it affords its residents the best education which the staff can produce, this education is deficient in breadth, scope and facilities to which that which is available in public schools. As a result, many children leaving such institutions as ours and attempting to enter public high school, find they are not fully qualified in certain aspects of the curriculum.
>
> "When St. Joseph's Village first settled in Rockleigh, we assured our neighbors that we would not be an educational burden to them. But times change, and we find now that we must request Rockleigh to act as the sending district for approximately 20 of our children from the fifth through the eighth grade. But still we are hopeful, indeed all but sure, that this

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will comprise no financial burden to the citizens of Rockleigh. May we quote from a letter addressed to the Village from Archie F. Hay, County Superintendent of Schools?:—'First, I think that it can safely be said that the responsibility for the education of the children resident in your home lies with the Rockleigh Board of Education if you choose to send the youngsters to public schools. Paragraph (e) of R. S. 18:14–1 would seem to make this plain. Furthermore, should such action place an undue financial burden upon the Rockleigh Board of Education, it may apply for relief to the Commissioner of Education under the provisions of R. S. 18:14–1.1a. In similar situations the Commissioner has awarded special state aid equal to the net cost per pupil. However, I think it must be pointed out that such special aid for Rockleigh would only be available under existing statutes. Should proposed legislation dealing with state aid be enacted, it is possible that this special aid would no longer be available to the Rockleigh Board of Education.'

"To what extent State aid is available will depend, of course, on the action of the current New Jersey Legislature. We hope it will make adequate provision.

"May we ask that you give our request your most earnest and thoughtful consideration. For that courtesy you have our sincere thanks and appreciation."

It appears that although respondent discussed the letter and a teacher from the Village appeared at the May 9 meeting of the Board, no effective communication was held until toward the close of the summer. On or about August 22, 1966, a meeting of the Mayor and Council, members of the Board of Education, and the administrator was held, at which the question here in issue was discussed. This was followed by a conference called by the Bergen County Superintendent of Schools in his office on August 30. In attendance were representatives of the Northvale School system and of St. Joseph's Village. No member of the Rockleigh Board was present but the County Superintendent noted in his letter summary of the meeting (Exhibit R-1) that he had conferred with respondent's President prior to the meeting and was aware of the opinions of respondent with respect to the question of sending 10 of petitioner's children to Northvale at public expense. Following this conference, the administrator registered 10 children from the Village at the Northvale school for the 1966-67 school year. A series of communications and conferences ensued culminating in a letter from the administrator to respondent's Secretary dated November 23, 1966 (Exhibit P-3), the relevant portion of which follows:

"As you no doubt know, ten children from St. Joseph's Village for Dependent Children are presently attending Nathan Hale Elementary School in Northvale. The registration of these children was based upon the opinion of Mr. Archie F. Hay, Superintendent of Schools, that the children are bona fide citizens of Rockleigh and, therefore, entitled to free Public Education. It is our understanding that your Board of Education has thus far not recognized the children as being eligible for such education.

"Since we are most anxious to establish the fact that your Board of Education does or does not intend to pay their tuition to Northvale we hereby request that your Board notify us as to their position in this matter.

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> If we do not hear from you in three weeks time we shall seek other mediums for a determination."

Respondent replied to this request by letter dated December 13, 1966, (Exhibit P-2) which stated that

> "the Rockleigh Board of Education cannot assume the obligation of the tuition of the children from the St. Joseph's Village for Dependent Children attending public school in Northvale."

Petitioner thereafter filed the subject appeal.

Petitioner maintains that it is an institution incorporated and located within the State of New Jersey for the purpose of caring for neglected children and therefore its children are legally entitled to a free public education to be provided by the local school district. Petitioner denies that it failed to take appropriate steps to have its children enrolled in the appropriate schools and avers that, despite any formal application, respondent was well informed of its wish to have ten children admitted to the public schools. Petitioner contends, with respect to the covenant of 1954 in which it agreed that the local school district would be relieved of educating children from the Village: (1) that times have changed and the best interests of some of its children can no longer be served by schooling solely within the institution, and (2) the local school district will not be burdened with any additional expense for the reason that State Aid will underwrite any such costs.

Respondent takes the position that petitioner has failed to exhaust its administrative remedies since it never applied to the local Board of Education for admission of any of its children to public school. While respondent admits its obligation to provide education to eligible persons, it contends that it also has the responsibility to determine the persons who are entitled to such education under the law. In this case, respondent argues, no application or facts with respect to petitioner's children were presented to the Board of Education, and therefore no competent determination of their eligibility has been made by reason of the failure to follow statutory requirements for the admission of pupils to school.

Respondent argues further that petitioner's institution does not come within the provision of the applicable statute, and its children are therefore not entitled to free public education at local district expense. It contends that whereas the statute applies to institutions for the care and welfare of neglected children, the Village's primary purpose is the operation of a school, to which the law makes no reference. Respondent further maintains that the children themselves do not qualify because their stay at the Village is limited, intermittent, and controlled by persons outside the Borough of Rockleigh. Therefore, the children are not residents of St. Joseph's Village, in respondent's view, and thus are not residents of Rockleigh. Respondent takes the position that only those persons taking up permanent residence in an institution not offering educational facilities and where there is a legally effective relationship between the owner of the institution and the child, are entitled to a free public education under the statutes.

Respondent also attacks the impartiality of this adjudication, contending that the trier of the facts has prejudged the issues and was therefore not an impartial arbiter. Finally, respondent cites the agreement of June 25, 1954,

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which it contends is not contrary to public policy or statutory prohibitions and is a valid enforceable instrument on which respondent can ground its contractual rights.

The statute relevant to the issues herein is *R. S.* 18:14–1, the pertinent portion of which reads as follows:

> "Public schools shall be free to the following persons over 5 and under 20 years of age:
>
> * * * * * * *
>
> "e. Any person, nonresident of the district, who is placed in the home of a resident of the district by order of a court of competent jurisdiction in this State, or by any society, agency or institution incorporated and located in this State having for its object the care and welfare of indigent, neglected or abandoned children, or children in danger of becoming delinquent, or any person who is a resident in any institution operated, by any such society, agency or corporation, on a nonprofit basis, whether or not such resident, society, agency or institution is compensated for keeping such nonresident child; but no district shall be required to take an unreasonable number of nonresidents under this subsection except upon order of the Commissioner of Education issued in accordance with the rules established by the State Board of Education. * * *"

The Commissioner agrees with respondent that it has the duty to furnish education to persons within the school district who can claim statutory entitlement thereto. A board of education may also require that such entitlement be established as, for example, the filing of an affidavit in the case of children not living with a parent or guardian, as provided in *R. S.* 18:14–1b.

The Commissioner knows of no statute, however, which requires that formal application be made to the board of education in order to be admitted to school. Even if the authority to make such a regulation is inferred, there is no showing in this case that respondent had ever adopted such a rule or had ever required any such procedure of any pupil. The usual custom and practice in school districts is for children to enroll at the office of the school which they will attend. The matter of eligibility for admission is generally an administrative procedure which is handled by the school staff. Such questions seldom reach the board of education and then only when the matter cannot be resolved at the administrative level. In this case the testimony reveals that the Board of Education had no rules or regulations governing admission to school nor did it have any form of application therefor. The Board's secretary testified that new families moving into the municipality would generally make inquiries of him with respect to schooling and he would answer their questions. Children from Rockleigh are enrolled in the public school in Northvale by their parents. After the school term begins a list of pupils from Rockleigh attending the Northvale schools is received by respondent's secretary from the Northvale secretary and on the basis of this list tuition is paid.

Respondent's contention that no application was made to it nor were facts supplied on which it could base a determination with respect to the children in question, is without merit. That the Board knew of petitioner's intention to send at least ten children from the Village to public schools is obvious. It was the subject of telephone conversations and at least two letters between

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the administrator and the President of the Board; it was also the topic of a conference involving members of the Board, the Mayor and Council, and the administrator. In a municipality as small as Rockleigh it is not credible that this matter was unknown to respondent despite the absence of a formal application and an appearance before the Board. Furthermore, on or about October 1, 1966, the Board received notice from the Northvale school district of the Rockleigh pupils attending school in Northvale, including the names of ten pupils from the Village. Nevertheless, respondent took no action on this matter until December 1966, after receiving a specific inquiry from the administrator, at which time it denied responsibility for the education of the Village children.

The Commissioner holds that petitioner was not required to make formal application in the absence of any rule, regulation, or established practice to that effect; that the procedures it followed to enroll its children in the Northvale schools as pupils from the Rockleigh school district were adequate under the circumstances; and that respondent had sufficient knowledge of the matter and could and should have moved to make its determination promptly with regard to the eligibility of petitioner's children. In any event, in view of the respondent's stated position in this controversy and its letter of December 13, 1966, refusing to pay the tuition here involved, a remand of the matter to the respondent Board would be a palpably useless and time-consuming act. The Commissioner, therefore, finds no failure by petitioner to exhaust its administrative remedies in this matter.

The main issue in this case is found in respondent's second point, in which it is urged that St. Joseph's Village is an educational institution with no legal relationship between teacher and pupil, and it does not come, therefore, within the ambit of *R. S.* 18:14–1e. The Commissioner cannot concur in this conclusion either factually or legally. The fact that the Village operates a school program from pre-kindergarten to grade 8, does not lead to the ineluctable conclusion that it is an educational institution whose primary function is to provide a school program to its inhabitants. The testimony is to the contrary and discloses that the school program maintained in the Village is only an adjunct of its larger purpose to care for all the needs of its residents. The fact that the children do not remain at the institution after age 14, that some leave before that time, and that they are sent to camp, to the home of sponsors or even to their own homes for a vacation period in the summer does not vitiate that purpose. The testimony is conclusive that the Village is an institutional home which has been given custody of New Jersey children removed from their parents by a court or other competent agency. As such it falls squarely within the requirements of the statute of a "society, agency or institution incorporated and located in the State having for its object the care and welfare of indigent, neglected or abandoned children, or children in danger of becoming delinquent * * *." The Commissioner holds that the facts do not support respondent's contention that petitioner's primary purpose is the operation of a school and that the Village must be designated as an educational institution lacking the characteristics of a home for unfortunate children.

Respondent argues further that the statute in question limits the right to a free public education only to those persons taking up permanent residence in an institution not offering educational facilities where there is a legally effective

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relationship between the owner of the institution and the child. It asserts that the purpose of the statute is to cover those cases whereby a child is a permanent habitant of a boarding home or similar institution; a place where the child intends to stay permanently upon his entrance and wherein the directors of the institution have a legal relationship with the child. It appears from the evidence, however, that petitioner does have a "legal" relationship to the children who live at the Village. Testimony discloses that the inmates are placed there by a legally constituted charitable organization which has the lawful capacity and authority to do so. Whether or not complete and permanent guardianship of each child has been delegated to the operators of the Village or its parent agency by a competent court, begs the question. Certainly the administrator and other members of the Village staff stand *in loco parentis* to the children committed to their care. There can be no doubt that an authorized legal relationship does exist for the time during which the institution has custody. Such relationship is sufficient, in the Commissioner's judgment, to come within the ambit of the statutes.

The statutory history of *R. S.* 18:14–1 further reveals the lack of merit in respondent's position. In its early form *R. S.* 18:14–1 stated simply that public schools are to be free to all persons between 5 and 20 years of age who are residents of the district. As school districts became more complex and new problems arose, the Legislature found it necessary to clarify the statute and to include within its entitlement specific groups of children whose residence was in some way different. As a result, additional sections have been enacted at various times, each applying to a particular kind of situation in which children were found, which situations provoked some question of their right to an education at local expense. Thus, paragraph c was added by the Legislature in 1942 to remove any question of the right of children of migrant workers to attend the public schools of the district in which they were quartered, however temporarily. Similarly, section e, *supra*, was enacted as *Chapter* 211 of the *Laws of* 1942 to clear up any doubt with respect to the rights of children in institutions of the kind enumerated. The statement which accompanied this legislation reads:

> "The purpose of this bill is to provide free educational opportunities for children placed in foster homes by order of a court or by responsible social agencies of this state and to provide state apportionment of school monies for such pupils."

Thus, it is clear that the Legislature placed no such narrow interpretation on its enactment as does respondent herein, but rather intended to insure that children living in institutions such as that operated by petitioner are to be entitled to a free public education provided by the local school district.

It is to be noted further that the situation herein is not unique in New Jersey and that custom and practice are contrary to respondent's position. Other institutions similar in character to the Village herein have functioned in cooperation with the local school district for many years. As an example, the Bonnie Brae Farm for Boys, a residential institution for neglected and abandoned boys, located in Bernards Township, Somerset County, at one time under the auspices of the Board of Social Service of the Episcopal Diocese of Newark but now under private sponsorship, has for many years sent a portion of its inmates to the local district schools while providing schooling for the

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remainder within the institution. This arrangement was contested in the case of *Baird et al.* v. *Bernards Township Board of Education*, decided by the Commissioner in an unpublished decision on June 12, 1939, and affirmed by the State Board of Education on December 9, 1939. In that action the petitioners challenged the power of the district board of education to admit pupils from Bonnie Brae to the public schools at local expense. In upholding the arrangement the Commissioner said:

> "The trustees of the Bonnie Brae Farm for Boys are rendering a valuable service by providing, without cost to the State, a home for these children who were without a proper home environment. This contribution to the welfare of the State in general, and to the boys who become residents of the Farm in particular, merits public commendation. The State may well expect the local community to provide educational facilities for them with the special aid established for that purpose. Counsel for respondent express well the educational problem in saying:
>
> 'The State of New Jersey must supply the schools for these boys. They are entitled to free schooling. They cannot be at the Farm and go to school where a deserting parent may have lived. The school district where a parent may be found, even if legal settlement could be shown, would in all probability refuse to pay for schooling for the boys outside of their own school system. They may and probably would take the position that the boys must either attend school in the municipality or shift for themselves. Such a course would be subversive of the public good and destructive of the Farm and its program.' "

See also *Child Care Center* v. *Howell Township Board of Education*, decided by the Commissioner of Education March 3, 1967.

Respondent relies upon the decision in *Mansfield Township* v. *State Board of Education*, 101 *N. J. L.* 474 (*Sup. Ct.* 1925). The Commissioner finds that the facts in that case differ materially from the circumstances herein. In *Mansfield* the Court held that a local board of education was not obligated to furnish free schooling to a child whose parents lived in another state and who had been sent by them to live in New Jersey for the express purpose of getting an education. Such is not the case herein, where the parents of the children are New Jersey residents and where the children have been placed for all purposes in the subject institution by a recognized agency having custody and control over them. Moreover, the statute in effect at the time of the *Mansfield* case contained none of the subsections since added, and no counterpart of subsection e, controlling herein, was then in existence. A similar conclusion was reached by the State Board of Education in its affirmance of the Commissioner in the *Baird* case, *supra*. After pointing out factual differences similar to those in the instant case, the State Board in that case went on to say:

> "In view of these material factual differences, it does not seem to us that in the Mansfield Township case the Court provided a rule of decision for the present controversy, even if the same statutory provisions were here involved.
>
> "The fact is, however, that since the Mansfield Township case, acts here applicable have been passed and earlier acts amended in material par-

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ticulars pertinent to the present case. * * * modifications of the school laws occurring since the Mansfield Township decision appear to us to clearly show a legislative intent to authorize the reception of the inmates of charitable institutions of school age in the public schools of the districts where such institutions are located, as *residents* of such districts."

Respondent also finds support in *Lake Farm* v. *District Board of School District No. 2, Kalamazoo Township*, 179 *Mich.* 171, 146 *N. W.* 115 (*Sup. Ct.* 1914) in which the Michigan Court found that the inmates of an institution whose purpose was the support and education of children and which did not contribute to the support of the local schools, did not acquire residence for school purposes. It must be noted, however, that the Michigan law at the time of that decision was not similar to the relevant New Jersey statute and contained no specific provisions such as those found in the subsections of *R. S.* 18:14–1. Indeed, it is to be noted that in *Child Welfare Society* v. *Kennedy School District*, 220 *Mich.* 290, 189 *N. W.* 1002 (*Sup. Ct.* 1922), the same court which decided the *Lake Farm* case, *supra*, held, some eight years later, that children who came from broken homes and were placed in a charitable institution were entitled to attend the schools of the district in which the home was located.

In its third point respondent questions the impartiality of this adjudication. It alleges that a premature determination was made by an Assistant Commissioner of Education, who later became the trier of the facts, in a letter dated September 9, 1966, to the Bergen County Superintendent of Schools. In that letter it was stated that the children in quesion had a statutory right to attend the public schools. The particular statement in the letter to which respondent takes objection reads: "The salient fact in this matter is that the children have a statutory right to attend the public school." Respondent contends that having reached such a conclusion on the basis of unilateral information which did not conform to the actual facts and in which respondent had no part, the office of the Commissioner of Education should have disqualified itself from jurisdiction over this matter.

The letter in question (Exhibit R-6) was written by the Assistant Commissioner in response to a request for advice from the Bergen County Superintendent of Schools, who was concerned with the proper measures to be taken with respect to the educational interests of the children involved herein. After a recital of the situation as understood from the County Superintendent, the Assistant Commissioner's letter goes on to say:

"I suggest that the Northvale Board of Education continue to receive the children while the problem of financial obligation is being resolved. The salient fact in this matter is that the children have a statutory right to attend the public schools. Certainly the rights of children cannot be voided by a past agreement. Who is to bear the expense is a separate question which will require a knowledge of all the facts and perhaps a formal adjudication. In any case, I fail to see how the Northvale School District can suffer financial harm.

"The children are not residents of that district and Northvale is therefore entitled to collect tuition whether it comes from public or private sources. Therefore, I suggest that the children's education continue without inter-

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ruption until a competent determination can be made as to who is responsible for the payment of the tuition."

The Commissioner fails to see how the above statements represent fatal prejudgment. The statements made clearly indicate the writer's avoidance of any predetermination with respect to the pertient aspects concerning respondent's obligation to the children of the Village and points to the fact that a "formal adjudication" and "competent determination" may have to be made on the basis of all the facts. The statement that "the children have a statutory right to attend the public schools" was nothing more than a statement of fact which permits no denial. The children herein are sons and daughters of New Jersey parents and came to the Village from New Jersey communities. They are undeniably residents of New Jersey and as such they have a statutory right to attend the public schools of the State. The Commissioner knows of no law or rule which holds that a New Jersey child must attend school in an institution, except for those found for some reason incapable of public school attendance. Every instance in which a child is not domiciled with a natural parent raises a question of schooling. The question, however, is not whether the child has a right to go to public school. That right is constitutionally guaranteed. The question is who must provide that education and who must bear the expense. Such is the issue herein, and the Commissioner holds that there is no evidence of any such prejudgment as respondent alleges.

In the context of this allegation, the Commissioner is impelled to point out that members of the State Department of Education, including the county superintendents and their staffs, are constantly called upon to counsel and advise officials of local school districts and to assist them in the fulfillment of their responsibilities. Prior involvement in questions and issues which may eventually lead to a formal controversy cannot always be avoided in the course of normal activities. The Commissioner himself and the Division of Controversies and Disputes in particular, however, take care to exercise great restraint and assiduously attempt to remain clear of involvement which might approach prejudgment in any matter which indicates potential formal adjudication. In reviewing the activities of his staff in connection with this matter the Commissioner finds that this long-established policy has been carefully adhered to and that the statements made and actions taken have always been appropriate and proper. The Commissioner finds no merit in respondent's allegations of partiality and predetermination.

Finally, respondent cites the agreement of June 1954, under which petitioner agreed to relieve respondent of the obligation to educate children of the Village. Petitioner now seeks to rescind certain pertinent provisions of its covenant. It exculpates such a breach by noting that when the agreement was entered into, the changes in the times and the needs of its children could not be foreseen. Petitioner maintains that it has discovered that certain of its children need interaction with a peer group who live a normal family life in a community and that their education and personal development is stunted and thwarted by constant confinement to an institutional existence and its necessary limitations. For that reason it is already sending 28 children to two parochial schools outside the Village, one in Norwood and the other in Northvale. Petitioner further asserts that it has reason to believe that the public education

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of its children will impose no financial burden upon respondent because the amount of additional State Aid received will compensate for any added expense and that this affords the very protection which the covenant intended.

There can be no question that the agreement of 1954 was entered into in good faith by both parties and that petitioner now seeks to breach its covenant. The Commissioner recognizes as valid petitioner's assertion of the stultifying effects of unrelieved institutional existence in the lives of children, but finds it exceedingly unfortunate that petitioner's awareness of this truth came well after an agreement upon which respondent could expect to rely was executed. Undeniably, petitioner is in breach of its convenant. On the other hand, the amount of funds available under the rules of the State Board of Education governing special State Aid for children resident in institutions pursuant to *R. S.* 18:14–1 will cover the entire cost of the education of petitioner's children. Upon its application Rockleigh will be entitled to receive the minimum aid payable under *R. S.* 18:10–29.34 plus an amount equal to the difference between such minimum aid and the tuition costs. The local school district will therefore be saved financially harmless from the costs of educating petitioner's children.

The crucial consideration here is the education of the children. The instrument in question directly affects them, their rights, and their future. While the Commissioner asserts no general right to judge the validity of agreements reached between private agencies and municipal governing bodies, he holds that any part of such an agreement which becomes an element of a controversy arising under the school laws, as in this case, is clearly within his statutory jurisdiction. For that reason, the portions of the 1954 agreement cited *supra* cannot be held binding upon the petitioner no matter what the intentions of the signatories may have been. Certainly petitioner had no right to sign away the rights of children then within its walls, let alone the privileges of children who would come into its custody in the future. Nor could respondent accept and rely upon such a representation which signed away the rights of third party children without their knowledge or consent. The Commissioner holds that that portion of the agreement of 1954 which purported to relieve the local school district of responsibility for the education of children resident in the Village contravenes *R. S.* 18:14–1 and can have no effect upon the issues involved in this controversy.

In reaching the determination herein the Commissioner is not insensitive to or unsympathetic to respondent's fears, although to a large extent unexpressed, that it may suddenly and without warning be forced to accept and provide schooling for 200 or more children presently educated at the institution. While any such eventuality appears unlikely, the possibility exists under New Jersey school law. Indeed, any nonpublic school, whether religiously affiliated or not, could close its doors tomorrow and the public schools would have no choice but to make provision for the pupils. In this case the Commissioner has no reason to believe that petitioner has the intention of sending other than a small group of selected pupils to the public schools. Any change in such a policy would hopefully be preceded by reasonable notice to the school authorities in order to allow for adequate preparation. The Commissioner is constrained to re-emphasize, however, that the overriding and paramount consideration must always be the educational welfare of the children, and all other issues must give way to that purpose.

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After thorough study of all the facts and issues in this matter the Commissioner finds and determines that children of legal school age who are domiciled at St. Joseph's Village are entitled to attend public schools and that the Rockleigh Board of Education, in whose district the institution is located, has the duty and responsibility to provide free public education for such children. The Rockleigh Board of Education is directed, therefore, to pay to the Northvale School District the amount of tuition due for the education of children from St. Joseph's Village attending the latter's public schools during the 1966-67 school year and for subsequent years as such charges may become due and owing. The Rockleigh Board of Education is further directed to immediately file an appropriate application for supplemental State Aid for the education of the pertinent pupils during the past year.

COMMISSIONER OF EDUCATION.

October 26, 1967.

Pending before State Board of Education.

LXXVI

WHERE EDUCATIONAL OPPORTUNITY IS UNEQUAL, BOARD IS LEGALLY OBLIGATED TO SEEK PROPER SOLUTION

PATRICIA RICE, A MINOR, BY MRS. MARVYN D. RICE, HER MOTHER AND NEXT FRIEND; ADRIENNE MOORE, A MINOR, BY HAROLD A. MOORE, HER FATHER AND NEXT FRIEND; MARIAN FLINT AND CAROLYN FLINT, MINORS, BY WILLIAM L. FLINT, THEIR FATHER AND NEXT FRIEND; ROBERT L. RICHARDSON AND JODI A. RICHARDSON, MINORS, BY LAWRENCE T. RICHARDSON, THEIR FATHER AND NEXT FRIEND; BYRON G. GREENE, A MINOR, BY MRS. AUDREY E. GREENE, HIS MOTHER AND NEXT FRIEND; ELIOT GREEN AND MARC GREEN, MINORS, BY THOMAS GREEN, THEIR FATHER AND NEXT FRIEND; GLEN JAMES AND CLAUDE DOUGLAS JAMES, JR., MINORS, BY CLAUDE D. JAMES, THEIR FATHER AND NEXT FRIEND; LAUREN E. MOORE, GEOFFREY A. MOORE AND THOMAS D. MOORE, MINORS, BY MRS. FRANCES T. MOORE, THEIR MOTHER AND NEXT FRIEND; LESLIE E. AND RENEE E. BASKERVILLE, MINORS, BY MARJORIE AND CHARLES M. BASKERVILLE, JR., THEIR PARENTS AND NEXT FRIENDS; GARY, STEPHEN AND TY AYERS, MINORS, BY MRS. MURIEL AYERS, THEIR MOTHER AND NEXT FRIEND; GORDON, JUDITH AND KEITH MORTON, MINORS, BY MRS. PATRICIA HANSLEY, THEIR GUARDIAN AND NEXT FRIEND; DEBRA AND DAVID COMERIE, MINORS, BY DANIEL COMERIE, THEIR FATHER AND NEXT FRIEND; SHERRY, CARLA AND WENDY ROSS, MINORS, BY MRS. MARIAN ROSS, THEIR MOTHER AND NEXT FRIEND; WILLIAM TAYLOR, A MINOR, BY MRS. BARBARA S. TAYLOR, HIS MOTHER AND NEXT FRIEND; BOOKER AND MICHAEL AUSTIN, MINORS, BY MRS. GRACE AUSTIN, THEIR MOTHER AND NEXT FRIEND; HENRY O'NEAL AIKENS, JR., A MINOR, BY MRS. ROSEMARY AIKENS, HIS MOTHER AND NEXT FRIEND; PENELOPE, PHYLLIS AND PEARL BREWINGTON, MINORS, BY MRS. PRISCILLA BREWINGTON, THEIR MOTHER AND NEXT FRIEND; GAIL AND CRAIG DUNN, MINORS, BY

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MRS. MARLINE DUNN, THEIR MOTHER AND NEXT FRIEND; MARILYN AND MARCIA WILSON, MINORS, BY EMANUAL WILSON, THEIR FATHER AND NEXT FRIEND; WANDA, CARLOS AND MILTON WORMLEY, MINORS, BY MRS. CLARICE WORMLEY, THEIR MOTHER AND NEXT FRIEND; WAYNE AND LANCE MCLEOD, MINORS, BY ROY MCLEOD, THEIR FATHER AND NEXT FRIEND; ADRIENNE AND JENNIFER GOODE, MINORS, BY CHARLES GOODE, THEIR FATHER AND NEXT FRIEND; KEITH AND SANDRA STOUTE, MINORS, BY MRS. PATRICIA STOUTE, THEIR MOTHER AND NEXT FRIEND; DARRYL FORD, A MINOR, BY MRS. ROBERTA FORD, HER MOTHER AND NEXT FRIEND,

Petitioners,

AND

KATHLEEN BROWN, A MINOR, BY ROBERT BROWN, HER FATHER AND NEXT FRIEND; MARGARET MARY MCGAHAN, A MINOR, BY DONALD MCGAHAN, HER FATHER AND NEXT FRIEND; DANIEL PETERSON, A MINOR, BY SHELDON PETERSON, HIS FATHER AND NEXT FRIEND; JEAN MARIE O'SHEA, A MINOR, BY NEAL F. O'SHEA, HER FATHER AND NEXT FRIEND; NANCY FROHLING, A MINOR, BY JOHN B. M. FROHLING, HER FATHER AND NEXT FRIEND,

Petitioners-Intervenors,

V.

BOARD OF EDUCATION OF THE TOWN OF MONTCLAIR, IN THE COUNTY OF ESSEX,

Respondent.

For the Petitioners, Barbara A. Morris, Esq.

For the Respondent, Charles R. L. Hemmersley, Esq.

For the Intervenors, Frohling and Gaulkin (John B. M. Frohling, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioners are Negro pupils attending the public schools in the Town of Montclair. They allege that these schools are maintained on a racially segregated basis and contend that the Board of Education has refused to formulate and to put into operation effective plans and procedures to eliminate the existing pattern of racial segregation. Such inaction, they assert, results in a denial of their right to equal educational opportunity and they ask that the Board of Education be directed to take positive steps, and to employ fair and impartial standards, to eliminate all aspects of racial segregation and discrimination in the schools under its jurisdiction.

A Petition for Intervention, subsequently amended, was filed prior to the commencement of hearings in this matter, on behalf of certain other pupils in the Montclair schools. Argument on the petition was heard on July 22, 1966, and leave to intervene was granted over the objection of counsel for petitioners. Subsequently, on July 26 and 28, November 3 and 22, 1966, and January 13, 1967, hearings were held before the Assistant Commissioner in charge of

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Controversies and Disputes at the East Orange Board of Education office, 21 Winans Street, East Orange.

Geographically, Montclair is roughly rectangular in shape and is about 4 miles long and 1½ miles wide. Most of its Negro population lives in the southeast sector and in one central area in which the Nishuane, Glenfield and Rand schools are located. The school district is organized under the provisions of Chapter 6 of Title 18 with an appointed board of education comprised of 5 members. During the 1965-66 school year it enrolled approximately 7,200 pupils who were assigned to appropriate grades in 13 school buildings as follows:

	Grades	*Enrolled*	*Negro Pupils*	*Percentage of Negroes*
Bradford	K-6	386	0	0%
Edgemont	K-4	361	10	3%
Glenfield	K-6	434	421	97%
Grove Street	K-6	298	95	32%
Nishuane	K-6	583	435	75%
Northeast	K-6	353	0	0%
Rand	K-6	315	265	84%
Southwest	K-6	236	6	3%
Watchung	K-6	525	30	6%
Hillside	K-6	291	106	36%
	7-8	527	179	34%
Mt. Hebron	K-6	343	0	0%
	7-8	481	160	33%
George Inness High School	9-12	2061	621	30%
		7194	2328	32%

On the basis of these statistics it cannot be disputed, and respondent concedes, that in three of the schools, Nishuane, Glenfield and Rand, Negro pupils predominate and that in others all, or almost all, of the children are white. Respondent denies, however, that the racially imbalanced condition results from its pupil assignment policies or that it has refused or neglected to take appropriate steps to eliminate or alleviate the problem. It cites a history of plans and proposals which it has devised over a period of years and submits as part of these proceedings a new plan, part of which it proposes to implement immediately, with the remainder to become operative as soon as practicable. A preliminary recital of the history of the school district's attempts to meet its problems is necessary to bring its present proposal into focus.

The record reveals that for some time prior to June 1962, there had been increasing unrest and dissatisfaction in the community over the operation of the Glenfield School. Whether the controversy arose out of the question of racial segregation or the inadequacy of the educational program for the junior high school grades is not material here. For either reason or both, the Board decided to discontinue the junior high school program in Glenfield at the close of the 1961-62 school year and distribute the pupils affected among the three other junior high schools. The result, in terms of the issue herein, was toward a better racial balance. See *Morean et al.* v. *Board of Education of*

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Montclair, 1963 *S. L. D.* 154, affirmed State Board of Education 160, affirmed 42 *N. J.* 237 (1964).

Thereafter, the Board proposed to reorganize all of the schools under a 6-3-3 plan whereby the elementary schools would house grades K-6, the three junior high schools would be eliminated and replaced by a single junior high school at the Inness School site, and the three-year senior high school would continue unchanged. Such a plan, the Board believed, would eliminate all aspects of racial segregation in grades 7 to 12 as those classes would be housed in one junior and one senior high school serving the entire community. This proposal, however, with its $3,850,000 cost, was rejected by the voters at a referendum in January 1964.

The Board next conceived a 4-4-4 plan of school organization and presented it to the public in a series of meetings beginning in January 1965. Called the "Montclair Educational Plan," it proposed that each of the 11 elementary schools would provide grades K-4 for pupils nearby. In addition to housing nearby pupils in grades K-4, Hillside and Mt. Hebron Schools would be enlarged and adapted to serve as community-wide "middle" schools, for grades 5-8. Inness and the High School would function as a single unit for grades 9-12. In its presentations the Board pointed out that this plan would eliminate all questions of racial percentages above the fourth grade. An immediate step toward such a plan was taken in September 1965, when all ninth grade pupils were assigned to the Inness School and pupils in grades 7 and 8 were divided between Hillside and Mt. Hebron. At the same time grades 5 and 6 in the Edgemont School were transferred to the Nishuane School to relieve overcrowding and to develop a special program for those grades. The Board submitted this plan, requiring an estimated expenditure of $4,300,000 at a referendum on March 1, 1966, but failed again to win approval of the voters.

Soon after the defeat of the Board's 4-4-4 plan, petitioners filed the instant appeal. In its Answer, respondent recited the several attempts it had made to solve the problem complained of, detailed the steps it had taken since the referendum defeat, and announced its determination to present a further plan at the earliest possible date. Subsequently, in a Supplement to its Answer, respondent proposed a 5-3-4 plan which it intended to implement as rapidly as possible. The proposal is divided into a "short-range" plan to be effected immediately and "long-range" elements to be put into operation as soon as practicable.

This latest proposal calls for the assignment of pupils in grades K-5 to nearby neighborhood schools, provision for two middle schools for grades 6, 7, and 8 at Hillside and Mt. Hebron, and continuation of the 9-12 grade program at the Inness-High School complex. It proposes the following steps as a short-range program to be put into operation immediately: (1) construction of a closed passageway between Inness and the High School at a cost of about $650,000, (2) transfer of grades 5 and 6 from Southwest School to the special program for those grades now operating for Edgemont and Nishuane children in the Nishuane School, (3) creation of a similar 5-6 grade program at the Rand School for pupils from the Rand and Watchung districts, and (4) transfer of pupils in grades 1-4 in the Rand School to Edgemont and Watchung. Testimony during the course of these proceedings revealed that these

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reassignments, having been effectuated, resulted in the following changes in the percentage of Negro pupils enrolled:

	Sept. 1965	*Sept. 1966*
Rand	85%	30%
Watchung	6%	25%
Edgemont	3%	13%
Southwest	3%	12%
Nishuane	76%	65%

The Board estimates that the "long-range" aspects of this plan will require the expenditure of about $4,000,000 if it is to be accomplished adequately and properly. It expresses the belief, however, that it can presently move toward implementation of this 5-3-4 plan without immediate funds if the proposal is deemed by the Commissioner to be legally tenable as meeting its affirmative duty to provide equal educational opportunity to all of its pupils to the greatest possible degree. The plan, if fully effectuated, would eliminate racial segregation in grades 6 to 12 but would not affect the racial balances in grades K-5.

The Board avers that it is well aware of its responsibility to furnish proper education for pupils in all grades of its school system, including the elimination of racial imbalance. It denies, however, that it is required to eliminate such imbalance apart from all other considerations affecting its schools. It takes the position that there are three major problems with which it must deal: (1) provision of adequate facilities appropriate for a modern school program, (2) development of an improved educational program, and (3) elimination of racial segregation. These three objectives are said to be inextricably mingled, and it is argued that any one of them cannot be separated or considered entirely apart from the other two. Thus, all of its proposals have sought the realization to some degree of all three of these goals. Unfortunately, despite its sponsorship of numerous studies over many years, and its several attempts to inform the public of its needs, none of the Board's proposals has won community acceptance in terms of the capital funds needed for proper implementation. The Board believes, therefore, that regardless of its duty and responsibility with respect to improvement of educational opportunities, including racial integration, any plan, to be successful, will require public approval of the expenditure of capital funds. That being so, the Board is convinced that any proposal must have the acceptance and support of the community, and that the plan it now presents (5-3-4), although a compromise, is the proposal most likely to obtain public support for the funds necessary to proper implementation.

The Board admits that this latest plan will not eliminate racial imbalance in the lower elementary grades and that there will continue to be a particular concentration of Negro pupils in grades K-5 at the Nishuane and Glenfield schools. At this point it can conceive of only two ways by which this condition can be eliminated:

(1) by pairing schools at opposite ends of the community and cross-bussing pupils each way for distances up to 4½ miles; or

(2) by closing the two schools at the southern end of the community, duplicating the space thus abandoned by construction of new schools or addi-

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tions to existing schools in the northern sector, and transporting the pupils displaced to the new facilities at the other end of the community.

The Board rejects both of these solutions on the basis that they are educationally undesirable.

Petitioners recognize the gains which respondent has achieved. However, they do not agree that they are obliged to accept the continuation of racial imbalance in grades K-5 in the Glenfield and Nishuane Schools, merely because the Board considers the ameliorative alernatives to be educationally undesirable. They take the position that the community must eventually recognize its obligation to provide equal educational opportunity for all children and must provide the funds essential to the accomplishment of that objective. Petitioners intimate that the Board, in stressing the need for funds, is obscuring the issue of racial segregation by tying it to a program of general educational improvement, two goals which, they maintain, are not necessarily inseparable. Petitioners' position, simply stated, is that the Board has both a legal obligation to eliminate racial segregation in its schools, and an educational obligation to raise the standards of its educational program. They question whether the Board and the community have evaluated the issues soundly or employed the proper criteria in deciding what can be done to achieve these aims. Petitioners argue, in essence, that there must be "equal" education before there can be "good" education and that, therefore, respondent's first duty is to raise the educationally deprived group to parity before it can undertake a program of general improvement.

Intervenors have taken the position that the paramount issue confronting the Board is the provision of a sound overall program of education and that racial imbalance should be considered as just one of the elements in the larger problem. Intervenors maintain that any plan must be the product of a comprehensive and detailed study of the total problem and contend that the Board's latest proposals are unclear, ill-conceived and hastily adopted. While intervenors consider the achievement of racial balance a praiseworthy social achievement, they maintain that this objective alone should not be accomplished at the sacrifice of "overall educational excellence" for all students. Intervenors contend, in essence, that although the Board's latest short-range plan has been proposed primarily to achieve a greater percentage of Negro pupils in certain schools, that result is achieved at the expense of a sound and comprehensive total educational program.

Any consideration of the issues herein must begin with the admitted fact that certain schools under respondent's jurisdiction are attended by a preponderance of Negro pupils. It is well established that such conditions incontrovertibly constitute a deprivation of equal educational opportunity for children of the minority race, that persistence of such circumstances is unlawful, and that the respondent has an affirmative duty to eliminate or alleviate such conditions to the extent that it is reasonable, practicable and educationally sound to do so. *Booker* v. *Board of Education of Plainfield*, 1963 *S. L. D.* 136, affirmed State Board of Education 1964 *S. L. D.* 167, reversed and remanded 45 *N. J.* 161 (1965), decision of the Commissioner on remand May 2, 1966; *Morean et al.* v. *Board of Education of Montclair, supra; Elliot et al.* v. *Board of Education of Neptune Township*, decided by the Commissioner May 2, 1966, affirmed State Board of Education November 2, 1966,

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affirmed 94 *N. J. Super* 400 (*App. Div.* 1967) The prime issue then becomes, in the Commissioner's judgment, whether the Board is meeting sufficiently its clear legal obligation to correct the racial imbalance in its schools within the guidelines enunciated by the Courts.

There can be little question that respondent and its administrative staff have been aware of their responsibility with respect to this problem. The long history of committees, surveys, studies, and reports under the leadership of the Board evidences its desire to meet this issue and achieve a proper solution. Unfortunately, the community has been unwilling to accept respondent's proposed solutions in terms of funds necessary thereto. As a result the Board now suggests a temporary ameliorative plan which it can implement without outlays of capital funds if they are not made available. The present plan satisfactorily achieves acceptable racial balances in all grades above the fifth but fails to remedy the preponderance of Negro pupils in two of the schools. The expedient remedies which respondent can suggest to eliminate these two unsatisfactory situations are to interchange Negro and white pupils between schools at opposite ends of the Town and to provide transportation at public expense therefor, or to abandon usable school buildings, construct new facilities outside of the Negro community and transport Negro pupils to them. Respondent, as noted, has rejected these alternatives and maintains that its plan provides the greatest extent of racial integration consistent with reason, practicability, and educational validity possible at this time.

The Commissioner finds no merit in the contentions of the intervenors. It is abundantly clear that respondent has studied not only the question of racial integration but all of the educational problems facing the school district, diligently and exhaustively. Nor is there any basis for assuming that the plan presently proposed will have adverse effects upon the educational program. In any case, the administrative reorganization of the various schools which the Board proposes is a matter which lies within the exercise of its discretionary authority. As such it is not subject to interference by the Commissioner unless clearly shown to be arbitrary, capricious or unreasonable. Evidence of conduct of such an illegal nature is totally absent here. Intervenor's objections are directed primarily at the wisdom of respondent's proposed action rather than its legality. It is well established that in such case the Board is responsible to its constituents and not to the Commissioner, who must decline to intervene on such grounds. *Cf. Boult and Harris* v. *Passaic Board of Education,* 136 *N. J. L.* 521 (*E. & A.* 1947).

It is apparent that the Board and the school administration have recognized the problem of racial imbalance in the schools, have accepted the necessity to correct it, and have made sincere and diligent efforts to find an appropriate solution. The understanding with which they have viewed this matter and the number and kinds of studies and approaches which have been made are impressive. The Commissioner believes that the Board and its Superintendent are to be commended for the manner in which they have attempted to deal with this issue. Yet, despite the exceptional efforts made by respondent, the fact remains that it has not produced a plan which fulfills its obligation to provide equal educational opportunity to all the children of the district. Its present proposal ameliorates the undesirable conditions to a large degree but still permits racial imbalances in the lower grades, notably in the Glenfield

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and Nishuane Schools. Until that condition is corrected, it cannot be said that the school district of Montclair is meeting its legal duty to all of its children. Therefore, to the extent that respondent's plan falls short of discharging its legal responsibility to all of the pupils of the school district, it cannot be endorsed or approved.

During the course of these proceedings, respondent alluded to two possible remedies which it had considered. The first such proposal is to "cross-bus" pupils from opposite ends of the town. The second calls for abandonment of the Glenfield and Nishuane schools and their replacement by construction of new facilities in areas of the municipality in which the Negro population is less concentrated. Both of these alternatives were rejected by the Board as being self-defeating, unattainable, or educationally undesirable.

Whether either or both of these proposals represent effective ways of eliminating racial imbalance in the Montclair schools or whether they would produce the negative conditions predicted by respondent cannot be determined from the evidence presented in this case. The thrust of petitioner's appeal is directed to the insufficiency of respondent's 5-3-4 plan. Although other proposals considered by the Board were alluded to, they were not presented in detail nor were they offered as alternatives which the Commissioner was asked to consider and evaluate. There is no basis on which the Commissioner can judge the adequacy or appropriateness of any other plan than the one examined in detail herein and any comment with respect to the merits of other solutions is, therefore, not in order. It may be that more adequate study and consideration will reveal that one of these plans represents the remedy of choice. It is equally possible that an entirely different means will offer more complete and acceptable correction. The Commissioner, therefore, will not attempt to suggest or evaluate alternatives but remands this matter to respondent for the purpose of formulating a plan which will comport adequately with the principles enunciated by the Court in *Booker*, *supra*.

The Commissioner has no magic formula, solution, or ready-made plan to offer the respondent school district. As all parties to this matter recognize, the problem with which the school district is faced is baffling in its complexity. Its solution will not be simple, easy, or immediate. But however difficult, State law demands that the problem be met and resolved. Respondent has made assiduous efforts toward that end but the Commissioner is not convinced that all possibilities have been exhausted or that the most effective solution has been proposed. Nor, in his opinion, can the situation be acceptably remedied by seeking as an ameliorative plan, one which is designed to avoid the outlay of capital funds and hence be palatable to the voters. Much can be accomplished through creative administrative techniques and devices such as the Board and its staff have attempted to employ, although there are limits to what such efforts can accomplish. There comes a point where the possibilities inherent in building utilization, reformation of attendance area boundaries, grade reorganization, transportation routes, special pupil groupings, curriculum innovations, etc. are exhausted and little more can be accomplished without the expenditure of capital monies. It appears clear that the Montclair school district has approached such a point. Despite the highly commendable efforts of the Board and its staff it is obvious that an effective solution to this problem needs total community acceptance and involvement. Such involvement requires recognition by the public at large of the serious nature of the

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problem, the unacceptability of present conditions, the probable inadequacy of proposed remedies, a desire to correct the situation speedily, effectively and conclusively, and the willingness to provide the funds for such purpose. The Commissioner feels certain that respondent can devise a plan which will find acceptance wtih both the minority and majority groups and for which the funds necessary for implementation will be approved by the electorate.

For the reasons stated, the Commissioner finds and determines that the 5-3-4 plan proposed by respondent is insufficient and therefore unacceptable. A condition of unequal educational opportunity having been determined to exist in the school system and no acceptable remedy having been proposed, the Commissioner directs the Montclair Board of Education to formulate a plan which will effectively achieve the goal of racial dispersal enunciated by the Court as the law of New Jersey. The Commissioner is constrained further to express the hope and to urge that the community as a whole lend support to the Board as it moves to accomplish this directive quickly and effectively. The Commissioner further directs the Montclair Board of Education to report to him at least once every three months what plans it is considering and what progress is being made toward the ultimate complete correction of racial imbalance in its school system. Jurisdiction will be retained in this matter by the Commissioner until such time as an adequate plan has been accepted and approved.

COMMISSIONER OF EDUCATION.

November 8, 1967.

LXXVII

EMPLOYING BOARD MAY FIX SHORTER PERIOD FOR ACQUISITION OF TENURE BY EMPLOYEE IN EXCLUSIVE EMPLOYMENT CATEGORY

CLIFFORD L. RALL,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,

Respondent.

For the Petitioner, Joseph N. Dempsey, Esq.

For the Respondent, John J. Pagano, Esq.

COMMISSIONER OF EDUCATION

DECISION ON MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

Petitioner, the Superintendent of respondent's schools, protests as illegal respondent's purported termination of his services. He asserts that he acquired tenure in January 1965 by virtue of a resolution of the Board then in office, and that respondent's purported recission of that resolution in May 1967 is therefore void and of no effect. Respondent answers that the prior resolution

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purportedly granting petitioner tenure was illegal, and that its subsequent rescission was a proper exercise of its discretion.

Application had earlier been made by petitioner for *pendente lite* relief, authorizing him to seek other employment and be relieved of reporting daily to respondent, pending a final determination of his petition of appeal. Following a hearing on petitioner's application, the Commissioner granted the requested relief in an Order dated July 24, 1967.

Petitioner has now moved for summary judgment and respondent has filed a cross-motion for similar relief in its favor. A hearing on these motions was held by the Assistant Commissioner in charge of Controversies and Disputes on August 24, 1967, at the State Department of Education, Trenton. Briefs and memoranda have been filed.

For the purposes of his motion, petitioner assumed as true the facts alleged in respondent's answer and the pertinent minutes of respondent's meetings. Respondent's cross-motion is based upon the same statement of facts. The minutes of the Board's meetings on June 18 and 25, 1964, and January 14, 1965, adverted to above, were placed in evidence at the hearing.

Petitioner was initially employed as Superintendent of the Bayonne school system by virtue of a resolution of the Bayonne Board of Education on June 25, 1964. This resolution appointed him for the period beginning July 1, 1964, and terminating on May 31, 1967, one month short of three calendar years. Approximately 6½ months after petitioner's appointment, on January 14, 1965, the same Board unanimously adopted a resolution rescinding the remainder of petitioner's original term of appointment, and granting him tenure after January 14, 1965, at the same salary as he was then receiving. (P-2) In May 1967, the present Board learned that petitioner was seeking employment elsewhere, and was, in fact, anticipating receipt of his resignation at a special meeting called for May 29, 1967. The stated purpose for this meeting was to act upon the petitioner's anticipated resignation and upon a resolution to rescind the aforementioned grant of tenure.

No resignation was received. The Board thereupon adopted a resolution reciting the terms of petitioner's original appointment and the resolution granting him tenure, characterized the latter resolution as an improper effort to deprive successor Boards of their discretion in granting tenure to petitioner after the statutory probationary period, and accordingly rescinded it. In the same resolution the respondent recognized the terms of the original appointment as the only valid and subsisting contract between it and petitioner, and terminated petitioner's employment at the close of business hours on May 31, 1967. The petition herein was filed on June 9, 1967.

Since there is no dispute as to the facts set forth above, the sole question to be resolved is: Did petitioner acquire tenure according to law as a result of the resolution of January 14, 1965? If the answer is affirmative, then petitioner could be removed only after charges were properly filed against him and certified to the Commissioner for hearing and determination pursuant to the appropriate provisions of the Tenure Employees Hearing Act. If, on the other hand, petitioner had not acquired tenure, then he had no entitlement to employment beyond the term for which he was employed. *Cf. Taylor and Ozmon* v. *Paterson State College, et al.*, decided by the Commissioner March

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29, 1966; *Amorosa* v. *Board of Education of Bayonne*, decided by the Commissioner December 30, 1966.

The relevant portion of the Tenure Law, *R. S.* 18:13–16, reads as follows:

> "The services of all * * * superintendents * * * shall be during good behavior and efficiency, (a) after the expiration of a period of employment of 3 consecutive calendar years in that district unless a shorter period is fixed by the employing board * * *."

It is petitioner's contention that when, after he had been employed in Bayonne for 6½ months, the Board conferred tenure upon him, it was exercising its discretionary right authorized by law to fix "a shorter period" than 3 consecutive calendar years for the acquisition of tenure. Petitioner further points to the minutes of the Board for January 14, 1965, which reveal that there was unanimous assent to the resolution granting tenure.

Respondent, on the other hand, argues that the original resolution of employment conferred upon the board that would be in office two years and 11 months later the vested right to decide on petitioner's further employment at that time and the subsequent resolution purporting to give tenure after 6½ months not only deprived that future Board of such right, but additionally violated public policy by depriving the citizens of Bayonne of having petitioner serve a full probationary period of three consecutive calendar years before tenure could be acquired under the statute, *supra*. Respondent relies upon *Cummings* v. *Board of Education of Pompton Lakes*, decided by the Commissioner August 29, 1966, in support of this contention. In *Cummings*, the Board of Education had employed the Superintendent for a period one day short of three calendar years. At a point in time when the original contract still had a full year to run, a new Board voted the Superintendent a second contract, to run for three additional years *from the expiration of the first one*, thus putting the Superintendent under the purported protection *of contract* for a period in excess of three calendar years. The Commissioner set aside the second contract as a nullity, saying:

> "* * * In this case, however, the 1965 Board intervened in June 1965 to 'extend' the agreement which would not expire until another year had elapsed, for an additional three-year period. * * *
>
> "There was no necessity for the 1965 Board to act on this matter, and to do so usurped the prerogative of the 1966 Board. There was no vacancy to be filled in June 1965, and the Board *then in power* had no authority to reach forward beyond its own official life and into the term of its successor to make a decision not due until then. *Brown* v. *Meehan*, 45 *N. J. L.* 189 (*Sup. Ct.* 188); *Fitch* v. *Smith*, 57 *N. J. L.* 526 (*Sup. Ct.* 1895); *Dickinson* v. *Jersey City*, 68 *N. J. L.* 99 (*Sup. Ct.* 1902)." (Emphasis added.)

The Commissioner therefore finds that the essential elements underlying his determination in *Cummings*, *supra*, are not present in the instant matter. Unlike *Cummings*, the Board here did not create a *new contract* to become effective on the expiration of the existing contract. Rather, in the instant matter the Board, in its discretion, acted to "rescind the remainder of the term" of the existing contract and immediately granted tenure henceforth.

Respondent has eschewed any allegation of bad faith in the adoption of the 1965 resolution granting tenure to petitioner. *Cf. Thomas* v. *Board of*

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Education of Morris Township, 1963 *S. L. D.* 106, affirmed State Board of Education 1964 *S. L. D.* 188, affirmed 89 *N. J. Super.* 327 (*App. Div.* 1965), affirmed per curiam 46 *N. J.* 581 (1966); see also *Cullum* v. *Board of Education of North Bergen*, 15 *N. J.* 285 (1954). The resolution was adopted unanimously and found that petitioner had "efficiently performed the duties of his office" and "should be granted tenure." (P-2) Respondent insists, however, reasoning from the Commissioner's decision in *Spadoro* v. *Board of Education of Jersey City*, 1965 *S. L. D.* 134, that tenure still cannot be conferred in the manner contested herein. The respondent's reliance upon *Spadoro* is misplaced. In *Spadoro*, tenure was granted to a high school principal immediately upon his employment in that position. In sustaining a succeeding Board's right to set aside the appointment, the Commissioner held, *inter alia*, that under the facts of the case the grant of tenure amounted to "a personal benefit not available to others in his employment category." *Id.*, at page 138; see also *Rinaldi* v. *North Bergen Board of Education*, 1959-60 *S. L. D.* 109. In the instant matter, of course, the petitioner, as Superintendent of Schools, was in an exclusive employment category. Moreover, in *Spadoro* the Commissioner further found that "*some* [*probationary*] *period*, however short, must be required in order that the board may evaluate the employee in his new post." *Id.*, at page 139 (Emphasis added.) In *Spadoro* there was no probationary period whatever, whereas in the instant case there was a period of 6½ months in which petitioner had been found to have efficiently performed the duties of his office. Respondent's position would require that some probationary period must always *follow* a determination to grant tenure in a less-than-three-year period. The Commissioner finds no such narrow interpretation of *Spadoro* to be indicated by the letter, spirit and intent of the Tenure Law. While there should be some probationary period as the basis for granting tenure, and such period must be applied to all employees in the same employment classification, it was within the discretion of the Board which employed petitioner in this case in 1964, and granted him tenure in January 1965, to determine that a 6½ months' period of probationary service gave it an adequate basis for its determination. The Legislature has plainly ordained that an employing board may fix a "shorter period" than three years for the acquisition of tenure. *R. S.* 18:13–16 Absent any showing of arbitrary, unreasonable, or discriminatory action, or bad faith, the grant of tenure by the employing board to petitioner herein was authorized by law and is not contrary to public policy.

The Commissioner finds and determines, therefore, upon the undisputed facts, that by virtue of the resolution of January 14, 1965, petitioner acquired tenure as Superintendent of Schools on January 15, 1965. Consequently, he further finds and determines that the resolution of respondent of May 29, 1967, purporting to rescind the grant of tenure and to terminate petitioner's employment is void and without effect, and must be set aside.

Petitioner's motion for summary judgment is granted, and respondent's cross-motion is denied. The Commissioner directs respondent to reinstate petitioner in his employment, with such rights as to compensation as may be found due him pursuant to *R. S.* 18:5–49.1.

COMMISSIONER OF EDUCATION.

November 22, 1967.

Pending before State Board of Education.

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LXXVIII

ESTABLISHMENT OF SEPARATE SALARY SCHEDULE FOR NURSE-ATTENDANCE OFFICER AND ADOPTION OF RULES REQUIRING USE OF VEHICLE CONSTITUTE VALID BOARD ACTIONS

GEORGIA L. JOHNSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST WINDSOR, MERCER COUNTY,

Respondent.

For the Petitioner, Richard J. Casey, Esq.

For the Respondent, Baggitt & Stonaker (William C. Baggitt, Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

Petitioner, a school nurse-attendance officer, has acquired tenure of employment in respondent's school system. She contends herein that respondent's establishment of a separate salary guide for the school nurse-attendance officer position, on which her salary is based, is improper and contrary to law. She also maintains, in a separate allegation, that respondent's rules which require her to provide a vehicle for use in performing her combined duties are unreasonable and should therefore be declared invalid. Respondent denies the allegations and asserts that both actions are within the proper exercise of its statutory authority.

Testimony, documentary evidence and argument were offered at a hearing before the Assistant Commissioner in charge of Controversies and Disputes at the State Department of Education, Trenton, on October 26, 1966. Counsel subsequently sumitted briefs.

Petitioner is a properly certificated school nurse, but does not hold a bachelor's degree or its equivalent. She was originally employed by respondent as a school nurse for the school year 1955-56. In the next year the duties of attendance officer were added to her assignment and, in addition to her salary, she was paid $150 for approved automobile expense in the performance of her combined duties. Through 1961-62 she advanced in salary in accordance with respondent's salary schedule for teachers with the bachelor's degree, and continued to receive the added $150 per year for automobile expense. However, beginning with the school year 1962-63, respondent established a separate schedule for non-degree school nurse-attendance officer and placed petitioner at the maximum thereon ($7,250), which amount she

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continued to receive through the 1965-66 school year. (Exhibit P-R-4) In 1965-66 she was paid an additional $200, instead of $150 for her automobile expenses.

Since 1962-63, when respondent first adopted a separate salary schedule for her job classification, petitioner has sought unsuccessfully, in appearances before the principals of the schools of the district, the Superintendent of Schools, and before respondent and its Personnel Committee, to be reinstated on the salary schedule for teachers who are graduates of approved colleges and normal schools. (Exhibit P-R-3) Petitioner has likewice sought to have the automobile expense allowance increased. This request, except for the $50 increment which petitioner deems insufficient, was likewise denied.

On April 18, 1966, respondent adopted addenda (Exhibits P-R-1, 2) to its rules No. 4002 and No. 4003, the job descriptions for school nurse and attendance officer, respectively. These addenda, which are identical, read in relevant part as follows:

> "1. The successful completion of the responsibilities and duties of the position of nurse-attendance officer is dependent upon the availability and use of the incumbent's vehicle. It is deemed essential that the nurse-attendance officer continuously have a vehicle at her disposal to transport ill or injured persons and/or to investigate cases involving attendance or health problems and to carry out her combined duties.
>
> "2. The Board of Education will compensate the incumbent at the rate of twenty (20c) cents per mile for approved mileage travelled in the performance of her duties. This rate shall be paid in consideration of such factors as gas, oil, depreciation, tires, batteries, insurance, etc.
>
> * * * * * * *
>
> "6. The approved mileage shall be that which is uniquely undertaken by the employee and shall not include mileage in reporting to work, attendance at meetings within the district, attendance at the N. J. E. A. Convention or any other mileage that would normally be undertaken by any other employee of this district in the performance of their duties;
>
> "7. The mileage compensation shall be for the totality of the position, and is not attached separately to either function."

The first issue raised by petitioner is whether she is entitled to payment of salary under the provisions of respondent's salary schedule for teachers. Conceding that her annual salary of $7,250 exceeds the maximum salary of $6,900 for a school nurse without a bachelor's degree prescribed by the State minimum salary schedule, *R. S.* 18:13–13.2, petitioner contends, nevertheless, that the intent and "spirit" of the statute is that teachers and nurses are to be considered equal and should be compensated equally and that respondent has arbitrarily and discriminatorily frozen her annual salary in violation of the provisions of *R. S.* 18:13–13.1 *et seq.* At no time, she avers, has she ever been given written notice by the respondent of its reasons for not compensating her at the maximum salary of $9,250 under its salary schedule for teachers and for not affording her a public hearing in the matter. Petitioner also points out that she is the sole employee of respondent who has not received an increase in salary for approximately four years.

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Respondent contends that petitioner, as a school nurse-attendance officer, has no entitlement to payment of salary under its salary schedule for teachers, and in establishing a separate salary schedule it acted properly within the discretionary authority given to it by law. In support of its contention it relies on *R. S.* 18:14–56 and 18:14–56.4, which specifically direct boards of education to employ nurses and fix their salaries. Respondent points out that since *R. S.* 18:13–13.2 specifically provides a distinct salary schedule for nurses who, like petitioner, do not hold a bachelor's degree, such a statutory provision fully supports its right to establish a separate salary schedule for employees in petitioner's category and to pay her in accordance therewith. As petitioner has reached the maximum level on the schedule prescribed by *R. S.* 18:13–13.2, she is only entitled, respondent contends, to such further increments as respondent sees fit to award.

Respondent maintains that its policy of not treating petitioner for salary purposes in the same manner as teachers is based on the fact that she obviously fulfills different responsibilities. It is further pointed out that the separate salary schedule for nurse-attendance officer provides, in any event, for an incentive for petitioner to pursue further education and thus become eligible for placement on a higher level of the schedule and payment of a higher salary.

The statutes cited *supra* provide that every board of education shall employ a school nurse and fix her salary. *R. S.* 18:14–56 The minimum salary that can be paid to a school nurse without a bachelor's degree is set forth in *R. S.* 18:13–13.2, which mandates a schedule ranging from a minimum of $4,400 in the first year of service to a maximum of $6,900 in the eleventh year of service. A board of education is empowered, however, to exceed the minimum salary for individuals or classifications of individuals or to adopt salary schedules in excess of the mandated minimums. *R. S.* 18:13–13.7, 13–13.8

Respondent has adopted a salary schedule for the employee category of nurse-attendance officer which provides for compensation at each level in excess of the minimums established by law. The Commissioner is unaware of any law or rule, nor has such been cited to him, which requires a board of education to place a non-degree nurse-attendance officer on the same pay scale as teachers or other employees. He holds, therefore, that respondent has the authority to fix a separate salary schedule for petitioner's employment category as long as it meets the minimum compensations mandated by law. *R. S.* 18:13–13.8 See also *Belli* v. *Clifton Board of Education,* 1963 *S. L. D.* 95. Petitioner has reached the maximum point in the scale, and in the Commissioner's judgment is not entitled to any further increments except as the Board may see fit to extend or increase the schedule.

The second issue raised is whether the enactment of the addenda to respondent's rules No. 4002 and No. 4003, *supra,* requiring petitioner to use her automobile in the performance of her duties and providing a rate of compensation therefor, constitutes a valid exercise of respondent's authority. Petitioner contends that respondent acted arbitrarily, capriciously, and discriminatorily in making it a mandatory condition of employment for her to provide a vehicle, urging that this constitutes an extension of her responsibility without adequate and proper compensation. Petitioner also contends that the requirement that she supply an automobile, not controlled by

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reasonable standards, for the transportation of ill or injured persons or for the investigation of attendance cases, is contrary to *R. S.* 18:14–8.1 and 18:14–12 *et seq.* Petitioner asserts that she is the only employee who is required by rule to supply transportation for pupil and adult personnel. This is different, she argues, from respondent's implied requirement that other employees have automobiles available for use in the performance of their duties, if necessary.

Petitioner also contends that the vehicle provided by her for service to respondent had to be purchased specifically for that purpose and if it were not mandatory that she have an automobile available for such use, she would have no need for a second car at all. Petitioner does not deny, however, that the vehicle is used at times for other than school purposes, that a license and some insurance coverage is necessary therefor and that some expenses for normal operation and minor repairs occur because of such other use.

The thrust of petitioner's contention is that if respondent has the right to order her to provide such transportation as part of her employment, then it is obligated to compensate her fully. Twenty cents per mile, she maintains, is inadequate compensation since the mere maintenance of the vehicle costs her considerably more than the allowance she receives. Petitioner characterizes as "shameful" respondent's rule which makes her dependent upon the occurrence of emergencies in order for her to realize sufficient moneys to pay for the transportation required of her.

Respondent replies that in making it mandatory that petitioner have an automobile available at all times during school hours to be used in the fulfillment of the combined responsibilities and duties of her position, it acted prudently, reasonably, and properly within its discretionary authority, maintaining that it adopted the addenda to its rules only after petitioner refused to use her automobile on several occasions during 1965-66 to transport ill and injured pupil and adult personnel on the ground that there was no written policy or rule requiring her to do so. Respondent asserts, moreover, that the addenda were adopted only after full and deliberate study and consideration of the desire to compensate petitioner for use of her automobile. Thus it avers that it established a rate of compensation at twenty cents per mile, despite the fact that other employees who use their automobiles in the performance of their duties receive only ten cents per mile, in order to compensate her more reasonably for necessary additional insurance coverage and to provide for possible cleaning costs which might occur as a result of her transportation of ill or injured persons. Respondent points out that costs of gasoline, oil, tires, batteries, wear and tear, maintenance and depreciation were also taken into consideration.

The testimony discloses that, since her first employment, petitioner has had an automobile available for use in the performance of her school nursing and attendance duties (Tr. 13, 38) and for whatever purpose she found necessary (Tr. 62), including the transportation of ill and injured pupil and adult personnel to their homes, to doctors' offices or to hospitals. (Tr. 17, 38, 40) It was also established that the addenda, *supra*, represent no increase in petitioner's responsibilities but merely comprise a formal statement of the duties and responsibilities previously required of her by respondent. (Tr. 40, 87)

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The necessity of petitioner's having to travel between the 3 schools of respondent's system was reduced beginning with the year 1964-65 by a schedule modification permitting her to remain at the larger schools for longer segments of time and eliminating daily appearances at each of the schools. (Exhibit R-8) Petitioner testified that from September 7, 1966, to October 21, 1966, she traveled 53.5 miles in the performance of her duties, and that she expected this pattern to continue for the remainder of 1966-67 unless there were an unusual number of emergencies or ill or injured pupils to be transported. (Tr. 24) The evidence further reveals that the distance traveled by petitioner in 1963-64 in the performance of her duties was 1,262.5 miles and in 1964-65, 886.6 miles. (Exhibits R-5, 6)

Petitioner claims that for the year 1965 the cost of providing a vehicle as required by respondent was $1,143.45, itemized as follows: depreciation, $699.66; insurance, $197.50; license, $25.00; gas, oil, minor repairs, etc., $221.29. She further testified that, on a ten-month or eighty per cent school use basis, the cost was $914.77. (Tr. 15, 59, 60)

It was established that other school personnel employed by respondent have their automobiles available, as an implied condition of employment, for use in the performance of their duties, if necessary. (Tr. 78, 79) The job descriptions for these employees, unlike petitioner's, do not make the availability of such transportation mandatory, however. Reimbursement for approved use of automobiles by personnel other than the school nurse-attendance officer is at the lesser rate of ten cents per mile.

The Commissioner finds upon the evidence adduced that petitioner's several contentions with respect to use of her automobile and compensation therefor are without merit. There can be no question that use of a personally owned automobile has been known by petitioner to be a necessary element of her employment from the time she was hired. Petitioner's duties as school nurse have required her to appear at each of the schools in the district at scheduled times and at any time her services were needed. No car was furnished by respondent at any time for this purpose. There can be no doubt that in accepting employment as school nurse petitioner fully understood and accepted the necessity for providing her own means of transportation from school to school. It is obvious that even if petitioner were not obliged to transport ill persons, she could not adequately perform her duties as school nurse without the use of a car. That being so, petitioner cannot now claim that if it were not for respondent's rule that she transport ill persons as needed, she would not have to furnish an automobile and would be relieved of the costs thereof. Petitioner would have to have an automobile available in any case in order to discharge the responsibilities of the job for which she was hired.

The evidence is clear that, since petitioner's first employment by respondent, it has been normal and customary practice for her to transport ill persons to appropriate places. As petitioner is also assigned duties as attendance officer, which require an occasional visit to the homes of pupils, use of her automobile for these dual functions is over and above the normal expectations of her routine duties. Because that is so, additional compensation therefor at a reasonable rate is proper and justified. In this case respondent has determined to reimburse petitioner at the rate of 20 cents per mile for the extraordinary use of her automobile, and the Commissioner finds this sum

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to be a reasonable reimbursement for the extra use to which petitioner's car may be required to be put.

In summary, the Commissioner finds and determines that respondent properly exercised its discretion in: (1) establishing a separate salary schedule for the nurse-attendance officer; and (2) adopting formal rules requiring petitioner to use her automobile in the discharge of certain prescribed duties and to be compensated therefor at a fixed rate per mile. The petition is therefore dismissed.

COMMISSIONER OF EDUCATION.

December 13, 1967.

Pending before State Board of Education.

LXXIX

GOOD GROUNDS MUST EXIST TO WARRANT TERMINATION OF SENDING-RECEIVING CONTRACT

IN THE MATTER OF THE APPLICATION OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY, TO TERMINATE THE SENDING-RECEIVING CONTRACT WITH THE BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN, MIDDLESEX COUNTY

For the Petitioner, Walter P. Romer, Esq.

For the Respondent, Johnson and Johnson (Edward J. Johnson, Jr., Esq., of Counsel)

COMMISSIONER OF EDUCATION

DECISION

In this application the Board of Education of Green Brook Township (hereinafter "Green Brook"), asks the Commissioner to consent to the termination of a sending-receiving contract with the Board of Education of Dunellen (hereinafter "Dunellen"). The respondent opposes the application for consent to terminate the contract, but indicates its willingness to modify the terms of the agreement.

A hearing on the application was held by the Assistant Commissioner in charge of the Division of Controversies and Disputes on October 25, 1967, at the State Department of Education, Trenton. Briefs and memoranda of counsel have been submitted.

Pursuant to the provisions of *Chapter* 273, *Laws* of 1953 (*R. S.* 18:14–7.3 *et seq.*), the Boards of Education of Green Brook and Dunellen entered into a contract on February 20, 1956, whereby Green Brook agreed to send, and Dunellen agreed to provide educational facilities for all Green Brook public school pupils in grades 7 to 12. The term of the contract was 10 years, which term was to commence when the new facilities which Dunellen was to provide

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were opened and made available to Green Brook's pupils. Thereafter delays occurred in Dunellen's building program, including a defeat of a bond issue referendum, and the enlargements and additions to the high school building (grades 9-12) were not available until the 1960-61 school year.

Meanwhile, Green Brook found a need to expand its facilities for grades K to 6, and proposed providing additional facilities to educate its own seventh and eighth grade pupils. This proposal was favorably received by Dunellen, and by mutual agreement Green Brook withdrew its grades 7 and 8 pupils at the beginning of the 1958-59 school year. No evidence was offered to show that the 1956 sending-receiving contract was formally modified; neither is there evidence that there was not general acquiescence to Green Brook's withdrawal of its seventh and eighth grade pupils.

As a result of a growing need for additional high school facilities, Dunellen and Green Brook entered upon discussions and studies which resulted in an agreement between the two Boards, dated January 11, 1966, which provided, *inter alia*, that

(1) Green Brook would provide facilities for the education of pupils in grades 10, 11, and 12 from both Green Brook and Dunellen;

(2) Dunellen would provide facilities for the education of pupils in grades 7, 8, and 9 from both Dunellen and Green Brook;

(3) The term of the agreement would be ten years, said term to "commence when the new additional facilities about to be constructed by the Greenbrook Board are opened and made available for the furnishing of education to the tenth, eleventh and twelfth grade pupils of both districts;" and

(4) Upon the availability of the aforesaid facilities in Green Brook, any previous contract between the two Boards becomes automatically void.

Green Brook thereupon proceeded with land acquisition and a bond issue referendum authorizing expenditure of $2,237,000 for construction and equipment of a new school building. The bond issue proposal was adopted on December 20, 1966. Plans for the building were prepared and approved, and construction bids were received on June 29, 1967.

Meanwhile, on May 9, 1967, *Chapter* 46, *Laws* of 1967, was approved and became effective. This act reads as follows:

"1. No board of education of a school district providing high school education in its own high school shall propose to close its high school and to contract with another district or districts to provide high school education for pupils of the district, unless and until a public question as to whether or not the board may enter into such a contract or contracts shall be submitted to and approved by a majority of the voters of the district voting thereon at an annual or special school election.

"2. No contract heretofore entered into between a sending and receiving district under the circumstances set forth in section 1 of this act, which requires the receiving district to provide additional school facilities prior to accepting high school pupils from the sending district and the contracts for construction of such facilities have not been entered into, as of the effective date of this act, shall be operative or binding upon the contracting districts until the question of the ratification and approval of said contract

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shall be submitted to and approved by a majority of the voters of the sending district voting thereon at a special school election which the board of education of the sending district shall call for said purpose within 60 days after the effective date of this act.

"3. This act shall take effect immediately."

Pursuant thereto, Dunellen submitted the question of ratification of the 1966 contract with Green Brook, to the voters of Dunellen, who rejected the contract on or about July 6, 1967.

Notwithstanding Dunellen's rejection, Green Brook has proceeded with the construction of the new building authorized by its voters, and presently plans to open and operate it as a building for grades 7 through 12. The projected date of opening is set for September 1968. In anticipation of such opening, on September 18, 1967, Green Brook adopted the following resolution:

"That the Board of Education of the Township of Green Brook, N. J., provide the Board of Education of the Borough of Dunellen with formal notice of its intention to withdraw all of its students from the facilities currently provided by Dunellen at the close of the 1967-68 school year."

Such notice was duly sent. Dunellen, by letter dated September 19, 1967, rejected what it termed Green Brook's "proposal for a termination of the [1956] sending-receiving contract and for the immediate withdrawal of all Green Brook pupils at the end of the current school year." However, Dunellen made a counter-proposal: that Green Brook withdraw its present ninth grade class at the end of the current school year, and enroll no further new classes at Dunellen, but permit its present tenth and eleventh grade classes to continue to graduation from Dunellen High School. Thus the withdrawal would be completed in June 1970. Green Brook's application herein followed in a letter to the Commissioner dated September 30, 1967.

The authority of the Commissioner to terminate a contract made pursuant to *R. S.* 18:14–7.3 is set forth in *R. S.* 18:14–7.4 and 7.5, as follows:

18:14–7.4

"Any board of education which shall have entered into such an agreement may apply to the Commissioner of Education for consent to terminate the same, and to cease providing high school education to the pupils of the other contracting district on the ground that it is no longer able to provide facilities for the pupils of the other district, or to withdraw its high school pupils from the schools of the other contracting district and provide high school educational facilities for them in its own district on the ground that the board of education of the receiving district is not providing school facilities and an educational program suitable to the needs of the pupils of the sending district or that the board of education of the receiving district will not be seriously affected educationally or financially by their withdrawal."

18:14–7.5

"Upon the making of any such application, an opportunity to be heard before the commissioner shall be given to the board of education of the other district before any determination is made by the commissioner, and if the commissioner finds that there are good grounds for the application,

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as provided in this act, he shall give his consent, and the applying board of education shall thereupon be entitled to terminate the agreement in accordance therewith."

Green Brook contends, in the first place, that notwithstanding its application for consent to terminate the contract made in 1956, such contract is not, in any event, still in force. It points to the limitation of ten years upon the term of a contract authorized by *R. S.* 18:14–7.3, and argues that since the original contract between Dunellen and Green Brook was made on February 20, 1956, it was effective, at the most, only until February 19, 1966. The agreement to start the term running when the additional facilities became available was, Green Brook contends, an attempt to make the agreement for a term of *more* than ten years and is therefore *ultra vires*.

The Commissioner does not so construe the statute. *R. S.* 18:14–7.3 provides that the receiving board of education, recognizing the need to provide additional facilities, may, "as a condition precedent to the provision of such additional facilities" enter into a sending-receiving contract for a term not exceeding ten years. Much must happen before the doors of the additional facilities swing open to receive pupils for the first time: an architect is employed to make preliminary plans, approval to exceed borrowing capacity may be necessary, approval of the voters for construction and the issuance of bonds therefor must be secured, final plans and specifications must be prepared and approved, and advertisements for bids must be placed and contracts let—all this before construction itself can begin. Any of these steps can, and not infrequently do, involve unanticipated delay. Yet the assurance of a ten-year sending-receiving relationship may be vital to the kind of facilities to be planned, to the granting of extension of borrowing capacity, or to the response of voters in a referendum. If the Legislature had intended that a sending-receiving contract could be made only *after* the additional facilities were completed and ready for use, it would have said so. On the other hand, if either party to such an agreement feels the necessity for setting a deadline for the provision of the additional facilities, such a matter can be the subject of negotiation before the contract is made. That there was no provision for such a deadline in the 1956 Dunellen-Greenbrook contract, and that Dunellen did not in fact have the additional high school facilities until 1960, cannot now be the basis for construing *R. S.* 18:14–7.3 beyond its clear intent.

Moreover, the Commissioner finds no merit in Green Brook's argument that since Dunellen has not, as agreed, provided facilities for Green Brook's seventh and eighth grade pupils, the conditions of the 1956 contract have not yet been met and the ten-year term has not begun to run. Without finding any necessity to decide whether Dunellen's construction of its Faber School meets the conditions of the contract, the Commissioner holds that the evidence makes it amply clear that Green Brook and Dunellen found it mutually satisfactory that Green Brook provide its own seventh and eighth grade facilities. That there is no evidence of formal action by either party to modify the 1956 contract does not support Green Brook's tenuous argument on this point.

The Commissioner finds and determines that the contract between Dunellen and Green Brook, made on February 20, 1956, conforms to the provisions of *R. S.* 18:14–7.3 and must therefore be held to be a valid contract. He finds further that as a result of a provision contained in this con-

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tract, because the additional facilities were not made available by Dunellen until the opening of the 1960-61 school year, the ten-year term of the contract runs to the opening of the 1970-71 school year.

There remains the question of whether the "good grounds," as provided in *R. S.* 18:14–7.4, *supra,* exist for the termination of the contract prior to 1970. The Commissioner has already determined, in an earlier case, that his authority is limited, if such grounds exist, to *termination* of the contract, not to its modification. *In the Matter of the Termination or Modification of the Sending-Receiving Relationship Between the Boards of Education of Chatham Township and Chatham Borough,* 1961-62 *S. L. D.* 144 In that case, as here, the sending-district party to a contract planned to have its own facilities available for use before the scheduled expiration of the contract. It sought the Commissioner's consent to such a modification of the provisions for the withdrawal of its pupils as would accelerate the completion of the contract. The Commissioner denied the application, holding that:

> "* * * *R. S.* 18:14–7.4 gives him the power to consent to terminate a sending-receiving agreement between two boards of education, but he finds no authority by which he can act to alter or modify the terms of such a contract."

The same limitation is applicable in the instant matter. Although Dunellen has proposed to Green Brook a gradual withdrawal, beginning in 1968 and concluding with the graduation of the present tenth grade class in 1970, it is not that proposal which the Commissioner is authorized to consider. Green Brook seeks to withdraw *all* of its pupils effective with the opening of school in September 1968. The two questions which describe the grounds provided for termination of the contract are as set forth in *R. S.* 18:14–7.4:

> 1. Is the board of education of the receiving district (Dunellen) providing school facilities and an educational program suitable to the needs of the pupils of the sending district (Green Brook)?
>
> 2. Will the board of education of the receiving district be seriously affected educationally or financially by the withdrawal of the pupils of the sending district?

In support of its contention that Dunellen's educational program and school facilities are not suitable, Green Brook offered the testimony of an educational consultant. His testimony demonstrates the flexibility of program which may be achieved with a new building on an ample site, such as Green Brook proposes, but does not establish such gross inadequacies of program or facilities at Dunellen as would warrant their being termed unsuitable to the needs of Green Brook students. An additional foreign language, an advanced mathematics course, an extended industrial arts offering may be important additions to the quality of an educational program. To hold, on the other hand, that the absence of such offerings from a program which is basically complete makes the program unsuitable to the needs of Green Brook pupils places upon Green Brook a burden of showing needs that are unusual. This burden has not been carried. The testimony of the Acting Superintendent of Schools in Dunellen establishes that the program presently offered is sensitive to the needs of pupils, that class sizes are at reasonable levels, that no substandard rooms are utilized, and that new course offerings are provided as interest and need arises. Nor do the projected enrollment figures for the 1968-69 and 1969-70

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school years show such increases as would significantly alter the present situation.

The Commissioner determines that the evidence does not support a finding that Dunellen is not providing school facilities and an educational program suitable to the needs of the pupils from Green Brook to such a degree as to warrant termination of the sending-receiving contract before 1970.

On the other hand, the withdrawal of all Green Brook pupils in September 1968 will have serious and significant effects. The present high school enrollment of 738 comprises 425 pupils from Dunellen and 313 from Green Brook. The testimony of the Secretary of the Dunellen Board shows that if all Green Brook pupils (computed at 322) were to be withdrawn in 1968, Dunellen would lose tuition revenues amounting to $270,000 at current rates. Offsetting this loss would be a reduction of $75,600 for salaries of 12 fewer teachers, and $13,846 in reduced expenses for supplies, textbooks, etc., for a net loss of $180,554. To raise this additional money locally would require an increase in the local tax levy from this year's $822,951 to $1,002,905, or an increase of nearly 22 percent.

Additionally, the loss of over 40 percent of its enrollment must necessarily be reflected in less efficient operation of several classes, particularly those presently enrolling only a very few pupils (*e. g.* Latin III, 8 pupils; Advanced Science, 7 pupils; Home Economics IV, 8 pupils; Clerical Practice, 6 pupils). While the Superintendent expressed the intention of the district to continue to offer at least the present program regardless of the withdrawal of Green Brook pupils, it must be recognized that the financial efficiency of the program will be adversely affected by the operation of many very small classes.

The Commissioner recognizes that the adverse effects, both financial and educational, which will occur if Green Brook were to be permitted to withdraw in 1968, will in large measure occur in 1970 if Green Brook withdraws at that time, unless some change occurs in Dunellen's situation of which the Commissioner has no present knowledge. But much as he may be concerned about an eventuality, the present application cannot be determined on that basis. The evidence supports a finding that the termination of the sending-receiving contract in 1968 will seriously affect Dunellen both financially and educationally, and he so holds.

In making this determination, the Commissioner is aware of, but not controlled by, Dunellen's expressed proposal to effect a gradual withdrawal of Green Brook's pupils, as previously described herein. While the Commissioner reiterates his conviction that he may not direct such a modification of the contract, he knows of no reason why such a modification or revision of the contract may not be effected by the mutual agreement of the parties thereto.

Nor in his present determination does the Commissioner overlook the degree of hardship which Green Brook must bear as a result of its inability to make optimum utilization of its new facility in 1968. Again, however, the Commissioner recognizes that his authority to make a determination is bounded by the limits imposed by the statute.

The Commissioner therefore finds and determines that a sending-receiving contract, entered into on February 20, 1956, by the Boards of Education of

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Dunellen and Green Brook pursuant to the provisions of *Chapter* 273, *Laws* of 1953 (*R. S.* 18:14–7.3 *et seq.*) is binding by its terms upon both districts until the beginning of the 1970-71 school year, and that good grounds, as set forth in the statute, do not exist to warrant termination of the contract prior to that date. The application of the Green Brook Board of Education is therefore denied.

COMMISSIONER OF EDUCATION.

December 21, 1967.

Pending before State Board of Education.

LXXX

PRESCRIBED ROTATION OF VACANCIES IN BOARD MEMBERSHIP MUST BE MAINTAINED

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF CHESILHURST, CAMDEN COUNTY

COMMISSIONER OF EDUCATION

DECISION

This in an emergent matter which has come before the Commissioner as a result of a letter addressed to him by the County Superintendent of Schools of Camden County, dated December 21, 1967. In this letter the County Superintendent directs the Commissioner's attention to a past error in the election of board of education members in the Borough of Chesilhurst, the effect of which is to deny the voters of the district an opportunity to elect members of the Board of Education at the annual school election to be held on the second Tuesday in February 1968.

The Commissioner, due to the exigencies of time, takes notice of this letter and proceeds immediately to a determination upon the facts set forth therein. By virtue of the statutory scheme which mandates the annual election of members in a board of education in a Chapter 7 school district, the Commissioner's failure so to act would deprive the voters of a right guaranteed them by statute. The Commissioner's action herein is further predicated on the fact that it is his "primary responsibility * * * to make certain that the terms and policies of the School Laws are being faithfully effectuated." *Laba* v. *Newark Board of Education*, 23 *N. J.* 364, 382 (1957)

Chesilhurst is a school district which has an elective board of five members. Under the provisions of the statute authorizing boards of education of five members, the original terms of the board are so established that two members are elected for three-year terms, two for two-year terms, and one for a one-year term. Thereafter, in any period of three consecutive years, there are annual elections for one member, then two members, then two members again, all for three-year terms.

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The information provided by the County Superintendent shows that in 1965 one member was elected for a three-year term; in 1966 two members were elected for three-year terms; and in 1967, *three* members were elected for three-year terms. The obvious error in the 1967 election resulted from the fact that the member whose term was to expire in 1968 resigned prior to the election in 1967. Thus there should have been opportunity for the voters to elect two members for three-year terms and one member for the unexpired term of one year. This opportunity was not offered, for reasons not made known, and as a result, no terms are scheduled to expire in February 1968. This is plainly contrary to the intent of the statute, *supra*, that provides for at least one vacancy to occur each year.

Regardless of the original cause of the faulty election in the past, there was no basis in law for the election of three members to three-year terms in February 1967. Only two such terms were vacant, and one of the three was elected to fill a vacancy which did not in fact exist.

There being no means to discover which of the three persons the voters wished to elect to full terms and which to the one-year term, the Commissioner has determined that there was a failure to elect the proper number of persons to fill all of the vacancies which lawfully occurred in February 1967. It follows, therefore, that three vacancies must now be deemed to exist in the Chesilhurst Board of Education by reason of a failure to elect.

The Commissioner therefore directs the Camden County Superintendent of Schools to forthwith appoint three persons who are qualified by law (*R. S.* 18:7–11) to fill the vacancies until the next annual school district election in February 1968. *R. S.* 18:4–7d At that time the voters will be given opportunity to elect one person to serve for a three-year term and two persons to serve for two-year terms. Thus there will be on the Board organizing in February 1968 two members whose terms will expire in February 1969, two members whose terms will expire in February 1970, and one member whose term will expire in February 1971. The rotation of vacancies prescribed by statute will thereby be re-established.

The Commissioner further directs that the Board of Education of Chesilhurst give prompt and effective notice to the voters of the district of the vacancies to be filled at the annual election in February 1968, in order that candidates who may wish to file nominating petitions may do so on or before 4 p. m. on January 4, 1968, as provided in the statutes. *R. S.* 18:7–25

COMMISSIONER OF EDUCATION.

December 26, 1967.

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DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION, SUPERIOR COURT (APPELLATE DIVISION), AND SUPREME COURT ON CASES PREVIOUSLY REPORTED

JOAN BYERS, *et als.*,
Petitioners-Respondents,

v.

THE BOARD OF EDUCATION OF THE CITY OF BRIDGETON,
Respondent,

and

HELEN BURGER, BARBARA CALABRESE, JAMES HAND and CONCERNED CITIZENS LEAGUE, a non-profit Corporation of the State of New Jersey,
Intervenors-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF BRIDGETON and THE STATE BOARD OF EDUCATION,
Respondents-Respondents.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued June 19, 1967—Decided June 29, 1967.

Before Judges Sullivan, Kolovsky and Carton.

On appeal from the State Board of Education.

Mr. Philip L. Lipman argued the cause for intervenors-appellants.

Mr. Stephen G. Weiss, Deputy Attorney General, argued the cause for respondent State Board of Education (*Mr. Arthur J. Sills,* Attorney General, attorney).

Barbara A. Morris argued the cause for petitioners-respondents, Joan Byers, et als. (*Mr. Arnold Brown,* attorney).

No appearance for the Board of Education of the City of Bridgeton.

PER CURIAM.

Intervenors-appellants appeal from a decision of the State Board of Education. Basically the appeal challenges the legality of an interim plan to correct racial imbalance adopted by the Board of Education of the City of Bridgeton pursuant to an order of the State Commissioner of Education, dated January 24, 1966. Appellants contend that the plan is contrary to State and

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Federal law and the Fourteenth Amendment of the United States Constitution, and violates basic principles of open enrollment and the right to attend a neighborhood school. In view of the importance of the constitutional issue raised, we pass over the procedural objection made by petitioners-respondents that appellants' attack on the interim plan comes too late. We proceed to consider the merits of the appeal.

The obligation of a local school board to take every reasonable step to eliminate harmful racial imbalance in its schools is clear. The cases and statutes cited by appellants do not support the contention made that the plan in question is illegal, unconstitutional, or unreasonable. On the contrary, without exception the authorities hold that a plan such as is here involved is well within the framework of a local board's power and authority. As noted in *Morean* v. *Board of Education of Montclair*, 42 *N. J.* 237 (1964) a school board may not close its eyes to racial imbalance in its schools which, though fortuitous in origin, presents the same disadvantages as are presented by segregated schools. In that case, the Supreme Court rejected the contention that it was an abuse of a local board's power to close a school with a Negro enrollment of almost 100% and distribute the students throughout other schools in the system. Similarly, in *Schults* v. *Bd. of Ed. of Teaneck*, 86 *N. J. Super.* 29 (*App. Div.* 1964), aff'd *per curiam* 45 *N. J.* 2 (1965), it was held that where there was a high concentration of Negro children in one of its public schools, the local board of education had discretion to convert the school in question to a central sixth grade school and assign pupils in the other grades to the several elementary schools of the township. See also *Booker* v. *Board of Education, Plainfield*, 45 *N. J.* 161 (1965).

The decision of the State Board of Education is in all respects affirmed.

Certification denied, N. J. Supreme Court, 50 *N. J.* 294.

COMMISSIONER OF EDUCATION

ORDER

August 4, 1967

DEAR DR. FEINSTEIN:

Upon my assumption of the duties of my office, Dr. Joseph E. Clayton turned over to me the copies of the *School Survey* and your letter to him dated June 23, which sets forth the long-range and interim plans of the Board of Education to correct conditions of racial imbalance in the Bridgeton schools.

I have carefully studied and considered the Englehardt report, and its detailed analysis of and broad implications for the Bridgeton school system. The program it offers is an ambitious and challenging one, well deserving of the careful consideration of the Board of Education and the citizens of the city.

The long-range plan proposed by the Board is a modification of the Engelhardt proposal, involving the retention of three of the schools which the *School Survey* proposed to abandon, and entailing consequently less new construction. In any event, the completion of either the Engelhardt proposal

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or the Board's modification could not be anticipated in less than three years (*School Survey*, p. 80), and is conditioned at least upon the following:

1. The determination of the tuition relationship with Upper Deerfield Township.
2. Planning and preliminary drawings for new construction.
3. Voter approval of bond issue proposals totaling at least $4.5 million.
4. Land acquisition.
5. Completion of final plans and construction.
6. The immediacy and urgency of the Junior High School building program.

The combination of these conditions is of such a nature, leaving so much of the time question unanswered, that the long-range proposal, however desirable it may be as a goal for the modernization and reorganization of the Bridgeton school system, cannot be an acceptable solution for the immediate problem of reducing racial imbalance in the schools. The findings of the Supreme Court in *Booker* v. *Plainfield*, and the decision and order of the Commissioner, as affirmed by the State Board of Education, in *Byers* v. *Bridgeton* compel a more positive and less conditional solution.

The immediate plan proposed for September 1967 is likewise unacceptable. This plan would discontinue the use of South Avenue School and relocate its pupils in available spaces in the other elementary schools of the district. Where those spaces are and how much imbalance would be relieved, except as to South Avenue School itself, is not set forth in your letter. But at least equally significant is that the extreme imbalance in Cherry Street School and the extensive imbalance in Bank Street School will be unaffected, and could conceivably remain so until the unspecified completion of a long-range plan.

As an interim step the Englehardt *School Survey* recommends the "Plan B" proposal set forth in the Kendree and Shepherd *Comparison of Proposed School Plans* (1966). As described by Englehardt, Plan B would

1. Utilize Bank Street, Buckshuten Road, Cherry Street, and South Avenue Schools for grades 4-6.
2. Utilize Indian Avenue, Irving Avenue, Monroe Street, Pearl Street, Quarter Mile Lane, Vine Street, and West Avenue Schools for grades 1-3.
3. Retain kindergartens in neighborhood schools except for a possible transfer of the Monroe Street kindergarten to West Avenue School.

As computed in *School Survey*, the percentage of Negro enrollment in all grades 4-6 schools would be in the range of 41% to 51%; in grades 1-3, from 39% to 46%, except in West Avenue School, where the Negro enrollment will constitute 6% of the K-3 enrollment. It is estimated that, dependent upon determinations of transportation policy to be made by the Board, this plan would require an increase of $40,000 in transportation expenditures.

I am well aware that, as with any interim plan looking toward a long-range plan, the adoption of Plan B may operate to delay the effectuation of

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the long-range solutions to Bridgeton's school building problems. However, I am confident that the people of Bridgeton will face up squarely to the needs that are clearly described in the Engelhardt *School Survey*, and will proceed at once to develop and enact a program of construction and revitalization that will provide for their children a safe, wholesome and modern school environment.

I am also aware that the enrollment projections used in both the Englehardt and the Kendree and Shepherd studies do not provide the same degree of balance in West Avenue School as in the other grades 1-3 schools. To whatever degree possible, this imbalance should be corrected; possibly some helpful change can be made in the Quarter Mile Lane and Vine Street attendance areas.

But even with these possible defects, I am convinced that Plan B is so far superior to the Board's interim proposal that it recommends itself, under the circumstances, as that plan which best comports with the stated goal of

> "* * * a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures." (*Booker, supra*)

I therefore direct the Board of Education of the City of Bridgeton to put into effect, upon the opening of school in September 1967, a plan designed to alleviate and correct racial imbalance in the elementary schools of the City, designated herein as Plan B, and essentially as described in pages 81 through 85 of the report entitled *School Survey*, by Engelhardt, Engelhardt and Leggett. To that end I will retain jurisdiction in this matter.

Finally, I commend the Bridgeton Board of Education and its administration for the expressed concern to provide for all the children of the City an educational program of high quality. The plan directed herein finds its justification in its contribution to the achievement of that goal. I recommend and urge, therefore, that concurrent activities be undertaken to develop curriculum study and in-service training programs that will focus on meeting the needs of every child as an individual and future citizen.

Sincerely,

CARL L. MARBURGER,
Commissioner of Education.

ARTHUR FEINSTEIN, D. D. S., President
Board of Education
Junior High School
Bridgeton, New Jersey

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JOAN BYERS, ET AL.,
Petitioners-Respondents,

v.

THE BOARD OF EDUCATION OF THE CITY OF BRIDGETON,
Respondent-Appellant.

DECISION OF STATE BOARD OF EDUCATION

For the Petitioners, Barbara A. Morris, Esq.

For the Respondent, Thomas P. Cook, Esq.

This is an appeal from an order of the Commissioner of Education ordering the Bridgeton Board of Education to put into effect a *temporary* plan integrating its schools, known as "Plan B," no later than October 1, 1967. This litigation began with a petition to the Commissioner on August 16, 1962. The Commissioner rendered a decision on January 24, 1966, in favor of petitioners, which was not appealed. During 1966, the Bridgeton Board and the Commissioner were in frequent communication about the details of the plan which the Board was preparing to effectuate complete integration of its schools, and various extensions of time were requested by the Board and granted by the Commissioner. On December 5, 1966, however, the Commissioner set a deadline of January 15, 1967, for the submission to him of a final plan and set an effective date for the institution of such plan at September 1, 1967. On January 3, 1967, the Bridgeton Board of Education served a notice of appeal from that order. On February 1, 1967, the State Board of Education affirmed the Commissioner, dismissed the appeal and remanded the entire matter to the Commissioner for further action. Meanwhile, a group of citizens of the community had applied to the Chancery Division of Superior Court in September of 1966 for an injunction against the Board of Education and the Commissioner of Education seeking to prevent the plan then under consideration from being put into effect. On December 2, 1966, the Chancery Division action was dismissed without prejudice on the grounds the Citizens group had not exhausted its administrative remedies and this group was permitted to intervene in the appeal of the Board of Education to the State Board of Education with the results already stated. The Citizens' group then appealed the February 1, 1967, decision of the State Board of Education to the Appellate Division of Superior Court. On June 29, 1967, in a per curiam opinion, the Appellate Division affirmed the decision of the State Board of Education. It is to be noted, however, that the Board of Education of the City of Bridgeton did not participate in this appeal. On July 19, 1967, the Citizens' group petitioned the Supreme Court for certification and this petition is apparently still pending.

On September 6, 1967, the Attorney General obtained an order from the Chancery Division of Superior Court to the effect that the Bridgeton Board of Education should comply with the orders of the Commissioner of Education. The implementation of a *temporary* integration plan had been ordered by the Commissioner on August 4, 1967. The plan was modified by the Commis-

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sioner on August 10 and August 17, 1967 (Plan B), and ordered by the Commissioner to be put into effect on the opening day of school September 7, 1967. In an order signed by the Honorable Anthony J. Cafiero, J. S. C., the Board of Education of Bridgeton was ordered to comply with the Commissioner's orders relating to Plan B by October 1, 1967. Meanwhile, the Bridgeton Board of Education had appealed to the State Board of Education from the orders of the Commissioner of Education, and on September 6, counsel for the Bridgeton Board and counsel for the petitioners appeared before the State Board of Education to argue the request of the Bridgeton Board of Education for a stay in the Commissioner's order pending the hearing of the appeal. The application for a stay was denied.

There is considerable doubt in our minds about the appealability of the Commissioner's orders of August 1967 directing the Bridgeton Board of Education to institute Plan B no later than the opening of school, and we expressly refrain from passing on this point and turn to consideration of the appeal on its merits.

The basis of the appeal is that the Commissioner is alleged to have abused his discretion in August 1967, when he directed the Bridgeton Board of Education to put Plan B into effect on the date the school opened (later postponed to October 1, 1967). During August, the Bridgeton Board of Education in brief outline submitted another plan (Plan C) to the Commissioner claiming it was far more economical, and superior in effectiveness. Some details and statistical support for Plan C were submitted piecemeal to the Commissioner on September 1, 1967 and on September 3, 1967, but even at that time no complete detailed written plan had been made to the Commissioner. On September 20, at the Law Committee hearing of this appeal and over the objections of counsel for the petitioners, the Board submitted a detailed and documented Plan C.

The total import of all the materials submitted is not so persuasive or so unequivocal as the appellant Board would have us believe. We are disinclined to substitute our judgment for that of the Commissioner and indeed should not do so unless we be persuaded that he has abused his discretion. In any event, it appears to us that Plan B is a better interim solution of the problem than Plan C. While Plan C appears to have the advantages asserted for it by the Bridgeton Board, it embodies some disadvantages not inherent in Plan B. Under the circumstances, we will not substitute our judgment for that of the Commissioner. We hold that his orders of August 4, August 10 and August 17, were proper and legal exercises of the Commissioner's authority. We dismiss the appeal and remand the matter to the Commissioner of Education for his continuing supervision. We urge the Commissioner to implement his orders in this matter and to make any additional orders he deems appropriate, using such of the means available to him as he may deem necessary, and to retain continuing jurisdiction over the matter until a permanent solution has been reached.

STATE BOARD OF EDUCATION.

October 4, 1967.

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Decision of Superior Court, Appellate Division

Argued December 11, 1967—Decided December 18, 1967.

Before Judges Kilkenny, Carton and Crahay.

On Appeal from Decision of the State Board of Education.

Mr. Thomas P. Cook argued the cause for Respondent-Appellant, The Board of Education of the City of Bridgeton.

Mr. Stephen G. Weiss, Deputy Attorney General, argued the cause for Respondent, State Board of Education (*Mr. Arthur J. Sills*, Attorney General of New Jersey, attorney).

PER CURIAM.

The Board of Education of the City of Bridgeton appeals from a decision of the State Board of Education which affirms orders of the Commissioner of Education, directing that the Bridgeton Board implement the Commissioner's interim plan to achieve racial balance in the Bridgeton school system. The Commissioner's plan is known as "Plan B."

We need not review the five-year history of this controversy. However, reference to its most recent phases may be of assistance in placing the present issue in focus.

On August 4, 1967, the Commissioner, deeming that certain proposals of the local board were not acceptable solutions for the immediate problem of reducing racial imbalance in the schools, directed the local board to place into effect, upon the opening of school in September 1967, the plan designated as Plan B. This plan, he noted, was essentially as described in a school survey made by the educational consultants of the local board.

By supplemental directives of August 10 and August 17, the Commissioner, after reviewing additional data supplied by the Board requesting modifications of Plan B, reaffirmed his order of August 4, but extended until October 1, 1967 the effective date for implementation of all phases of the plan. Meanwhile, apparently in response to the Commissioner's directive to effectuate Plan B, the Bridgeton Board submitted to the Commissioner its own interim proposal for the alleviation of the racial imbalance. The origin of this proposal, which became known as "Plan C," is succinctly set forth in the decision of the State Board of Education:

> "* * * During August, the Bridgeton Board of Education in brief outline submitted another plan (Plan C) to the Commissioner claiming it was far more economical, and superior in effectiveness. Some details and statistical support for Plan C were submitted piecemeal to the Commissioner on September 1, 1967 and on September 3, 1967, but even at that time no complete detailed written plan had been made to the Commissioner. On September 20, at the Law Committee hearing of this appeal and over the

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objections of counsel for the petitioners, the Board submitted a detailed and documented Plan C."

On September 18, the Superior Court, Chancery Division, at the instance of the Commissioner, mandated compliance with the Commissioner's directives. The Bridgeton Board appealed from the Commissioner's decision to the State Board of Education and thereafter appealed to this court from the latter Board's decision. In view of the public interest involved, we have accelerated the hearing on the merits and meanwhile have granted a stay of the Commissioner's orders.

The Bridgeton Board contends that its own plan, Plan C, is superior to Plan B, and that the Commissioner acted arbitrarily and in excess of his authority in rejecting Plan C. In substance, we are asked on this appeal to review the relative merits of the Commissioner's plan as compared with that submitted by the local board.

We are satisfied from our review of the record that the determination of the Commissioner of Education, as affirmed by the State Board of Education, was based upon substantial evidence and fully sustained the Commissioner's determination that Plan B should be placed in operation.

There is no evidence that the Commissioner, in deciding to implement Plan B, or in refusing to substitute for it the local board's competitive plan, acted in an arbitrary manner or in excess of his authority. We cannot ignore the fact that the local board did not submit its supposedly superior plan until the Commissioner affirmatively ordered that Plan B be effectuated. Under the circumstances, we must defer to the special expertise of the Commissioner of Education in the field of education, whose responsibility it is to make such a determination. See *Booker* v. *Board of Education of Plainfield*, 45 *N. J.* 163, 177-78 (1965). This court should not attempt to weigh the merits of the respective plans or to choose between the contending plans unless it appears that the Commissioner acted arbitrarily in making that determination or has wholly failed to fulfill the responsibility cast upon him by law. There has been no such showing in the present case.

We note that Plan B is an interim plan and that its implementation is not necessarily a permanent solution of the problems of racial imbalance confronting the school board, but one that may and ought to be re-examined at the end of the school year in June 1968, to the end that the best possible solution may be devised through the co-operative workings of the local board and the State Commissioner.

The decision appealed from is affirmed, compliance with the Commissioner's directive to take effect not later than January 1, 1968. The stay heretofore granted is vacated.

Certification denied, Supreme Court, January 8, 1968.

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GLADYS M. CANFIELD,

Petitioner-Respondent,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL,

Respondent-Appellant.

Decided by the Commissioner of Education, August 22, 1966.

Affirmed by the State Board of Education, April 5, 1967.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued October 9, 1967—Decided November 10, 1967.

Before Judges Gaulkin, Lewis and Kolovsky.

On appeal from the State Board of Education of New Jersey.

Mr. Frank Vittori argued the cause for appellant (*Messrs. Piarulli and Vittori,* attorneys).

Mr. Cassel R. Ruhlman, Jr., argued the cause for respondent.

Mr. Stephen G. Weiss, Deputy Attorney General, appeared and filed a Statement in Lieu of Brief for the State Board of Education (*Mr. Arthur J. Sills,* Attorney General of New Jersey, attorney).

The opinion of the court was delivered by KOLOVSKY, J. A. D.

Defendant Board of Education (Pine Hill Board) appeals from a final decision of the State Board of Education (State Board) which affirmed a decision of the Acting Commissioner of Education (Commissioner) that petitioner Gladys M. Canfield has tenure as a teacher and is to be reinstated immediately "with all such rights as she would have enjoyed had she not been deprived of her employment."

Four written contracts of employment on forms provided by the Commissioner pursuant to *N. J. S. A.* 18:13–7 were entered into between the Pine Hill board and petitioner. The first, dated December 12, 1962, provided for petitioner's employment as a teacher from November 19, 1962 to June 30, 1963; the second, dated April 15, 1963, for her employment from September 1, 1963 to June 30, 1964; the third, dated April 14, 1964, for her employment from September 1, 1964 to June 30, 1965; and the fourth, dated April 20, 1965, for her employment from September 1, 1965 to June 30, 1966.

The fourth contract contained the following provision:

> "It is hereby agreed by the parties hereto that this contract may at any time be terminated by either giving to the other 60 days' notice in writing of intention to terminate the same, but that in the absence of any provision herein for a definite number of days' notice, the contract shall run for the full term named above."

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An identical paragraph appeared in each of the first three contracts except that the notice period provided therein was 30 days instead of 60 days.

On November 15, 1965, the Pine Hill board wrote a letter to Mrs. Canfield reading as follows:

> "The Board of Education of the Borough of Pine Hill herein notifies you that as of November 15, 1965 they are terminating your teaching contract, to take effect immediately, with this District, giving you two months pay."

Enclosed with the letter was a check for two months' pay which petitioner promptly returned, asserting that she had tenure.

The Commissioner and the State Board, which adopted the Commissioner's decision, ruled that petitioner has tenure under clause (c) of *N. J. S. A.* 18:13–16 which provides in pertinent part as follows:

> "The services of all teachers, * * * shall be during good behavior and efficiency, (a) after the expiration of a period of employment of 3 consecutive calendar years in that district unless a shorter period is fixed by the employing board, or (b) after employment for 3 consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment, within a period of any 4 consecutive academic years, for the equivalent of more than 3 academic years, some part of which must be served in an academic year after July 1, 1940; * * *.
>
> An academic year, for the purpose of this section, means the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation."

The Pine Hill board does not dispute the Commissioner's determination that since petitioner's employment began on November 19, 1962, "employment on November 20, 1965 would provide for her the equivalent of more than 3 academic years within the period of 4 consecutive academic years beginning with the 1962-1963 academic year." But it does dispute the Commissioner's ruling

> "that petitioner's employment did not terminate on November 15, 1965, as respondent (the Pine Hill board) purported to accomplish, but barring any intervening rights, would have terminated 60 days thereafter. Thus, petitioner was in fact employed on November 20 and thereafter, and thereby acquired tenure of employment in respondent's schools."

The Commissioner held that the contract of employment could not be terminated without 60 days' prior notice; that while "a board of education may terminate the *services* of a teacher when it gives notice, * * * it may not terminate the *employment* until the expiration of the period of notice provided in the employment contract." Reference was made to other decisions of the Commissioner and the State Board which recognized "the legal significance of the difference between service and employment" as used in the Tenure Law.

We agree with the determination of the State Board and the Commissioner and affirm.

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The notice served by the Pine Hill board on November 15, 1965 "terminating (petitioner's) teaching contract, to take effect immediately," clearly was ineffective to that end in face of the express contract provision permitting its termination only on 60-days' prior notice. There is no suggestion or claim that there is any authority for terminating the contract other than the reserved right to terminate. To exercise that right on November 15, 1965, required service of notice of termination at least 60 days prior thereto.

The Pine Hill board had the *power* to prevent the petitioner from continuing to render services as a teacher after November 15, 1965, even though in doing so it breached its contract employing petitioner. But the exercise of that power did not terminate petitioner's employment. To terminate the employment prior to November 20, 1965, when petitioner acquired tenure, required service of the notice not later than September 20, 1965, a course which the Pine Hill board had available to it but did not adopt.

The Teachers' Tenure Law, *N. J. S. A.* 18:13–16, measures the right to tenure in years of employment, not in years of service. "Employment" is the word used in the statute, not "service." (For only the one year that the 1934 amendment (*L.* 1934, *c.* 188) to that section was in effect did the Tenure Act refer to "service" in measuring the right to tenure; the reference was eliminated when the section was again amended by *L.* 1935, *c.* 27).

Although normally the period of a teacher's employment and her service coincide, when as here, they do not, the difference in the two terms must be recognized and given effect.

That difference has been recognized by the State Board and the Commissioner in administering the law, a factor which gives supportive weight to our construction of the statute.

> "The principle is well established that practical interpretation by an administrative agency is entitled to great weight in construing statutes in order to ascertain their meaning, to explain a doubtful phrase or to illuminate any obscurity." (*State* v. *LeVien*, 44 *N. J.* 323, 330 (1965).)

We do not agree with our dissenting colleague that *N. J. S. A.* 18:13–11 and *N. J. S. A.* 18:13–11.1 furnish legislative support for the position advocated by defendant. Neither section relates to tenure rights.

N. J. S. A. 18:13–11 was originally enacted as part of the School Law of 1903, *L.* 1903, *c.* 1, and antedates the first Teachers' Tenure Law, *L.* 1909, *c.* 234, by six years. (The sole change effected by the 1954 amendment, *L.* 1954, *c.* 80, was a grammatical change in the last clause.) In the circumstances envisioned by the School Law section, the reinstated teacher would be a "lame duck" employee for the balance of the contract term, with no prospect of re-employment. The object of the section is to enable the local board to avoid the problems and embarrassments inherent in her continued presence in the school.

This, too, is the object of *N. J. S.A.* 18:13–11.1 applicable to the circumstances in which the teacher's "lame duck" status results from the exercise of the right reserved in the contract between the teacher and the board to terminate the employment on notice.

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The question reserved in *Thomas* v. *Board of Education of Morris Township*, 46 *N. J.* 581 (1966), aff'g 89 *N. J. Super.* 327 (*App. Div.* 1965), is not involved in this case. There, in dealing with the contract of a superintendent of schools whose appointment may be for a term up to five years, *N. J. S. A.* 18:7–70, the court said:

> "We reserve, however, the question whether *mere execution* of the three-year contract of employment entered into on August 18, 1961 between Thomas and the Board of Education, even if it had been a valid one, would have given tenure to Thomas."

Here, we are concerned not with an employee who may be originally appointed for a term in excess of the three-year period provided in the Tenure Law but with a teacher who may only be and was employed for successive one-year periods, *N. J. S. A.* 18:13–6.

Finally, we are satisfied that a teacher employed under annual contracts for the number of years of employment specified in the Teachers' Tenure Law is not to be deprived of her right to tenure because the local board, in violation of her employment contract, terminates her services and prevents her from teaching during the balance of the current annual contract period. *Cf. City of Knoxville* v. *State*, 175 *Tennessee* 159, 133 *S. W.* 2*d* 465, 469 (*Tenn. Sup. Ct.* 1939).

In *Knoxville, supra*, the City's Board of Education had "elected" relator Hayward as a teacher for three consecutive school years, "the last of said elections being in April 1937, for the school year 1937-38." During the latter year, she was dismissed because she had married on December 26, 1937. A regulation of the Board prohibited the appointment of married women as teachers and equated marriage during employment to an "immediate resignation." A Tennessee statute granted tenure to teachers "who have been employed by the Board of Education of the City of Knoxville for the third year from the time of their appointment or employment" and prohibited the dismissal of tenure employees except for specified causes and after notice and a hearing.

In affirming a judgment ordering the Board to restore relator as a teacher, the Supreme Court of Tennessee ruled that the dismissal was illegal because the statute did not list marriage as a cause for removal. The court then dealt with the Board's further contention that because relator had been dismissed during the third year, she had not been "employed for the third year from the time of her appointment" as required by the tenure statute. The court's rejection of that argument is opposite to the instant case:

> "It is true that relator was dismissed during her third year; but we construe the language of the statute as meaning the employment of a teacher for the third year from the time of his or her appointment, brings the teacher under the Act. The language of the Act is not that the teacher shall have served three years, but, on the contrary, the language is 'employed * * * for the third year.'" (At *p.* 469.)

The decision of the State Board of Education is affirmed.

GAULKIN, S. J. A. D.—Dissenting.

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In *Thomas* v. *Board of Education of Morris Township*, 46 *N. J.* 581 (1966), *aff'g* 89 *N. J. Super.* 327 (*App. Div.* 1965), the Supreme Court expressly reserved the question whether "mere execution" of a contract of employment to run for a period which would encompass tenure gives tenure to the employee, even though he is discharged before he has served the period fixed by statute. That appears to me precisely the question involved in the case at bar. My Brothers say, in effect, that "mere execution" gives tenure. I disagree.

It seems to me that tenure and contract are two different concepts; tenure is statutory and arises only by passage of the time fixed by the statute; and the discharge of an employee before the passage of the required time bars tenure, even if the discharge is in breach of an employment contract which, if not breached, would have extended to a date which would have given tenure. *Cf. Zimmerman* v. *Board of Education of Newark*, 38 *N. J.* 65, 73-74 (1962).

N. J. S. A. 18:13–16 provides that an "employing board" may fix a period shorter than 3 consecutive calendar years as giving tenure. Plaintiff does not argue that defendant meant to shorten her statutory 3-year probationary period. However, my Brothers conclude that defendant inadvertently did so when it misinterpreted the cancellation clause in the employment contract and consequently failed to exercise it in time. I contend that the contract was properly cancelled (subject to plaintiff's right to 60 days' salary) when the notice of cancellation was given but, even if the contract did not become legally terminated until 60 days after the notice of dismissal, the notice itself barred tenure.

N. J. S. A. 18:13–11 provides:

> "When the dismissal of any teacher before the expiration of a contract entered into between the teacher and a board of education shall, upon appeal, be decided to have been without good cause, the teacher shall be entitled to compensation for the full term for which the contract was made; but it shall be optional with the board of education whether or not the teacher shall teach for the unexpired term."

The forerunner of this statute was passed in 1903 (*L.* 1903, 2*d* Special Session, *c.* 1, § 107) but it was amended in 1954 (*L.* 1954, *c.* 80, § 9). In addition, *L.* 1954, *c.* 80, § 10 added the following (*N. J. S. A.* 18:13–11.1):

> "If the employment of any teacher is terminated on notice pursuant to a contract entered into between the teacher and the board of education, it shall be optional with the board of education whether or not the teacher shall teach during the period between the time of the giving of the notice and the date of termination of employment fixed therein."

All beginner teachers must be employed by written contracts, unless the board has adopted rules and regulations for their hiring and compensation, *N. J. S. A.* 18:13–5, 7 and "blanks" for such contracts are prepared and distributed by the Commissioner of Education for use by boards, *N. J. S. A.* 18:13–7. It seems to be agreed that such teachers are hired on an annual basis, allegedly because of *N. J. S. A.* 18:13–6, although I am not sure that statute forbids longer contracts. This being the practice, it would follow from the position taken by my Brothers that if a beginner teacher is hired under a contract which contains no cancellation clause and which runs to a date beyond the date at which he would achieve tenure, he could not be dismissed

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before the tenure date even if the board tendered his salary to the end of the contract period, pursuant to *N. J. S. A.* 18:13–11.

I disagree with the construction. Although the forerunner of *N. J. S. A.* 18:13–11 was passed before the tenure act was adopted, for some purpose which then had no relation to tenure, the fact of the matter is that the Legislature, in 1954, amended section 11 and added 11.1. I think it is fair to assume that the Legislature then must have been cognizant of the usefulness of these sections to boards of education to avoid tenure before the time periods fixed by the statute. In any event, said sections 11 and 11.1 are now integral strands of the entire web of tenure acts.

If the contract contained no cancellation clause, and the board elected not to permit the teacher to teach beyond the date of notice of dismissal, it seems to me the teacher would, at most, be entitled to his salary for the full term of the contract, but not to tenure. If I am correct in this, I see no reason why the result should be different when the contract contains a cancellation clause but the board's notice of dismissal is not given in accordance with the cancellation clause. Suppose here the board had simply discharged plaintiff and not even offered her the 60 days pay? It seems to me that she would then be entitled to the 60 days' pay, under section 11, or, at most, damages for the breach of the contract, but not to tenure.

My Brothers cite *City of Knoxville* v. *State*, 175 Tenn. 159, 133 *S. W.* 2*d* 465, 469 (*Sup. Ct.* 1939). However, it seems to me the Tennessee statute was different than *N. J. S. A.* 18:13–16 (a). The Tennessee statute gave tenure to teachers who "have been employed *for the third year* * * *," which the Tennessee Supreme Court construed to mean two academic years plus hiring for the third year. Our *N. J. S. A.* 18:13–16 (b) is similar to the Tennessee statute, in that it gives tenure "after employment *for* 3 consecutive academic years together with employment at the beginning of the next ensuing academic year." But *N. J. S. A.* 18:13–16 (a) provides that there shall be no tenure until "*after* the *expiration* of a period of employment of 3 consecutive calendar years * * *."

Finally, I find nothing in the contract which justifies the conclusion reached by my Brothers that the dismissal was not effective on the date the notice of dismissal was given. If this were a dispute arising out of the breach of the contract itself in which the question of the date of termination of the contract became important, it might be held that the termination was not effective until 60 days after the notice of dismissal was given. Examples of such cases are those involving cancellation of insurance policies or similar contracts, and see *Larstan Industries* v. *Res-Alia Holding Co.*, 96 *N. J. Super.* 37 (*App. Div.* 1967). But here we are concerned not with the contract or its breach, but with the status of the plaintiff—*i. e.*, tenure. It seems to me that the dismissal immediately stopped the running of the time to tenure. The burden of proving the right of tenure is upon plaintiff and ordinarily that right must be clearly proved. I do not think a municipality should be trapped into tenure by the construction of words which neither party expected to have that meaning.

For the foregoing reasons, I would reverse and enter judgment for defendant.

97 *N. J. Super.* 483, 235 *A.* 2*d* 470.

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IN THE MATTER OF THE TENURE HEARING OF JOSEPH A. MARATEA, TOWNSHIP OF RIVERSIDE, BURLINGTON COUNTY

Decided by the Commissioner of Education, July 5, 1966.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued October 9, 1967—Decided December 1, 1967.

Before Judges Kilkenny, Carton and Matthews.

On Appeal from the Decision of the State Board of Education.

Mr. Francis Hartman argued the cause for appellant (*Messrs. Hartman and Schlesinger* attorneys).

Mr. Stephen G. Weiss, Deputy Attorney General, argued the cause for the State Board of Education (*Mr. Arthur J. Sills*, Attorney General of New Jersey, attorney).

PER CURIAM.

This is an appeal from a decision of the State Board of Education upholding the dismissal of the appellant, Joseph A. Maratea, as Superintendent of Schools of Riverside Township, Burlington County.

Maratea was employed by the local Board of Education to the position of superintendent in 1961 for the 1961-1962 school year, and was re-employed for the next three succeeding school years, acquiring tenure as a result of his re-employment in the spring of 1964 for the ensuing year.

In September 1965, two members of the local Board of Education certified 27 charges against appellant, whereby they sought his dismissal as superintendent. The charges were heard on several days in 1965 and 1966 before an Assistant Commissioner of Education, and thereafter, the Commissioner of Education, in a lengthy opinion, found that the weight of the evidence supported all or part of 15 charges, namely, 1, 2, 3, 4, 5, 6, 8, 9, 10, 15, 17, 19, 22, 23 and 26. The Commissioner concluded that Maratea had forfeited his right to protection of tenure in the office and authorized the Board of Education to adopt a resolution to dismiss him. The local Board of Education adopted such a resolution.

On Maratea's appeal to the State Board of Education the decision of the Commissioner was affirmed. Maratea now prosecutes this appeal pursuant to *R. R.* 4:88–8. We affirm substantially for the reasons set forth by the Commissioner of Education in his decision.

On this appeal appellant raises two narrow legal issues. The first is that the local Board, by re-employing him in 1964, waived any right to rely upon his misconduct prior to that date as alleged in the first charge made against him. This charge involved a claim that he misappropriated approximately $1,000 from the school cafeteria fund and used it for his own purposes by

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making loans to certain teachers. The Commissioner found that although appellant was not technically guilty of misappropriation, he "manipulated and used school moneys for purposes of his own choosing without the knowledge of and without informing his employer in whose control the funds belonged, * * *" and that such conduct was improper, whatever appellant's motives.

If this were the only substantial charge, and if all the improper conduct charged occurred before appellant acquired tenure as superintendent, it might well be argued that the local Board was precluded from reviving stale charges if it was aware of the existence of them and nevertheless re-employed appellant. An examination of the other charges which the Commissioner found supported by the evidence clearly shows that the episode contained in charge number one was only one of many demonstrating appellant's unsuitability to serve in the office of superintendent.

An individual's unfitness to retain a position as a school district official may be demonstrated by a single incident, if such is sufficiently flagrant. *In re Fulcomer*, 93 *N. J. Super.* 404, 421 (*App. Div.* 1967). However, such unfitness may also be established by proof of a series of related events, each of which taken individually would not support an action for dismissal. *Redcay* v. *State Board of Education*, 130 *N. J. L.* 369, 371 (*Sup. Ct.* 1943), aff'd. 131 *N. J. L.* 326 (*E. & A.* 1944).

The findings of the Commissioner demonstrate that appellant's insubordinate and unprofessional conduct created an atmosphere of disharmony which would not fail to injure the welfare of the school system. Although the charges directed against appellant are of varying degrees of seriousness, we find that the nature of Maratea's actions considered as a whole was such as to support the Commissioner's conclusion that "they add up to a pattern of behavior that conclusively demonstrates unfitness for the position of superintendent in this school system."

This finding is fully justified even if we were to disregard, as appellant wishes, the allegations in charge number one. The record does not demonstrate that the Commissioner based his opinion solely on the charge that the appellant mishandled school funds. Clearly, the Commissioner considered all of the charges as a whole in reaching his decision.

Since we have found that proof of the first charge was properly admitted under *Redcay* v. *State Board of Education, supra*, we find it unnecessary to reach the argument that the case should be remanded for new findings.

At oral argument, a statement in lieu of brief was handed up on behalf of the local Board of Education by counsel for the appellant. The statement indicated that the local Board (now changed in composition as a result of recent elections) did not intend to press the allegations contained in charge number one (mis-appropriation) before the Commissioner. Significantly, no mention was made of the allegations contained in the other twenty-seven charges. We do not believe that this statement should alter the conclusions we have reached herein.

Affirmed.

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IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF VERNON, SUSSEX COUNTY

Decided by the Commissioner, May 2, 1966.

DECISION OF STATE BOARD OF EDUCATION

For the Petitioners-Appellants, John J. Greco, Esq.

For the Respondent-Respondent, Robert Lee Esq.

This case involves the validity of the annual school election held in the school district of Vernon Township on February 8, 1966. Petitioners challenge the validity of the election and urge that the results be set aside and a new election held.

The matter was decided by the Commissioner on May 2, 1966. Oral argument before the State Board of Education has been waived.

We have carefully considered the record and briefs of counsel. The decision of the Commissioner is affirmed for the reasons set forth in his opinion of May 2, 1966.

September 2, 1967.